

FEB 14 1969

UNITED NATIONS
GENERAL
ASSEMBLY



UN/SA COLLECTION

Distr.
GENERALA/CN.9/17
3 February 1969

ORIGINAL: ENGLISH

UNITED NATIONS COMMISSION ON
INTERNATIONAL TRADE LAW
Second session
Geneva, 3 March 1969
Item 4 (a) of the provisional agenda

INTERNATIONAL SALE OF GOODS

THE HAGUE CONVENTIONS OF 1964

Analysis of the replies and studies received from GovernmentsReport of the Secretary-General

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1/ The Convention relating to a Uniform Law on the International Sale of Goods will be referred to as "Convention on Sales", the Uniform Law on the International Sale of Goods as "Uniform Law on Sales", the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods as the "Convention on Formation", and the Uniform Law on the Formation of Contracts for the International Sale of Goods as "Uniform Law on Formation".

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I. INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL), at its first session, decided to include in its work programme, as a priority topic, the harmonization and unification of the law of the international sale of goods. The Commission selected, as one of the items falling within the scope of the international sale of goods, the Hague Conventions of 1 July 1964 on the International Sale of Goods and on the Formation of Contracts of Sale.^{2/} Considering it desirable to ascertain the attitude of States in respect of those Conventions, the Commission requested the Secretary-General to invite: (a) States Members of the United Nations and States members of any of its specialized agencies to indicate whether or not they intended to accede to the 1964 Conventions and the reasons for their position, and (b) States members of the Commission to make, if possible, a study in depth of the subject taking into account the aim of the Commission in the promotion of the harmonization and unification of the law of the international sale of goods.^{3/}
2. The substantive portions of the replies and studies received by the Secretary-General have been reproduced in document A/CN.9/11 and Addendum 1.
3. The Commission further requested the Secretary-General to prepare, in consultation with the Secretariat of the International Institute for the Unification of Private Law (UNIDROIT), an analysis of the replies and studies.^{4/} It was also stated in the Commission's report that, in the preparation of such an analysis, account should be taken of any action which might be undertaken

^{2/} Report of the United Nations Commission on International Trade Law on the work of its first session, Official Records of the General Assembly, Twenty-third Session, Supplement No. 16, p. 17, para. 7.

^{3/} Ibid., p. 19, para. 14, A and B.

^{4/} Ibid., para. 14 E.

by UNIDROIT, pursuant to Recommendation II adopted by the Diplomatic Conference on the Unification of Law governing the International Sale of Goods.^{5/}

4. The analysis of the replies and studies received from Governments is set out in chapter II hereinafter and is divided into two parts. Part A summarizes the information submitted by Governments as to ratification of, or accession to, the Hague Conventions. Part B analyses, and is confined to, the opinions expressed by Governments on the Conventions and the Uniform Laws to which they relate.^{6/}

5/ Ibid.

The text of this Recommendation is as follows:

"(1) The Conference recommends, in the event the Convention relating to a Uniform Law on the International Sale of Goods comes into force by 1 May 1968, that the International Institute for the Unification of Private Law establish a committee composed of representatives of the Governments of the interested States, to review the operation of the Law and to prepare recommendations for any Conference convened pursuant to Article XIV of the Convention.

(2) The Conference recommends, in the event the Convention relating to a Uniform Law on the International Sale of Goods has not come into force by 1 May 1968, that the International Institute for the Unification of Private Law establish a committee composed of representatives of the Governments of the interested States, which shall consider what further actions should be taken to promote the unification of law on the international sale of goods."

Under Article X of the Convention on Sales and Article VIII of the Convention on Formation, the Conventions shall come into force six months after the date of deposit of the fifth instrument of ratification or accession.

By its resolution 5 (1968), the Governing Council of UNIDROIT decided to appoint a Committee with the following terms of reference:

"to examine the replies of Governments and interested organization to the questionnaire sent by the United Nations Commission on International Trade Law (UNCITRAL) and to consider ways and means which would, as soon as possible, give effect to Recommendation II of the Final Act of the Hague Conference of 1964 on the unification of Law Governing the International Sale of Goods."

According to information received from the Secretary-General of UNIDROIT, the above Committee will meet after the second session of UNCITRAL in order to have the benefit of the views expressed by Governments during that session.

6/ In addition to the views of Governments analysed in this report, attention may be drawn to the analytical study of the 1964 Conventions and of the 1955 Hague Convention on the Law Applicable to the International Sale of Goods submitted by Mexico and reproduced in document A/CN.9/11/Add.1, pp. 10-23 and A/CN.9/12/Add.1, pp. 5-9 respectively.

II. ANALYSIS OF THE REPLIES AND STUDIES

A. RATIFICATION OF, OR ACCESSION TO, THE HAGUE CONVENTIONS OF 1964

5. As of the date of this report, the Convention on Sales had been ratified by Belgium,^{7/} the United Kingdom^{8/} and

7/ In depositing, on 12 December 1968, its instrument of ratification, Belgium made the following declaration: in accordance with the provisions of article V of the Convention, the Kingdom of Belgium will apply the Uniform Law only to contracts in which the parties thereto have, by virtue of article 4 of the Uniform Law, chosen that Law as the law of the contract. In accordance with article IV of the Convention, the Kingdom of Belgium will apply the Uniform Law only if the Hague Convention of 15 June 1955 on the Law Applicable to the International Sale of Goods leads to the application of the Uniform Law. The latter notification shall become operative when the Kingdom of Belgium withdraws the declaration made in accordance with article V of the Convention.

8/ In depositing, on 31 August 1967, its instrument of ratification, the United Kingdom made the following declaration:

- (a) In accordance with the provisions of article III of the Convention, the United Kingdom will apply the Uniform Law only if each of the parties to the contract of sale has his place of business, or, if he has no place of business, his habitual residence in the territory of a different contracting State, the United Kingdom will in consequence insert the word "contracting" before the word "States" where the latter word first occurs in paragraph 1 of article 1 of the Uniform Law.
- (b) In accordance with the provisions of article V of the Convention, the United Kingdom will apply the Uniform Law only to contracts in which the parties thereto have, by virtue of article IV of the Uniform Law, chosen that Law as the law of the contract.

San Marino,^{9/} and the Convention on Formation by the United Kingdom and San Marino.^{10/}

6. The position of the other States that have submitted replies and studies may be summarized as follows:

(a) States which have expressed the intention to ratify, or to accede to, both Conventions

Australia,^{11/} Colombia,^{12/} Federal Republic of Germany,^{13/} France,^{14/} Italy,^{15/} Luxembourg,^{16/} Mexico^{17/} and Netherlands.^{18/}

9/ In depositing, on 24 May 1968, its instrument of ratification, San Marino made the following declaration: in accordance with the provisions of article III of the Convention relating to a Uniform Law on the International Sale of Goods, the Republic of San Marino will apply the Uniform Law only if the parties to the contract of sale have their place of business or, if they have no place of business, their habitual residence, in the territory of different contracting States. The Republic of San Marino will in consequence insert the word "contracting" before the word "States" where the latter word first occurs in paragraph 1 of article I of the Uniform Law.

10/ In depositing, on 24 May 1968, its instrument of ratification, San Marino made the following declaration: in accordance with the provisions of article III of the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods, the Republic of San Marino will apply the Uniform Law only if the parties to the contract of sale have their place of business or, if they have no place of business, their habitual residence, in the territory of different contracting States. The Republic of San Marino will in consequence insert the word "contracting" before the word "States" where the latter word first occurs in paragraph 1 of article I of the Uniform Law.

11/ "... the present intention is to accede to the Conventions with similar reservations to those made by the United Kingdom" (A/CN.9/11, p. 4).

12/ "... intends to adhere..." (*ibid.*, p. 13).

13/ "... intends to propose to the German parliamentary bodies that the (1964 Conventions)... be ratified, if feasible, during the present legislative term of the German Bundestag which ends in the autumn of 1969" (*ibid.*, p. 14).

14/ "... has decided to ratify... (and) initiated the procedure for the parliamentary authorization required by the Constitution" (*ibid.*, p. 15).

15/ "... the ratification procedure is now under way. Italy intends to give favourable consideration to the possibility of these Conventions being ratified, which will no doubt require the adoption of appropriate domestic legislation" (*ibid.*, p. 16).

16/ "... has initiated the procedure for the parliamentary approval" of the Conventions of 1964 (*ibid.*, p. 17).

17/ "... considers it fitting to ratify..." (the 1964 Conventions) (*ibid.*, p. 18).

18/ "By Royal Message of 23 September 1963, draft Bills pertaining to the approval and execution of both Conventions... have been submitted to Parliament" (*ibid.*, p. 18).

(b) States in which the question of whether to ratify or accede is under consideration

Denmark,^{19/} Ireland,^{20/} Korea,^{21/} Norway,^{22/} Romania,^{23/} Sweden,^{24/} and Switzerland.^{25/}

(c) States which do not intend to ratify or accede

Austria,^{26/} Jordan,^{27/} Laos,^{28/} Maldiv Islands,^{29/} South Africa,^{30/} United States of America.^{31/}

7. Israel intends to ratify the Convention on Sales^{32/} but is still considering the question of ratification of the Convention on Formation.^{33/}

8. Spain, Czechoslovakia and the Union of Soviet Socialist Republics, which submitted comments on the Conventions, have not expressly indicated whether or not they intend to ratify or accede to the 1964 Conventions.

B. THE 1964 HAGUE CONVENTIONS

(a) Observations of a general nature

9. Some of the replies and studies received from States refer to what are, in their view, the merits and weaknesses of the 1964 Conventions in general.

10. Belgium stresses the importance of the 1964 Conventions in view of the inadequacy of national legislation on the sale of goods which is generally designed to regulate the domestic sale of goods only.^{34/} The Federal Republic of

^{19/} A/CN.9/11, p. 13.

^{20/} Ibid., p. 15.

^{21/} Ibid., p. 17.

^{22/} Ibid., p. 19.

^{23/} A/CN.9/11/Add.1, p. 24.

^{24/} A/CN.9/11, p. 28.

^{25/} Ibid., p. 28.

^{26/} A/CN.9/11, p. 4.

^{27/} Ibid., p. 17.

^{28/} Ibid., p. 17.

^{29/} A/CN.9/11/Add.1, p. 9.

^{30/} A/CN.9/11, p. 28.

^{31/} Ibid., p. 36.

^{32/} "The Israel Ministry of Justice is... preparing a memorandum to be submitted to the government recommending that it ratify without reservation" (ibid. p. 15).

^{33/} Ibid., p. 16.

^{34/} A/CN.9/11, p. 12.

Germany considers that the Conventions are an excellent means of ensuring a uniform solution to the most important legal problems involved in the international sale of goods,^{35/} while Norway, though noting that several provisions of the Uniform Law on Sales have been met with considerable criticism in the Nordic States, expresses the view that the Uniform Law provides a coherent system of rules on the most important subjects of the law on international sales.^{36/}

11. The need for such a law is, however, denied by South Africa which holds the view that the field covered by the Conventions is regulated reasonably satisfactorily by either existing legislation or commercial practice.^{37/}

12. The Conventions in their present form are criticized by the Union of Soviet Socialist Republics which, noting that only twenty-eight States, of which only three are socialist and two developing States, participated in the 1964 Hague Conference, expresses the opinion that the Conventions do not meet the requirements which the majority of States demand from international instruments of this kind.^{38/}

13. Austria is of the opinion that the Uniform Law on Sales is too voluminous, too detailed and not always well arranged and fears that its complexity will have an adverse effect on its application.^{39/} The United States doubts whether the Uniform Law on Sales will be understood by individuals in the commercial field,^{40/} regrets the employment therein of abstract and artificial concepts which are of academic or regional significance only and are likely to be construed differently in different parts of the world, and states that this result ill serves the basic objective to minimize misunderstanding and litigation.^{41/} Other weaknesses of the Uniform Law on Sales are, in the view of the United States, that it points more to external trade between common boundary nations geographically near to each other and that insufficient attention has been given to international trade problems involving overseas shipments.^{42/}

^{35/} Ibid., p. 14.

^{36/} Ibid., pp. 20-21.

^{37/} Ibid., p. 3.

^{38/} A/CN.9/11/Add.1, p. 32.

^{39/} A/CN.9/11, p. 6.

^{40/} A/CN.9/11/Add.1, p. 35.

^{41/} Ibid., pp. 34 and 36.

^{42/} Ibid., p. 35.

14. Belgium, the Federal Republic of Germany and Norway deem that the Uniform Law on Sales strikes a fair and proper balance between the rights and obligations of the seller and of the buyer.^{43/} This view is, however, not shared by the United States, according to which these rights and obligations viewed in the light of the practical realities of trade practices, are not well balanced,^{44/} and by Spain which states that they are not clearly defined and will thus benefit the stronger party.^{45/}

15. In the opinion of the United States the Uniform Laws are as yet not acceptable for international use and since improvements from time to time are impossible where difficulties lie at the heart of the Law's structure and approach, further work on the Uniform Laws is needed.^{46/} In the light of this, the United States recommends:

(a) that a committee of UNIDROIT should review the replies and studies set out in documents A/CN.9/11 and Add.1. The United States expresses the view that such a committee can be expected to make concrete recommendations for the appropriate next steps to promote the unification of law for the international sale of goods and might recommend methods of revising the Uniform Laws and make them generally acceptable;^{47/}

(b) (i) that the recommendation that emerged from the first session of UNCITRAL for the development of standard contracts and conditions of sale suitable for international trade should be vigorously implemented;

(ii) that standard contracts and conditions of sale should be further developed and that their drafting should be done under international auspices so as to ensure that the interests of both buyers and sellers are fully represented and to avoid one-sided or overreaching provisions that reflect a dominant economic interest. This work

^{43/} Belgium, A/CN.9/11, p. 12; Federal Republic of Germany, *ibid.*, p. 14; Norway, *ibid.*, p. 21.

^{44/} A/CN.9/11/Add.1, p. 35.

^{45/} *Ibid.*, p. 28.

^{46/} A/CN.9/11/Add.1, p. 36.

^{47/} *Ibid.*, p. 37.

would have a double utility: on the one hand it would provide a vehicle of immediate practical application for international trade, on the other it would provide a wider background and a more realistic foundation for the eventual revision of the Uniform Laws.^{48/}

16. The United States further suggests that an important and immediate task for UNCITRAL is the determination and adoption of methods by which all the necessary activities relating to the unification and harmonization of the law of international sale can be organized and co-ordinated.^{49/}

17. Czechoslovakia suggests that UNCITRAL should re-examine various principles on which the Uniform Laws are based.^{50/}

18. The Federal Republic of Germany is of the opinion that UNCITRAL would make an important contribution towards standardization of sales law if it decided to recommend acceptance of the Conventions to the Members of the United Nations and their specialized agencies.^{51/} The Union of Soviet Socialist Republics, on the other hand, holds the view that the 1964 Conventions are not suitable material for the work of UNCITRAL.^{52/}

(b) Observations on the Convention on Sales and the Convention on Formation

1. Article I of the 1964 Conventions: incorporation of the Uniform Laws into national legislation

19. Article I of the 1964 Conventions requires Contracting States to incorporate the Uniform Laws, either in one of the authentic texts or in a translation, into their own legislation.

20. Norway would prefer if each State were at liberty to incorporate the provisions of the Uniform Law into its own legislation as would best suit the State concerned in view of its own legal system and traditions of drafting legal

^{48/} Ibid., p. 36.

^{49/} Ibid., p. 38.

^{50/} Ibid., p. 8.

^{51/} A/CN.9/11, p. 15.

^{52/} A/CN.9/11/Add.1, p. 32.

texts, without being bound by the special, and partly peculiar or unfamiliar, structure of the Uniform Law and the wording of its different articles.^{53/}

2. Article IV of the Conventions, article 2 of the Uniform Law on Sales and article 1, paragraph 9 of the Uniform Law on Formation: the Uniform Laws and rules of private international law ^{54/}

21. Article IV of both Conventions permits a ratifying or acceding State which is already a Party to one or more Conventions on conflict of laws in respect of the international sale of goods to declare that it will apply the Uniform Laws in cases governed by one of the conflict of laws Conventions only if that Convention itself requires the application of the Uniform Laws.

22. Article 2 of the Uniform Law on Sales and article 1, paragraph 9, of the Uniform Law on Formation provide that rules of private international law shall be excluded for the purposes of the application of the present law, subject to any provision to the contrary in the said law.

23. The observations made by States in connexion with the above articles centre on the following questions:

- (i) A uniform substantive sales law obviates the necessity of rules of private international law

24. In the reply by Luxembourg it is stated that the six member States of the European Economic Community (Belgium, Federal Republic of Germany, France, Italy, Luxembourg, Netherlands) have decided that those which have not yet ratified the 1955 Hague Convention on the Law Applicable to the International Sale of Goods will not continue the procedure for obtaining parliamentary approval, while those which have already ratified that Convention will denounce it as soon as they have the option of doing so.^{55/} The reasons given by some of these States individually are that the 1964 Conventions will put an end to the uncertainties involved in the application of the rules of private international law;^{56/} that it is an

^{53/} A/CN.9/11, p. 21.

^{54/} On this question, see also the comments submitted by the Secretary-General of the Hague Conference on Private International Law (A/CN.9/12/Add.2).

^{55/} A/CN.9/12, p. 9.

^{56/} Belgium, A/CN.9/11, p. 12.

essential aim of the standardization of substantive sales law to do away with any stipulation as to which national law shall be applicable and that article 2 of the Uniform Law on Sales achieves that aim;^{57/} and that the removal of differences in various legal systems can be more fully realized by application of the Uniform Law on Sales, than by application of rules governing conflicts of law.^{58/} Another reason given is that the declaration under article IV of the Convention on International Sales would result in largely eliminating again the benefits afforded by the Uniform Law through the standardization of substantive law.^{59/}

25. Similar views are put forward by Israel. ratification of the 1964 Convention on International Sales would obviate the necessity to accede to the 1955 Convention in view of the fact that article 2 of the Uniform Law on Sales excludes the application of rules of private international law.^{60/}

(ii) Coexistence of uniform substantive rules and rules of private international law

26. Several States hold the view, expressly or impliedly, that ratification of the 1964 Conventions would still leave room for rules of private international law. Thus, Colombia and Mexico intend to ratify, or accede to, both the 1964 Conventions and the 1955 Convention.^{61/} Spain suggests that the 1955 Convention should be brought into line with the Convention on International Sale^{62/} which it complements.^{63/}

27. Other States oppose the exclusion of rules of private international law on the ground that this may lead to undesirable consequences in so far as the application of the Uniform Laws is concerned. The United States notes that provisions such as article 2 of the Uniform Law on Sales have been the subject of considerable controversy and may be deterring States from becoming parties to

^{57/} Federal Republic of Germany, A/CN.9/12, p. 7.

^{58/} Netherlands, A/CN.9/11, p. 15.

^{59/} Federal Republic of Germany, ibid.

^{60/} A/CN.9/12, p. 8.

^{61/} Colombia, A/CN.9/11, p. 13; Mexico, ibid., p. 13.

^{62/} A/CN.9/12/Add.1, p. 12.

^{63/} A/CN.9/11/Add.1, p. 23.

the Convention on Sales.^{64/} Czechoslovakia observes that the principle embodied in article 2 entails for a Contracting State the application of the lex fori (i.e. the uniform law), regardless of the fact whether that law is, in a given case, to be applied at all according to rules of private international law; the Uniform Law would thus be applicable to transactions between persons having their seat of business or residence in non-Contracting States by the mere fact of a court of a Contracting State having jurisdiction.^{65/} A similar view is expressed by Norway which considers it unfortunate that the Uniform Law seeks to extend its field of application by covering cases which have little or no connexion with the State of the forum.^{66/}

28. The remedy suggested by Czechoslovakia is to unify the rules of private international law and to decide in accordance with these rules which law is applicable; the Uniform Law would thus be applicable only if the conflict rules refer to the substantive law of a State which is a Party to the Convention on Sales.^{67/} Along the same lines, Norway suggests that article 2 be deleted, or be amended in order to make the application of the Uniform Law dependent on the rules of private international law of the State of the forum, or, in the alternative, that article IV of the Convention on Sales, which lays down the requirement of previous ratification or accession of a conflict of laws convention, be amended so as to make it permissible for a Contracting State to accede to conventions on conflict of laws also after having ratified, or acceded to, the Convention on International Sales.^{68/}

29. It is also pointed out by Czechoslovakia that article 3 of the Uniform Law on Sales, which allows the parties to a contract of sale to exclude the application of the Uniform Law either entirely or partially, is in contradiction with article 2 of the Uniform Law which starts from the opposite premise.^{69/} A similar objection is made by Mexico which considers that it follows from the consequences inherent in permitting the parties to a contract of sale to exclude the Uniform

^{64/} Ibid., p. 35.

^{65/} Ibid., p. 5.

^{66/} A/CN.9/11, p. 22.

^{67/} A/CN.9/11/Add.1, p. 5.

^{68/} A/CN.9/11, p. 22.

^{69/} A/CN.9/11/Add.1, p. 6.

Law under article 3, that the rules of the 1955 Convention on the Applicable Law which refer to domestic law, will apply.^{70/}

3. Articles III and IV of the 1964 Conventions: reservations limiting application of Conventions

30. Article III of both Conventions permits a Contracting State, by way of derogation from article 1 of both Uniform Laws, to apply the Uniform Laws only if each of the parties to the contract of sales has his place of business or habitual residence in a different Contracting State. Article IV of both Conventions are described above.^{71/}

31. It is submitted by Austria and Norway that the reservations permitted by articles III and IV may give rise to problems. Austria observes that, should both reservations be exercised, the effects of the 1964 Conventions would be entirely different in one or another Contracting State,^{72/} while in the opinion of Norway some complicated and dubious questions of conflicts of law would arise.^{73/}

4. Article V of the Convention on International Sales and articles 3 and 4 of the Uniform Law on Sales: freedom of contract

32. Article V of the Convention on Sales permits a Contracting State to declare that it will apply the Uniform Law on Sales only to contracts in which the parties thereto have chosen that Law as the law of the contract.

33. Under article 3 of the Uniform Law on Sales, the parties may exclude the application of the Uniform Law either entirely or partially and such exclusion may be express or implied.

34. Article 4 of the Uniform Law on Sales provides that the Law shall also apply where it has been chosen as the law of the contract by the parties, irrespective of whether their places of business or habitual residence are in different States and whether such States are Contracting Parties to the Convention on International

^{70/} A/CN.9/12/Add.1, p. 7.

^{71/} For summary of article IV, see p. 16, para. 21 above.

^{72/} A/CN.9/11, pp. 4-5.

^{73/} Ibid., p. 22.

Sales; the choice of the Uniform Law on Sales as the law of the contract will, however, not affect the application of mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law.

35. Several States criticize the reservation allowed by article V of the Convention on Sales, either on its own merits or in conjunction with articles 3 and 4 of the Uniform Law on Sales.

36. According to Austria, article V reduces considerably the value of the Uniform Law since the reservation makes it possible for any State to become a party to the Convention without having to make even the slightest change in its own law, as required by article I of the Convention on Sales.^{74/} Since, however, article V refers to article 4 of the Uniform Law on Sales, the agreement of the parties on the Uniform Law on Sales as the applicable law is, in the view of Austria, meaningless to the extent that the Uniform Law cannot set aside any mandatory provisions of law that would have been applicable if the parties had not chosen the Uniform Law as the proper law of the contract.^{75/}

37. The reservation allowed by article V is also opposed by Spain in that it unduly complicates the application of the Convention, extends even further the principle of freedom of contract recognized in article 3 of the Uniform Law on Sales and potentially affects attempts to solve problems arising in connexion with the international sale of goods.^{76/} Application of the reservation, it is held, could be detrimental to nationals of other countries who entered into a contract without knowing of the existence of such a reservation extending to nationals of the country which had made it. Furthermore, the reservation might entail divergencies in the settlement of disputes related to the application of the Convention and involving nationals of countries which have not made the reservation, depending on which country the court considering the case is situated in.^{77/} Spain therefore suggests that article V of the Convention on International Sales should be deleted.

^{74/} A/CN.9/11, p. 5.

^{75/} Ibid.

^{76/} A/CN.9/11/Add.1, p. 26.

^{77/} Ibid., p. 27.

38. Objections are also formulated by Spain to article 3 of the Uniform Law on Sales, though not to the general principle of the freedom of contract which that article recognizes. According to Spain, article 3, in its present wording, makes it possible that the parties may exclude, entirely or partially, the application of the Uniform Law on Sales without indicating what provisions are to govern the contractual relationship in lieu of the Uniform Law; the principle of freedom of contract could thus be used in such a way that the parties would not know what their position is under the contract.^{78/} For that reason, Spain expresses preference for article 6 of the 1963 draft^{79/} which accords freedom of contract only when the parties make it sufficiently clear what provisions are applicable to the contract.^{80/}

(c) Observations on the Uniform Law on Sales

5. Article 1 of the Uniform Law on Sales and of the Uniform Law on Formation: definition of international sale

39. Article 1 of the Uniform Law on Sales and of the Uniform Law on Formation provide that the uniform laws shall apply to contracts entered into by parties whose places of business or, if a party has none, his habitual residence, are in the territories of different States, in each of the following cases:

^{78/} Ibid.

^{79/} Draft of a Uniform Law on the International Sale of Goods, text of the articles modified in accordance with the propositions of the Special Commission in 1963 (Doc. V/Frep. 4 of the Hague Conference). The text of article 6 is as follows:

"The parties may entirely exclude the application of the present law provided that they indicate the municipal law to be applied to their contract.

"The parties may derogate in part from the provisions of the present law provided that they agree on alternative provisions, either by setting them out or by stating to what specific rules other than those of the present law they intend to refer.

"The reference, declarations or indications provided in the preceding paragraphs are to be subject of an express term or to clearly follow from the provisions of the contract."

^{80/} A/CN.9/11/Add.1, pp. 27-28.

(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 (Uniform Law on Sales); 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 (Uniform Law on Formation);

(b) where the acts constituting the offer and the acceptance have been (Uniform Law on Formation: 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 have been (Uniform Law on Formation: are) effected.

Furthermore, both articles state expressly that the application of the Uniform Laws shall not depend on the nationality of the parties.

40. It is suggested by Norway that Contracting States should be given the opportunity of applying a less restrictive and complicated definition in their municipal law, and that the scope of the Uniform Law should therefore be extended.^{81/} Czechoslovakia also considers that the above provisions are too complicated and that the definition of international sale ought to be re-examined on the ground that it might well be desirable to bring within the purview of the Uniform Laws certain contracts of sale of goods which do not satisfy the conditions laid down in the present text.^{82/} In defining the international character of goods, the point of departure should be, according to Czechoslovakia, the subjective criterion of the domicile of the parties to the contract of sale, while the commercial character of the sale (of which there is no definition in the Uniform Law) should be determined according to the purpose of the sale. It would thus be possible, for instance, to define international sale as a contract of sale concluded between parties not having their domicile or place of business in the territory of the same country if, at the time of conclusion of the contract, they knew or ought to have known, that the goods were destined for resale or other commercial activities of the buyer. In the view of Czechoslovakia, it would also be desirable to exclude from the definition of a contract of sale

^{81/} A/CN.9/11, p. 23.

^{82/} A/CN.9/11/Add.1, pp. 6 and 7.

contracts for the supply of goods to be manufactured when the party who ordered the goods undertakes to supply components or items to be used in the manufacturing process. It is stated by Czechoslovakia that difficulties would probably arise in connexion with the interpretation of the words "an essential and substantial part of the materials", found in article 6 of the Uniform Law on Sales.^{83/}

41. Both Czechoslovakia and Norway submit that the present text may give rise to certain difficulties of interpretation. In connexion with one of the requirements, namely that goods will be carried from one territory to another, doubts may exist at the time of conclusion of the contract (when it ought to be clear which law is applicable), whether the carriage will actually take place. Doubts may further arise in respect of the applicable law if the place of delivery is not indicated in the contract.^{84/} According to Norway, it is not clear from paragraph 1 (a) whether the contract of sale, in order to fall within the sphere of application of the Uniform Law on Sales, must contain a provision or information to the effect that the goods are to be sent to another country, or whether it is sufficient that the seller understands that the goods are to be sent out of the country; clarity in this respect is particularly important in connexion with the question whether an F.O.B. sale or a sale "ex works" falls within the scope of the Uniform Law on Sales.^{85/}

6. Article 3 of the Uniform Law on Sales: autonomy of the will of the parties ^{86/}

42. Article 3 of the Uniform Law on Sales is described above.^{87/}

43. Mexico observes that the principle of the autonomy of the will of the parties has rightly been criticized for obvious reasons of justice and equity, which require mandatory provisions of the law of obligations to be upheld.^{88/}

It notes that this principle is not recognized in the General Conditions of the Delivery of Goods of the Council for Mutual Economic Assistance unless a derogation

^{83/} A/CN.9/11/Add.1, p. 8.

^{84/} Czechoslovakia, A/CN.9/11/Add.1, p. 7.

^{85/} A/CN.9/11, p. 23.

^{86/} Certain comments on this article were made with reference to the relevance of rules of private international law and may be found under sub-section 4 above, pp. 22-23 above.

^{87/} See p. 21, para. 33, above.

^{88/} A/CN.9/11/Add.1, pp. 17-18.

from them is rendered necessary by the specific nature of the goods or the characteristics of their delivery and concludes that the non-mandatory nature of the Uniform Law on Sales may possibly produce the result that the will of the stronger party to the contract prevails.^{89/}

7. Article 5, paragraph 2, of the Uniform Law on Sales: mandatory provisions of national law designed to protect a party to an instalment sales contract are not affected

44. Article 5, paragraph 2, of the Uniform Law on Sales provides that the Law shall not affect the application of any mandatory provision of national law for the protection of a party to a contract which contemplates the purchase of goods by that party by payment of the price by instalments.

45. It is pointed out by Norway that this article seems to invite an interpretation a contrario, namely that only the mandatory provisions relating to the protection of a party to an instalment sales contract are not affected by the Uniform Law. Its deletion is suggested.^{90/} Furthermore, in the view of Norway, this paragraph seems superfluous since the Uniform Law, according to article 8 of the Uniform Law, is not concerned with the validity of the contract or any of its provisions.^{91/}

8. Article 9 of the Uniform Law on Sales and article 2 of the Uniform Law on Formation: commercial usages and practices

46. Article 9 of the Uniform Law on Sales provides that the parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract or by any practices which they have established between themselves as well as by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract.

47. Article 2 of the Uniform Law on Formation provides that the parties shall be bound by usage and by practices which they have established between themselves.

^{89/} Ibid., p. 18.

^{90/} A/CN.9/11, p. 23.

^{91/} Ibid. Reference is made by Norway to the comments of the Special Commission on the 1956 Draft Uniform Law on Sales, Vol. II, page 30 of the Records and Documents of the 1964 Hague Conference, where it is stated that the Uniform Law "does not in any way affect the imperative rules of municipal law".

48. In the view of Mexico, the subordination of the Uniform Laws to normative and interpretative usages and practices may result in the imposition of unfair usages or inequitable practices, for example, those based on limited responsibility clauses, or those existing in the waiver by the buyer of certain warranties or in the establishment of very short time-limits for the submission of claims, which in standard contracts are usually laid down by the economically stronger party to the detriment of the weaker party.^{92/} This danger is deemed to be aggravated by the fact that, according to article 8 of the Uniform Law on Sales, the Uniform Law is not concerned with the validity of any usage.^{93/}

9. Article 10 of the Uniform Law on Sales: difference between the French and the English text of this article

49. It is pointed out by Austria that the wording in the French text of this article "personne raisonnable de même qualité placée dans la situation de l'autre partie" differs from the wording in the English text: "reasonable person in the same situation as the other party".^{94/} Moreover, the requirement that a person should be of the same character as the other party (de même qualité) cannot, in the view of Austria, be seriously imposed.^{95/}

10. Article 11 of the Uniform Law on Sales: the term "promptly"

50. Austria observes that the term "promptly" is defined in article 11, but that this term is used less frequently in the following articles of the Uniform Law on Sales than the words "within a reasonable time", for which no definition is given.^{96/}

11. Article 15 of the Uniform Law on Sales: form of a contract of sale

51. Article 15 of the Uniform Law on Sales provides that a contract of sale need not be evidenced in writing and shall not be subject to any other requirements as to form, and may, in particular, be proved by means of witnesses.

^{92/} A/CN.9/11/Add.1, p. 19.

^{93/} Ibid.

^{94/} A/CN.9/11, p. 6.

^{95/} Ibid.

^{96/} Ibid.

52. Austria submits that this article is out of place in the Uniform Law on Sales and further observes that many countries prescribe in their legislation special forms for legal transactions by persons suffering from physical or mental infirmity, or standing in certain close relationship to each other. In the view of Austria, article 15 of the Uniform Law on Sales, and also article 3 of the Uniform Law on Formation, make it appear that, in so far as the application of the Uniform Law is concerned, it would no longer be permissible to prescribe such forms.^{97/}

12. Article 17 of the Uniform Law on Sales: interpretation

53. Article 17 of the Uniform Law on Sales provides that questions concerning matters governed by the present law which are not expressly settled therein shall be settled in conformity with the general principles on which the present law is based.

54. This provision, in that it excludes the supplementary application of municipal law, is, in the opinion of Austria, of questionable practicability.^{98/} Austria points out that some questions of very great importance to transactions arising from contracts of sale, such as prescription, are not dealt with at all in the Uniform Law on Sales and that it would be impossible to settle such questions in conformity with the spirit of the Uniform Law.^{99/} Furthermore, the Uniform Law on Sales contains many terms which also occur in national laws but does not define these specifically, and it does not seem possible to separate their interpretation from the interpretation of the same terms as they are used in national laws.^{100/}

55. Norway considers the article to be unfortunate and states that it seems doubtful whether it will be permissible to rely on principles other than the general principles on which the Uniform Law on Sales is based.^{101/} The question is made the more acute in view of the obligation under article I of the Convention

^{97/} Ibid., pp. 6-7.

^{98/} Ibid., p. 5.

^{99/} Ibid.

^{100/} Ibid.

^{101/} Ibid., p. 24.

on Sales to incorporate the article literally into national legislation without any complementing provision.^{102/} Norway would therefore like to see the article deleted.^{103/}

13. Articles 18 and 19 of the Uniform Law on Sales: obligation of the seller to deliver the goods

56. Under article 18 of the Uniform Law on Sales the seller shall effect delivery of the goods. Article 19, paragraph 1, states that delivery consist in the handing over of goods which conform with the contract.

57. Article 19, paragraph 2, provides that where the contract of sale involves carriage of the goods and no other place of delivery has been agreed upon, delivery shall be effected by handing over the goods to the carrier for transmission to the buyer.

58. In the opinion of Spain, the inclusion of delivery among the obligations of the seller is unacceptable on the following grounds: delivery in its true sense means the transfer of possession of the goods but such transfer is not dependent solely upon the will of the seller since it requires co-operation of the buyer; it is thus a bilateral act, which consists of the seller's supplying the goods and the buyer's accepting them. In no circumstances, therefore, can delivery be regarded as an exclusive obligation of the seller.^{104/} Accordingly, Spain suggests: (i) to replace, in article 18, the word "entrega" (delivery) by the words "puesta a disposición de una cosa conforme con el contrato" (placing the goods which conform with the contract at the disposal of); (ii) to delete as being unnecessary, paragraph 1 of article 19 and, throughout the Uniform Law, replace the word "entrega" (delivery) by the words "puesta a disposición" (placing at the disposal).^{105/} In the view of Spain, these amendments would bring the substance of articles 18 and 19 more into line with the rest of the Uniform Law. Reference is made by Spain in this respect to article 56 of the Uniform Law on Sales which places upon the buyer the obligations "to take delivery" of the goods and to article 65 which defines taking delivery as consisting in "the buyer's

^{102/} A/CN.9/11.

^{103/} Ibid.

^{104/} A/CN.9/11/Add.1, p. 29.

^{105/} Ibid., p. 30.

doing all such acts as are necessary in order to enable the seller to hand over the goods and actually taking them over", the passing of risk thus being effected by placing the goods at the disposal of the buyer.^{106/}

59. Mexico qualifies this definition of delivery as an over-simplification and the term "handing over" as being vague, and states its preference for the terminology of the 1939 Rome draft, according to which delivery includes all the acts which the seller was obliged to perform for the goods to be handed over to the buyer.^{107/}

60. Austria observes that article 19, paragraph 2, of the Uniform Law on Sales conflicts with the provisions of the Geneva Convention of 1956 on the Contract for the International Carriage of Goods by Road (CMR) and the International Convention concerning the Carriage of Goods by Rail (CIM) as concerns the sender's right of disposal during transit, and that this contradiction can in practice only produce adverse consequences.^{108/}

14. Article 26 of the Uniform Law on Sales: remedies as regards delay of delivery

61. Article 26 of the Uniform Law on Sales lays down rules concerning claims of performance or avoidance of the contract, when there is delay of delivery.

62. Norway observes that, whereas article 39 of the Uniform Law on Sales lays down strict rules for the making of notifications applicable to all remedies as regards lack of conformity, article 26 provides only rules concerning claims for performance or avoidance of the contract, and not concerning claims for damages. This is regarded as a lacuna in the Uniform Law on Sales. In the opinion of Norway, the buyer should be under an obligation to notify also if he intends to claim damages on account of delay or when the goods have been delivered at a wrong place, though only after delivery has taken place.^{109/}

^{106/} Ibid.

^{107/} Ibid., p. 20.

^{108/} A/CN.9/11, p. 7.

^{109/} Ibid., p. 24.

15. Article 38, paragraph 3 of the Uniform Law on Sales: deferment of the buyer's duty to examine the goods

63. Article 38 of the Uniform Law on Sales places upon the buyer the duty to examine the goods promptly. Paragraph 3 of this article contains an exception to this general rule in that, if the goods are redispached by the buyer without trans-shipment, examination by the buyer may be deferred until the goods arrive at the new destination.

64. Norway submits that a difficulty may arise in connexion with article 38, paragraph 3, when goods are shipped in containers and suggests that the deferment of the buyer's duty to examine the goods might be made subject to the condition that examination before redispach would put an unreasonable burden on the buyer, even when there is trans-shipment.^{110/}

16. Article 42, paragraph 1, of the Uniform Law on Sales: remedying defects in the goods by the seller in the case of lack of conformity

65. Under article 42, paragraph 1 (a), of the Uniform Law on Sales, the buyer may require the seller to perform the contract if the sale relates to goods to be produced or manufactured by the seller, by remedying defects in the goods, provided the seller is in a position to remedy the defects. Under paragraph (c) of this article, if the sale relates to unascertained goods, the buyer may also claim performance by delivering other goods which are in conformity with the contract.

66. It is suggested by Norway that the right of the buyer under paragraph 1 (a) should be made subject to the condition that the seller's remedying defects in the goods does not cause the seller unreasonable inconvenience or expense. It is also suggested that the buyer's right under paragraph 1 (c) should be exercised only when the lack of conformity is of an essential nature, i.e. amounts to a fundamental breach of contract. In the opinion of Norway, the exercise of both these rights should further be made subject to the condition that the buyer presents his claims within a reasonable time after giving notice in accordance with the provisions of article 39 of the Uniform Law on Sales.^{111/}

^{110/} A/CN.9/11, pp. 24-25.

^{111/} Ibid., p. 25.

17. Article 44, paragraph 2, of the Uniform Law on Sales: rights of the buyer after expiration of period within which the seller should have remedied the defects in the goods

67. Under article 44, paragraph 2, of the Uniform Law on Sales, where the seller, at the expiration of an additional period of time fixed by the buyer for further delivery or for the remedying of the defect, has not delivered the goods or remedied the defects, the buyer may choose between requiring performance of the contract or reducing the price or declaring the contract avoided.

68. Norway is of the opinion that this provision seems to go too far where it enables the buyer to declare the contract avoided even if the defect is unimportant. It is proposed, therefore, to restrict the exercise of this remedy by the buyer to cases where the requirements laid down by article 42, with the amendments suggested in respect of that article,^{112/} are satisfied.^{113/}

18. Article 49 of the Uniform Law on Sales: time-limit for exercise of right to rely on lack of conformity

69. Article 49, paragraph 1, of the Uniform Law on Sales, lays down a time-limit within which the buyer must exercise his right to rely on lack of conformity, i.e. one year after having notified the seller in accordance with article 39 of the Uniform Law.

70. Paragraph 2 provides that, after the expiration of this period, the buyer shall not be entitled to rely on the lack of conformity, even by way of defence to an action. However, if the buyer has not paid for the goods, he may advance as a defence to a claim for payment of the price a claim for a reduction in the price or for damages.

71. Norway observes that it is probably correct to interpret paragraph 1 of this article in the sense that the one year's time-limit could only be interrupted by legal action, but submits that this does not clearly ensue from the wording of the paragraph. In the opinion of Norway, the period of limitation of one year is too short and should be prolonged to two or three years.^{114/}

^{112/} See under sub-section 16, para. 66.

^{113/} A/CN.9/11, p. 25.

^{114/} Ibid., p. 25.

72. Austria notes that paragraph 2 of this article, according to its wording, includes the defence of the buyer to declare the contract avoided. Since this defence is not mentioned among the exceptions set out in the second sentence of paragraph 2, the buyer would be forced to rely on this defence even if he has not paid the purchase price. This interpretation imposes itself all the more in view of the fact that there are instances elsewhere, in national laws, of the automatic extinction not only of counter-claims but also of defences which contend that the legal relationship to which the claim relates is void.^{115/}

19. Article 52, paragraph 1, of the Uniform Law on Sales: rights or claims of third persons over the goods sold

73. Article 52, paragraph 1, of the Uniform Law on Sales, provides that where the goods are subject to a right or claim of a third person, the buyer, unless he agreed to take the goods subject to such right or claim, shall notify the seller and request that the goods should be freed therefrom within a reasonable time or that other goods free from all rights and claims of third persons be delivered to him by the seller.

74. It is observed by Austria that this provision does not distinguish between cases where a right of a third person exists and those where a third person merely claims a right. According to Austria, this leads to the conclusion that the buyer may avail himself of the guarantees set out in the article even in cases where a third person claims a non-existent right over the goods. Austria suggests that this provision is too wide, since the seller cannot be held responsible for unwarranted claims. Moreover, article 52 does not set any time-limit for claims to the goods by a third person.^{116/}

20. Articles 54 and 55 of the Uniform Law on Sales: other obligations of the seller

75. Article 54 of the Uniform Law on Sales lays down that where the seller must dispatch the goods to the buyer, he shall make the contracts that are necessary for

^{115/} Ibid., p. 7.

^{116/} Ibid., pp. 7-8.

the carriage of goods. Under paragraph 2 of the same article the seller, if he is not bound by the contract to effect insurance in respect of the carriage of goods, shall provide the buyer with all information necessary to enable him to effect such insurance.

76. Article 55 of the Uniform Law on Sales provides that if the seller fails to perform any obligation other than those referred to in articles 20 to 53 (i.e. obligations as regards the delivery and conformity of the goods, the handing over of documents and the transfer of property, but not those referred to in article 54), the buyer may, in the cases set forth in article 55, declare the contract avoided, claim damages or require performance.

77. It is pointed out by Austria that whereas article 55 attaches penalties to non-performance by the seller of any obligations not mentioned in articles 20 to 53, article 54 arbitrarily singles out two of those obligations which are not otherwise dealt with.^{117/}

21. Article 57 of the Uniform Law on Sales: fixing the price

78. Article 57 of the Uniform Law on Sales provides that where a contract has been concluded but does not state a price or make provision for the determination of the price, the buyer shall be bound to pay the price generally charged by the seller at the time of the conclusion of the contract.

79. In the view of Austria, the wording of article 57 would oblige the buyer to pay the price generally charged by the seller at the time of the conclusion of the contract even if that price was much higher than the usual price for such goods. The provision leaves also unsolved the case where the purchase price has not been agreed upon either expressly or, by reference to the seller's general price lists, tacitly. According to Austria, in that case the normal commercial practice is that the purchase price means the usual price generally agreed on for similar goods at the same place. It is submitted by Austria that, according to the rule laid down in the Uniform Law, no effective contract of sale would have come into being in such cases - a consequence which is intolerable in the light of prevailing commercial practice.^{118/}

^{117/} Ibid., p. 8.

^{118/} Ibid., pp. 8-9.

22. Article 62 of the Uniform Law on Sales: remedies of the seller
for non-payment

80. Article 62 of the Uniform Law on Sales provides that where the failure of the buyer to pay the purchase price at the date fixed amounts to a fundamental breach of the contract, the seller may either require the buyer to pay the price or declare the contract avoided. The seller shall inform the buyer of his decision within a reasonable time; otherwise the contract shall be ipso facto avoided. According to paragraph 2, the seller may grant to the buyer an additional period of time where failure to pay the price at the date fixed does not amount to a fundamental breach of contract. If the buyer fails to pay the price at the expiration of the additional period, the seller may either require payment or, provided that he does so promptly, declare the contract avoided.

81. Norway suggests that there should be included in this article a provision regarding the right of interpellation in favour of the buyer, corresponding to what has been provided in article 26, paragraph 2, of the Uniform Law on Sales, in favour of the seller, and that the seller should be obliged to inform the buyer of his decision if payment is made later than on the date fixed and he nevertheless wishes to declare the contract avoided. It is noted by Norway that, under paragraph 1, the contract shall be ipso facto avoided if the seller does not inform the buyer within a reasonable time whether he requires payment or declares the contract avoided. Norway suggests that this rule should be confined to cases where the goods have not been delivered. In cases where delivery has taken place, it should be sufficient that the seller has the right to declare the contract avoided.^{119/}

82. As to paragraph 2 of the article, Norway does not regard the requirement that the seller shall make his declaration of avoidance promptly as a well-founded general rule for all cases. The suggestion is made that, in cases where delivery has not taken place, the right of the seller to declare the contract avoided should be maintained as long as the delay in delivery continues.^{120/}

^{119/} Ibid., p. 26.
^{120/} Ibid.

23. Article 70, paragraph 1 (a) of the Uniform Law on Sales: other obligations of the buyer

83. Article 70, paragraph 1 (a) of the Uniform Law on Sales, provides that, if the buyer fails to perform any obligation other than those referred to in sections I and II of this chapter (i.e. payment of the price and taking delivery), the seller may, where such failure amounts to a fundamental breach of the contract, declare the contract avoided, provided he does so promptly, and claim damages.

84. Austria submits that it is difficult to understand why the seller may only declare the contract avoided if he does so promptly and that an additional period of time for the buyer to perform would be in the latter's interest.^{121/}

24. Article 73, paragraph 2 of the Uniform Law on Sales: prevention by the seller of the handing over of the goods

85. Article 73, paragraph 2 of the Uniform Law on Sales provides that if the seller has already dispatched the goods before the economic situation of the buyer described in paragraph 1 of this article becomes evident, he may prevent the handing over of the goods to the buyer even if the latter holds a document which entitles him to obtain them.

86. In the opinion of Austria, this provision, in that it regulates the obligations of the carrier also, conflicts with provisions of municipal and international law concerning the carriage of goods. It also places an unreasonable burden on the carrier.^{122/}

25. Article 74 of the Uniform Law on Sales: liability for non-performance of an obligation

87. Article 74, paragraph 1 of the Uniform Law on Sales, provides that a party shall not be liable for non-performance of one of his obligations if he can prove that it was due to circumstances which, according to the intention of the parties at the time of the conclusion of the contract, he was not bound to take into account.

^{121/} Ibid., p. 9.
^{122/} Ibid.

88. Norway suggests that the party who wishes to be relieved of his liability for non-performance should have a duty to notify the other party of the impediment, so that failure to notify would entail liability to pay damages for the loss sustained by the other party through lack of proper notification.^{123/}

89. According to Austria, the party who is the beneficiary of the obligation which is not performed and is liable for reciprocal performance, retains the possibility of declaring the contract void. In many cases he may only do so if he acts "promptly"; if for any reason he fails to act promptly he must perform without being entitled to reciprocal performance. In the view of Austria, this would constitute a hardship for that party.^{124/}

26. Article 84, paragraph 1 of the Uniform Law on Sales: damages in cases of avoidance

90. Under article 84, paragraph 1 of the Uniform Law on Sales, in case of avoidance of the contract, the date to be used in determining the current price of the goods for the purpose of calculating the amount of damages shall be the date on which the contract is avoided.

91. According to Austria, this provision makes it possible for the party avoiding the contract by declaration to engage in speculation and it is suggested that the applicable date should be the date on which the goods were delivered or should have been delivered.^{125/}

27. Article 98, paragraph 1 of the Uniform Law on Sales: passing of the risk

92. According to article 98, paragraph 1 of the Uniform Law on Sales, where the handing over of the goods is delayed owing to the breach of an obligation of the buyer, the risk shall pass to the buyer as from the last date when, apart from such breach, the handing over could have been made in accordance with the contract.

93. In the opinion of Austria, this paragraph may produce unfair consequences: if the handing over of the goods is delayed owing to non-performance of accessory obligations of the buyer, but through no fault of his, then the buyer has not

^{123/} Ibid., p. 26.

^{124/} Ibid., p. 9.

^{125/} Ibid., pp. 9-10.

committed a breach, of those accessory obligations because he is relieved of them under article 74 of the Uniform Law on Sales. It is pointed out by Austria, that in that event the risk will continue to be borne by the seller, although the non-performance was solely for reasons pertaining to the buyer.^{126/}

94. Mexico, on the other hand, considers that the provisions concerning the passing of the risk are adequate, in that they not only indicate clearly the effects which it produces and provide for different possibilities, such as goods in transit, sales of unascertained goods and cases of non-performance or lack of conformity of the goods, but also make the passing of the risk a consequence not of passing of property, but of delivery of the goods. Mexico further points out that these provisions allow the parties to arrange for the risk to be assumed in a manner other than that provided for in the Uniform Law on Sales.^{127/}

(d) Observations on the Uniform Law on Formation

28. General comments on the Uniform Law on Formation

95. The United States submits that it seems necessary to give principal attention to the problems presented by the Uniform Law on Sales, since it would be impractical to give approval to the Uniform Law on Formation independently of the closely related Uniform Law on Sales.^{128/}

96. Mexico, referring to the various theories on the question at which moment contracts are concluded, states that it would have been preferable for one or another theory to have been stated openly and clearly in the Uniform Law, so as to avoid conflicts and doubts regarding its interpretation.^{129/}

97. Austria expresses the view that the Uniform Law on Formation does not regulate the most important questions in connexion with the formation of contracts, namely, the time and place at which the contract comes into being.^{130/} This absence is also noted by Mexico.^{131/} Austria further observes that the Uniform Law on Formation applies to transactions up to the coming into being of the contract,

^{126/} Ibid., p. 101.

^{127/} A/CN.9/11/Add.1, p. 22.

^{128/} Ibid., p. 34.

^{129/} Ibid., pp. 22-23.

^{130/} A/CN.9/11, p. 11.

^{131/} A/CN.9/11/Add.1, p. 22.

while the Uniform Law on Sales applies to the consequences of the formation of the contract. Between the two instruments there remains therefore a gap which will have to be filled by municipal law and this constitutes, according to Austria, another reason for the necessity of rules of private international law.^{132/}

29. Article 2 of the Uniform Law on Formation: application of the provisions of the uniform law

98. Article 2 of the Uniform Law on Formation embodies the principle that the provisions of the Uniform Law are not of a mandatory nature and will apply only if it does not appear from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usage that other rules apply. However, a term of the offer stipulating that silence shall amount to acceptance is invalid.

99. Austria notes that the purpose of the Uniform Law is to establish the validity, not only of the expressly agreed terms of the contract, but also of what may be deemed to be the legal intention of the parties. However, only intentions shared by both parties have any effect and the fixing of the terms of the contract by one party is excluded. The fact that article 2 of the Uniform Law on Formation singles out a specific case of unilateral fixing of the terms of the contract and declares it without effect, might, in the opinion of Austria, lead to the conclusion a contrario that the provisions contained in the offer and reply can have effect unilaterally.^{133/}

30. Article 4 of the Uniform Law on Formation: communication constituting an offer

100. According to article 4 of the Uniform Law on Formation, the offer must be sufficiently definite to permit the conclusion of the contract by acceptance.

101. Austria suggests that it should be made clear what essentials of the future contract must be already included in the offer in order for the latter to be regarded as such.^{134/}

^{132/} A/CN.9/11, p. 11.

^{133/} Ibid., p. 11.

^{134/} Ibid.

31. Article 7 of the Uniform Law on Formation: acceptance altering
the terms of an offer

102. According to article 7 of the Uniform Law on Formation, an acceptance altering the terms of an offer shall be a rejection and a counter-offer; a reply to an offer which purports to be an acceptance but which contains additional terms which do not materially alter the terms of the offer shall constitute an acceptance.

103. In the opinion of Austria the rule in this article will be a source of disputes and difficulties.^{135/}
