

## VIII. ALTERNATIVE METHODS FOR THE FINAL ADOPTION OF CONVENTIONS EMANATING FROM THE WORK OF THE COMMISSION

### Note by the Secretariat: alternative methods for the final adoption of conventions emanating from the work of the Commission (A/CN.9/204)\*

1. The Working Group on International Negotiable Instruments at its tenth session was of the view that at its eleventh session, which will be held in New York from 3 to 14 August 1981, it would probably be able to terminate the work on international negotiable instruments the Commission has conferred upon it.<sup>1</sup> The Working Group expects at that time to adopt two separate draft texts, the draft Convention on International Bills of Exchange and International Promissory Notes and the draft Uniform Rules Applicable to International Cheques, the two texts either to be set forth in a single draft convention or in two separate draft conventions.

2. The Working Group noted that it would accord with past practice for the Secretary-General to transmit the draft texts adopted by the Working Group upon their completion, together with a commentary, to Governments and interested international organizations for comment prior to their consideration by the Commission. However, after hearing a statement from the Secretary of the Commission on the desirability of simplifying if possible the procedures for the adoption of the texts as conventions, the Working Group suggested that, for the purpose of accelerating the work, the Commission might wish to consider whether it should request the Working Group to study and consider those comments and report to the Commission.<sup>2</sup>

3. In addition, the Working Group on International Contract Practices at its second session adopted draft Uniform Rules on Liquidated Damages and Penalty Clauses. The Working Group decided that the issue as to the final form in which the rules might be adopted should be left to the Commission.<sup>3</sup> The advantages and dis-

advantages of adopting the Draft Uniform Rules on Liquidated Damages and Penalty Clauses as a convention, as a model law or as recommendations are discussed in A/CN.9/203,\* paras. 114 to 122.

4. This note will discuss alternative procedures available for adopting a convention which emanates from the work of the Commission. This discussion is applicable to the texts which have been or will be adopted by both Working Groups. These texts differ from those previously adopted by the Commission for submission to a conference of plenipotentiaries in that the draft Uniform Rules on Liquidated Damages and Penalty Clauses are much shorter while the draft Convention on International Bills of Exchange and International Promissory Notes and the draft Uniform Rules Applicable to International Cheques are longer than were the earlier texts. This fact raises the question as to whether the past practice of the Commission in respect of its draft conventions is the most appropriate procedure to be used for these draft texts.<sup>4</sup>

5. If the Commission were to decide at its present session that the draft Uniform Rules on Liquidated Damages and Penalty Clauses would be adopted in the form of a convention, past practice would indicate that the draft rules, with a commentary prepared by the Secretariat, would be circulated to all States in the autumn of 1981 for comments. The comments would be received in the spring of 1982 and the Commission could consider the draft Uniform Rules and the comments thereon at its fifteenth session in 1982. The General Assembly might then be requested to convene a conference of plenipotentiaries of perhaps two weeks in duration to be held in 1984 to consider the draft text and adopt a convention.

6. If the Working Group on International Negotiable Instruments were to finish its work at its eleventh session

\* 12 May 1981. Incorporates A/CN.9/204/Corr.1 (English only) (21 May 1981). Referred to in Report, paras. 12, 39 (part one, A, above).

<sup>1</sup> Report of the Working Group on International Negotiable Instruments on the work of its tenth session, A/CN.9/196, paras. 208-209 (reproduced in this volume, part two, II, A).

<sup>2</sup> *Ibid.*, paras. 211-213.

<sup>3</sup> "Report of the Working Group on International Contract Practices on the work of its second session" (A/CN.9/197) (reproduced in this volume, part two, I, A).

\* Reproduced in this volume, part two, V, B.

<sup>4</sup> Some of the same issues were discussed in a Note by the Secretariat, "Alternative Methods for the Final Adoption of the Draft Convention on Prescription (Limitation) in the Field of International Sale of Goods" (A/CN.9/R.12) and by the Commission at its 123rd meeting (A/CN.9/SR.123).

in August as expected, and past practice were followed, the same pattern as above would take place except that the Commission would consider the texts at its sixteenth session in 1983 and the conference of plenipotentiaries would be held in 1985. If the two draft texts were to be given as thorough a review as was given the United Nations Convention on Contracts for the International Sale of Goods, a minimum of seven weeks should be scheduled both for the sixteenth session of the Commission in 1983 and for the conference of plenipotentiaries in 1985.

7. Although the Commission and a conference of plenipotentiaries gave a full review of the draft conventions originally prepared by Working Groups in the case of the Convention on the Limitation Period in the International Sale of Goods, the United Nations Convention on Carriage of Goods by Sea, 1978 and the United Nations Convention on Contracts for the International Sale of Goods, this three-level consideration and review was not followed in the case of the UNCITRAL Arbitration Rules or the UNCITRAL Conciliation Rules. In both cases the draft rules were considered in substance only by the Commission. The General Assembly subsequently recommended the use of the Rules as adopted by the Commission.

8. Therefore, in order to simplify the procedure for the adoption of the texts which the Working Groups have completed or soon will complete, it may be possible to reduce the scope of one of the two reviews of the text which would normally follow adoption by a Working Group.

9. In the case of the draft Uniform Rules on Liquidated Damages and Penalty Clauses, it is not suggested that a full review by the Commission be eliminated. However, in the case of the draft Convention on International Bills of Exchange and International Promissory Notes and the draft Uniform Rules Applicable to International Cheques, the Commission might decide, as suggested by the Working Group, that it should ask the Working Group to consider the observations of Governments and interested international organizations and make the changes in the texts deemed desirable as a result of those observations. The Commission might then adopt the draft texts without detailed discussion. It could be expected that the Working Group, which is thoroughly familiar with these relatively long and difficult texts, would be able to review the observations and make the necessary changes in less time than would be necessary in the Commission.

10. In this regard it may be noted that, on the basis of past practice, the draft texts will be circulated for comment to all States, including States non-members of the Commission. Furthermore, under the provisions of General Assembly resolution 31/99,\* para 10(c),

Governments of Member States of the United Nations that are not members of the Commission are entitled to attend the sessions of the Commission and its working groups as observers. The tenth session of the Working Group on International Negotiable Instruments was attended by observers from nine States members of the Commission, twelve States non-members of the Commission and five international organizations, in addition to the eight States members of the Working Group. Since the practice has been to allow observers to participate fully in the discussions in the Working Group, all interested States would have had an ample opportunity to participate in the preparation of the draft texts.

11. An alternative means of simplifying the procedure would be for the conventions to be adopted by the General Assembly on the recommendation of the Sixth Committee, rather than by a separate conference of plenipotentiaries. This would leave it for the Sixth Committee itself to make the detailed review of the draft Uniform Rules on Liquidated Damages and Penalty Clauses that would otherwise have been undertaken by a conference of plenipotentiaries. While in this case there would be no reduction in the number of reviews, it would nevertheless result in a reduction of some of the conference servicing costs of the United Nations in the following ways:

A separate conference of plenipotentiaries would devote a substantial portion of the two weeks to organizational matters which may be unnecessary in the Sixth Committee;

If the draft Uniform Rules were considered and adopted by the Sixth Committee, in-session conference servicing requirements would probably be met by the regular staff of the United Nations already allocated to the Sixth Committee. The extra costs for in-session conference servicing of a conference of plenipotentiaries would depend on the time and location of the conference. If the conference were held in Vienna, the presumable location of the conference since it is the location of the Commission's Secretariat, conference staff would mainly be brought from Geneva, as it was for the United Nations Conference on Contracts for the International Sale of Goods, with the attendant costs of travel and per diem. Pre-session and post-session costs of documentation would be the same whether the draft Uniform Rules were adopted by the Sixth Committee or by a separate conference of plenipotentiaries.

12. Costs for the States which participated in the adoption of the draft Uniform Rules as a convention would be approximately the same whether the Rules were adopted by the General Assembly or by a conference of plenipotentiaries since it could be expected that most States would find it necessary to send specialists in private law to attend those sessions of the Sixth Committee devoted to a consideration of the Uniform Rules.

\* Yearbook . . . 1977, part one, I, C.

13. It cannot be anticipated whether the Sixth Committee would be willing to undertake a detailed examination of the draft Uniform Rules on Liquidated Damages and Penalty Clauses in 1984, the year the rules are expected to be ready for consideration and adoption as a convention. However, if the Commission were of the view that consideration by the Sixth Committee would be desirable, it would be appropriate for the Commission to make such a recommendation.

14. However, it would not be feasible for the Sixth Committee to conduct an article by article examination of the draft Convention on International Bills of Ex-

change and International Promissory Notes and the draft Uniform Rules Applicable to International Cheques.

15. In considering the issues involved in this note, the Commission may wish to bear in mind resolution 35/10C in which the General Assembly

“1. *Invites* Member States and United Nations organs, when considering the convening of special conferences, to ensure that the objectives of the proposed conference are such that they have not been achieved and cannot be pursued within a reasonable time-frame through the established intergovernmental machinery of the United Nations and the specialized agencies;”