I. INTERNATIONAL SALE OF GOODS*

A. Uniform rules on substantive law

1. *Analysis of replies and comments by governments on the Hague Conventions of 1964:** report of the Secretary-General****

CONTENS

* For action by the Commission with respect to this subject, see part two, section II, A, Report of the Commission on the work of its second session, 1969, paragraphs 16–39. See also part two, section III, A, Report of the Commission on the work of its third session, 1970, paragraphs 17–102.

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

*** A/CN.9/31.

CONTENTS *(continued)*

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.[1] Considering it desirable to ascertain the attitude of States in respect of those Conventions, the Commission requested the Secretary-General (*a*) to invite 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*) to invite 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.[2]

2. The substantive portions of the replies and studies received by the Secretary-General have been reproduced in document A/CN.9/11 and Addenda 1, 2, 3 and 4. In accordance with the Commission's request,[3] an analysis of the replies and studies was prepared by the Secretary-General for the second session of the Commission.[4]

3. The Commission considered the Hague Conventions of 1964 at its second session. A summary of the Commission's discussions on general aspects of the Conventions is set out in its Report on the work of its second session;[5] a summary of the comments made by members of the Commission on specified articles of the Conventions and annexed Uniform Laws is set out in annex I to that Report.

[1] *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/7216), p. 17, para. 7.

[2] *Ibid.*, p. 19, para. 14, A and B.

[3] *Ibid.*, para. 14 E.

[4] A/CN.9/17.

[5] *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18* (A/7618), paras. 21-30.

4. In a resolution concerning uniform rules governing the international sale of goods adopted at its second session, the Commission decided, *inter alia*, to request the Secretary-General "to complete the analysis of the replies received from States regarding the Hague Conventions of 1964 (A/CN.9/17) in the light of the replies and studies received since its preparation and of the written and oral comments by members of the Commission during its second session" and to submit the analysis to a Working Group which the Commission established under paragraph 3 of the resolution.

5. The analysis requested by the Commission is set out in chapter II hereinafter and replaces the earlier analysis set out in document A/CN.9/17. It 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 summarizes the opinions on the Conventions and annexed Uniform Laws expressed by Governments and by representatives of members of the Commission at its second session. For the sake of completeness, part B summarizes also the comments made by observers from international organizations at the second session of the Commission.

II. Analysis of the replies, studies and comments

A. Ratification of, or accession to, The Hague Conventions of 1964

6. As of the date of this report, the Convention on Sales has been ratified by Belgium,[6] the United Kingdom,[7] and San Marino.[8] The Convention on Formation had been ratified by the United Kingdom and San Marino.[9]

7. 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, the Convention on Sales and or the Convention on Formation:* Australia,[10] Colombia,[11] Federal Republic of Germany,[12] France,[13] Gambia,[13a] Greece,[14] Israel,[15] Luxembourg,[16] Mexico,[17] and Netherlands.[18]

(b) *States in which the question of whether to ratify or accede is under consideration*: Denmark,[19] Finland,[20] Hungary,[21] Ireland,[22] Japan,[23] Korea,[24] Norway,[25] Pak-

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[6] 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.

[7] 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.

[8] 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.

[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 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.

[10] "... 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).

[11] "... intends to adhere ..." (*ibid.*, p. 13).

[12] "... 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).

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

[13a] "... has the honour to convey its decision to accede ..." (Note by the Ministry of External Affairs of Gambia to the Secretary-General of 30 July 1969).

[14] "... proposes to ratify the Convention relating to a Uniform Law on the International Sale of Goods ..." (A/CN.9/11/Add.3, p. 3).

[15] "The Israeli Ministry of Justice is ... preparing a memorandum to be submitted to the government recommending that it ratify without reservation" (A/CN.9/11, 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 1968, draft Bills pertaining to the approval and execution of both Conventions ... have been submitted to Parliament" (*ibid.*, p. 18).

[19] A/CN.9/11, p. 13 and A/CN.9/11/Add.6, p. 2.

[20] A/CN.9/11/Add.6, p. 2.

[21] A/CN.9/11/Add.2, p. 3.

[22] A/CN.9/11, p. 15.

[23] A/CN.9/11/Add.3, p. 22.

[24] A/CN.9/11, p. 17.

[25] *Ibid.*, p. 19.

istan,[26] Romania,[27] Sweden,[28] Switzerland,[29] and Togo.[30]

(c) *States which do not intend to ratify or accede:* Austria,[31] China,[32] Jordan,[33] Laos,[34] Maldive Islands,[35] South Africa,[36] United Arab Republic,[37] Union of Soviet Socialist Republics,[38] United States of America,[39] and Upper Volta.[40]

B. The 1964 Hague Conventions

(a) *Observations of the general nature*

8. 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.

9. Belgium stressed the importance of the 1964 Conventions in view of the inadequacy of national legislation on the sale of goods which was generally designed to regulate the domestic sale of goods only.[41] The Federal Republic of Germany considered that the Conventions were an excellent means of ensuring a uniform solution to the most important legal problems involved in the international sale of goods, while Norway, though noting that several provisions of the Uniform Law on Sales have been met with considerable criticism in the Nordic States, expressed the view that the Uniform Law provided a coherent system of rules on the most important subjects of the law on international sales.[42]

10. A similar view was expressed by the United Kingdom which saw the Uniform Laws as providing a valuable bridge between divergent legal systems which would enable parties to international contracts of sale, who carried on business in countries where different legal systems applied, to conduct their business by reference to a common code of law with which each was, or might readily become, equally familiar.[43]

11. In the opinion of Hungary, the Uniform Laws could be considered as high standard, novel pieces of legislation which had taken into account the solutions provided by different legal systems,[44] while the United Arab Republic considered the Conventions to constitute an important contribution to the unification of private law in a sphere which is essential to the development of international trade relations.[45]

12. The need for a uniform law on international sales was, however, denied by South Africa which held the view that the field covered by the Conventions is regulated reasonably satisfactorily by either existing legislation or commercial practice.[46]

13. The Conventions in their present form were criticized by the Union of Soviet Socialist Republics which noted that only twenty-eight States, of which only three are socialist and two developing States, participated in the 1964 Hague Conference and expressed the opinion that the Conventions do not meet the requirements which the majority of States demand from international instruments of this kind.[47]

14. Austria expressed the opinion that the Uniform Law on Sales is too voluminous, too detailed and not always well arranged and feared that its complexity would have an adverse effect on its application.[48] Sweden considered that many of the provisions of the Uniform Laws were vague and gave rise to considerable doubt in the context of practical issues that might arise.[49] The United States doubted whether the Uniform Law on Sales would be understood by individuals in the commercial field,[50] regretted the use of abstract, artificial and complex concepts which could result in ambiguity and error[51] and were likely to be construed differently in different parts of the world; it further stated that this result ill-served the basic objective to lead to effective unification.[52] Other weaknesses of the Uniform Law on Sales were, in the view of the United States, that it pointed more to external trade between common boundary nations geographically near to each other and that

[26] A/CN.9/11/Add.2, p. 3.

[27] A/CN.9/11/Add.1, p. 24.

[28] A/CN.9/11, p. 28 and A/CN.9/11/Add.5, pp. 6-7. Should they decide to ratify the Conventions, "The Nordic countries, having unified their laws on sales, will probably make a declaration in accordance with article II, paragraph 1 of the Conventions. Furthermore, since Sweden has ratified the 1955 Hague Convention on the applicable law, Sweden may make use of the reservation in article IV. It may also be deemed appropriate to make a reservation in accordance with article III; the position taken by other Contracting Parties on this issue will be of importance for the Swedish decision. As regards article V, Sweden is not at present contemplating to make use of the reservation provided for therein." In their replies of 29 July 1969, Denmark and Finland stated that they concurred in the views expressed in the reply of the Government of Sweden (A/CN.9/11/Add.5), "including those relating to the use of the right to make reservations ensured in the Conventions" (A/CN.9/11/Add.6, p. 2). The views attributed in this document to Sweden represent therefore also the views of Denmark and Finland.

[29] A/CN.9/11, p. 28.

[30] A/CN.9/11/Add.3, p. 22.

[31] A/CN.9/11, p. 4. In its additional comments (A/CN.9/11/Add.3, pp. 2-3), Austria stated that it was "not in a position to accede to the Conventions unless a number of States with which Austria is maintaining close and friendly relations become parties to the Conventions without reservations (including reservations in respect of the field of application). It is, therefore, by no means excluded that Austria may sign and ratify the Conventions at a later stage."

[32] A/CN.9/11/Add.2, p. 2.

[33] A/CN.9/11, p. 17.

[34] *Ibid.*, p. 17.

[35] A/CN.9/11/Add.1, p. 9.

[36] A/CN.9/11, p. 28.

[37] A/CN.9/11/Add.3, p. 27.

[38] A/CN.9/L.9, para. 13.

[39] A/CN.9/11, p. 36.

[40] A/CN.9/11/Add.2, p. 4.

[41] A/CN.9/11, p. 12.

[42] *Ibid.*, pp. 14, 20-21.

[43] A/CN.9/11/Add.2, p. 4.

[44] A/CN.9/11/Add.3, p. 21.

[45] *Ibid.*, p. 23.

[46] A/CN.9/11, p. 28.

[47] A/CN.9/11, Add.1, p. 32.

[48] A/CN.9/11, p. 6.

[49] A/CN.9/11/Add.5, p. 5.

[50] A/CN.9/11/Add.1, p. 35.

[51] A/CN.9/11/Add.4, p. 8.

[52] A/CN.9/11/Add.1, pp. 34 and 36.

insufficient attention had been given to international trade problems involving overseas shipments.[53]

15. In the opinion of Belgium, the Federal Republic of Germany and Norway the Uniform Law on Sales strikes a fair and proper balance between the rights and obligations of the seller and of the buyer.[54]

16. This view was, 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, were not well balanced;[55] Spain noted that the Law's obligations were not clearly defined and would therefore benefit the stronger party.[56] Along the same lines, Hungary submitted that some of the solutions adopted by the Uniform Laws were objectionable because they helped a better situated and economically stronger party to occupy a more favourable position vis-à-vis a less developed party.[57] The United Arab Republic stated that certain principles embodied in the Uniform Law on Sales caused developing countries some apprehension.[58]

17. In the opinion of the United States the Uniform Laws were as yet not ready for adoption. Improvements subsequent to adoption could not deal with problems that lay at the heart of the law's structure and approach. Therefore, further work on the Uniform Laws was needed at the present stage before they come into force.[59]

18. Sweden, drawing attention to the relation between the Uniform Laws and standard contracts, expressed the view that it would be expected that the main legal issues of the greater part of international contracts of sale would be governed by standard contracts and that it would be the role of the Uniform Laws to supplement these contracts on points on which they did not contain provisions. Specific examples of possible difficulties were mentioned; the interrelation between the Uniform Laws and such contracts should be studied in greater depth.[60]

19. In the view of Sweden, a similar issue was raised by the connexion between the provisions of the Uniform Laws and the trade terms that were in common use. It was standard procedure to include such terms in the contract of sale in order to regulate questions of transport and payment. It was a matter of regret that the Uniform Laws gave so little guidance regarding the way in which they were supposed to relate to these terms.[61] There was also a measure of uncertainty as to whether or not the Uniform Laws were intended to apply to various types of contract such as contracts involving the supply and erection of plants and machinery. The position of these laws with regard to the consequences of export and import restrictions, currency regulations, etc., could not be ascertained, and their relationship to tort liability and to general principles of contract law was subject to considerable doubt.[62]

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

1. *Article I, paragraphs 1 and 2 of the Convention: incorporation of the Uniform Laws into national legislation*

20. Norway expressed the view that a contracting State should be 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 texts, without being bound by the special, and partly unfamiliar, structure of the Uniform Law and the wording of its different articles.[63] China expressed a similar view.[64]

21. At the second session of the Commission, the representative of Norway further observed that a contracting State should not be prevented, for example, from adding to its domestic law matters which might go beyond the scope of the Uniform Law, without being inconsistent with it; accordingly, he suggested that paragraph 2 of article I should be deleted.[65] This, in his view, would in no way endanger uniformity as to substance. The representatives of the USSR, Tunisia, Romania and Czechoslovakia, and the observer from the Hague Conference on Private International Law, expressed agreement with the Norwegian suggestion.[66]

22. The representative of the United Kingdom opposed the Norwegian suggestion on the ground that the ensuing flexibility would, in effect, transform the Uniform Laws into model laws and that this would, in turn, increase disparities between the laws of different countries governing the international sale of goods.[67] The representatives of Australia and Mexico concurred with this view.[68]

23. The representative of the Union of Soviet Socialist Republics expressed the opinion that the system of an international convention was preferable to the technique of incorporating the text of a uniform law into national legislation. Such a convention should only establish broad principles. Moreover, States should be at liberty to apply other international instruments relating to international sale which were in force at the present time or might be concluded in the future.[69]

2. *Article II: opportunity to exclude applicability as to regions: States deemed not different for the purpose of the requirements of the Uniform Law*

24. The representative of the United Arab Republic suggested at the second session of the Commission that

[53] *Ibid.*, p. 35.

[54] Belgium, A/CN.9/11, p. 12; Federal Republic of Germany, *ibid.*, p. 14.

[55] A/CN.9/11/Add.1, p. 35.

[56] *Ibid.*, p. 28.

[57] A/CN.9/11/Add.3, p. 21.

[58] *Ibid.*, p. 23.

[59] A/CN.9/11/Add.1, p. 36.

[60] A/CN.9/11/Add.5, p. 5.

[61] *Ibid.*

[62] *Ibid.*, p. 6.

[63] A/CN.9/11, p. 21.

[64] A/CN.9/11/Add.2, p. 2.

[65] A/7618, annex I, para. 1.

[66] *Ibid.*, para. 2.

[67] *Ibid.*, para. 5.

[68] *Ibid.*

[69] *Ibid.*, para. 4.

the principle embodied in article II, permitting the unification and harmonization of international sales law on regional level within the framework of a world-wide unification, should be incorporated in article 1 of the Uniform Law.[70]

3. *Article III: declaration to the effect that the Uniform Law shall be applicable only if each of the parties has his place of business (habitual residence) in the territory of a different contracting State.*

25. The United Arab Republic submitted that the exception permitted by this article should be the rule. Indeed, without the reservation provided for in article III, the Uniform Law could, in certain circumstances, apply to a contract between parties whose places of business were in the territories of non-contracting States.[71] The representative of Tunisia, at the second session of the Commission, expressed the same view.[72]

26. In connexion with his observations on articles 1 and 2 of the Uniform Law on Sales, the representative of the United States expressed the view that the "coercive effect" of those articles would only be relieved by the reservation made under article III if that reservation had been made by the forum State.[73]

27. The same view was held by Hungary, which pointed out that the reservation would effectively restrict the application of the Uniform Laws to cases where the countries of both parties are contracting States only when the reservation had been made by the State of the forum. Hungary noted in addition that it was hardly worth while to make the reservation under article III since it tended to limit the unification of laws and would thus reduce the resulting advantages.[74]

4. *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*[75]

28. The observations made in connexion with the above articles centre on the following questions:

(a) *A uniform substantive sales law obviates the necessity of rules of private international law*

29. Luxembourg stated that the six member States of the European Economic Community (Belgium, Federal Republic of Germany, France, Italy, Luxembourg, and the Netherlands) had decided that those member States which had not yet ratified the 1955 Hague Convention on the Law Applicable to the International Sale of Goods would not continue the procedure for obtaining parliamentary approval, while those which had already ratified that Convention would denounce it as soon as they had the option of doing so.[76] In this connexion, Belgium submitted that the 1964 Conventions would put an end to the uncertainties involved in the application of the rules of private international law.[77] The Federal Republic of Germany expressed the opinion that the essential aim of the standardization of substantive sales law was to do away with any stipulation as to which national law should be applicable, and that article 2 of the Uniform Law on Sales achieved that aim.[78] The Federal Republic added that, in its view, the declaration under article IV of the Convention on Sales would result in largely eliminating the benefits afforded by the Uniform Law through the standardization of substantive law.[79] A similar view was expressed by the Netherlands which stated that the removal of differences in various legal systems could be more fully realized by application of a uniform sales law than by application of rules governing conflicts of law.[80]

30. On its part, Israel observed that ratification of the Convention on Sales would obviate the necessity to accede to the 1955 Convention in view of the mandatory provision of article 2 of the Uniform Law on Sales.[81]

(b) *Coexistence of uniform substantive rules and rules of private international law*

31. 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 stated that they intended to ratify, or accede to, both the 1964 Conventions and the 1955 Convention.[82] Spain suggested that the 1955 Convention should be brought into line with the Convention on International Sale[83] which it complements.[84]

32. Other States opposed the exclusion of rules of private international law on the ground that this might lead to undesirable consequences in so far as the application of the Uniform Laws was concerned. The United States noted that provisions such as article 2 of the Uniform Law on Sales had been the subject of considerable controversy and might be deterring States from becoming parties to the Convention on Sales.[85] At the second session of the Commission, the representative of the United States further amplified that view by stating that the "coercive effect" of article 2, as well as of article 1, of the Uniform Law on Sales was unfortunate in that the Uniform Law might be forced on the parties to a sales contract even though their Governments had not accepted the Uniform Law and the contract was executed and performed outside the forum State.[86]

33. Similar views were advanced by Czechoslovakia which observed that the principle embodied in article 2

[70] A/7618, annex I, para. 8.

[71] A/CN.9/11/Add.3, p. 26.

[72] A/7618, annex I, para. 10.

[73] A/7618, annex I, para. 40.

[74] A/CN.9/11/Add.3, p. 5.

[75] On this question, see also A/CN.9/12, and the comments submitted by the Secretary-General of the Hague Conference on Private International Law (A/CN.9/12/Add.2).

[76] A/CN.9/12, p. 9.

[77] A/CN.9/11, p. 12.

[78] A/CN.9/12, p. 7.

[79] *Ibid.*

[80] *Ibid.*

[81] A/CN.9/12, p. 8.

[82] Colombia, A/CN.9/11, p. 13; Mexico, *ibid.*, p. 18.

[83] A/CN.9/12/Add.1, p. 12.

[84] A/CN.9/11/Add.1, p. 28.

[85] *Ibid.*, p. 35.

[86] A/7618, annex 1, para. 40.

entailed for a contracting State the application of the *lex fori* (i.e. the Uniform Law), regardless of the fact whether that law was, 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.[87] Also Norway considered that it was unfortunate that the Uniform Law sought to extend its field of application by covering cases which had little or no connexion with the State of the forum.[88]

34. Other objections against the provision of article 2 of the Uniform Law on Sales were put forward by the Union of Soviet Socialist Republics and Hungary.

The representative of the Union of Soviet Socialist Republics, at the second session of the Commission, observed that article 2 seemed to be based on the premise that the Uniform Law dealt with all matters relating to the international sale of goods. While it was true that article 17 of the Uniform Law on Sales provided that questions concerning matters governed by the Uniform Law which were not expressly settled therein should be settled in conformity with general principles, it could not be doubted that the expression "general principles" was very vague and that there remained matters which would still fall outside the scope of the Uniform Law. Those matters should be governed by the rules of private international law.[89]

35. In this connexion, the observer of UNIDROIT specified that the purpose of article 2 was to give the Uniform Law an autonomous character, and to make it unnecessary for courts to determine the applicable law in each case. However, it would not be possible to exclude totally the application of conflict rules since these were matters (e.g. prescription) that were not dealt with in the Uniform Law and which could not be settled by reference to the general principles on which Uniform Law was based. Hence, in some cases recourse should be had to rules of private international law.[90]

36. Sweden stated that the exclusion of rules of private international law was undesirable in that the Uniform Laws could be applied by a court for the sole reason that one of the parties to a contract was subject to suit in a country which had adopted those laws and the other party deemed it advantageous to institute a law suit there. Moreover, the reservations which contracting States were allowed to make under the Conventions more or less represented exceptions from the main principle that the Uniform Laws were to be applied whenever they formed part of the *lex fori*. The result was to jeopardize the main objective of excluding the rules of private international law, namely to diminish the uncertainty and complications supposed to ensue from the application of these rules.[91]

37. Hungary recognized that the exclusion of private international law had the advantage that the forum would never apply foreign substantive law. On the other hand, it was observed that the parties would not know in advance which law applied to their contract, since there was no way of knowing beforehand which party would bring an action, nor whether he would do so in a third country.[92]

38. Both Czechoslovakia and Hungary suggested that a solution would seem to lie in the unification of rules of private international law and to decide in accordance with these rules which law would be applicable. In the view of Czechoslovakia, 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.[93] In the view of Hungary, such a solution would offer a greater degree of security than the solution adopted in the Uniform Laws.[94]

39. Along the same lines, Norway suggested 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. Attention was also directed to article IV of the Convention on Sales, which laid down the requirements of previous ratification or accession of a conflict of laws convention; this article should be amended to make it permissible for a Contracting State also to accede to conventions on conflict of laws after having ratified, or acceded to, the Convention on International Sales.[94a] The deletion of article 2 was also suggested by the representative of the Union of Soviet Socialist Republics.[95]

40. It was also pointed out by Czechoslovakia that article 3 of the Uniform Law on Sales, which allowed the parties to a contract of sale to exclude the application of the Uniform Law either entirely or partially was in contradiction with article 2 of the Uniform Law which started from the opposite premise.[96] A similar objection was made by Mexico which considered that it followed from the consequences inherent in permitting the parties to a contract of sale to exclude the Uniform Law under article 3, that the rules of the 1955 Convention on the Applicable Law which refer to domestic law, would apply.[97]

5. *Article V of the Convention and article 3 of the Uniform Law: freedom of contract*

41. The United Kingdom, which ratified the Convention on Sales subject to a declaration under article V of that Convention, stated that such ratification had the advantage of providing a flexible system under which the Uniform Law would affect the relations of parties to contracts only to the extent that they had expressly agreed that their relations should be governed by that law. Parties to contracts would thus be free to adopt

[87] A/CN.9/11/Add.1, p. 5.
[88] A/CN.9/11, p. 22.
[89] A/7618, annex I, para. 38.
[90] *Ibid.*, para. 39.
[91] A/CN.9/11/Add.5, pp. 2-3.
[92] A/CN.9/11/Add.3, p. 5.
[93] A/CN.9/11/Add.1, p. 5.
[94] A/CN.9/11/Add.3, p. 6.
[94a] A/CN.9/11, p. 22.
[95] A/7618, annex I, para. 38.
[96] A/CN.9/11/Add.1, p. 6.
[97] A/CN.9/12/Add.1, p. 7.

some provisions and to exclude others or to apply some other law if they preferred to do so.[98]

42. At the second session of the Commission, the representative of the United Kingdom further observed that in view of the fact that the Uniform Law incorporated certain civil law concepts with which common law countries were not familiar, a transitional period was necessary and this was made possible by article V.[99]

43. The representatives of Australia and Japan expressed similar views. Retention of article V might mean the difference between ratification and non-ratification by a number of countries, especially those belonging to the common law system.[100] Business circles had expressed themselves in favour of the reservation which made it possible to test the effectiveness of the Uniform Law over a period of time.[101]

44. Objections to the reservation permitted by article V of the Convention (either on its own merits or in conjunction with article 3 of the Uniform Law) were raised by the United Arab Republic, Austria, Spain and Hungary, and, at the second session of the Commission, by the representatives of Iran, Mexico, Argentina, Ghana, Romania and Tunisia.

45. The United Arab Republic considered the reservation allowed by article V superfluous, since under article 3 of the Uniform Law on Sales the parties were at liberty to exclude the application of the Uniform Law either entirely or partially. In addition, the United Arab Republic considered it inadmissible that the application or effectiveness of a law should depend exclusively on the will of those governed by it.[102]

46. In the view of Austria, article V reduced considerably the value of the Uniform Law since the reservation made 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. It was also suggested that, in view of article 4 of the Uniform Law on Sales, agreements choosing the Uniform Law presented difficult problems with respect to mandatory rules of national law.[103]

47. The reservation permitted under article V was also opposed by Spain in that it unduly complicated the application of the Convention, extended even further the principle of freedom of contract recognized in article 3 of the Uniform Law on Sales.[104]

48. Similar objections were raised by the representatives of Iran and the United Arab Republic: the combined effect of article V of the Convention and article 3 of the Uniform Law was to give the parties to a sales contract complete freedom to exclude the application of the Uniform Law even where both parties were nationals of, or had their places of business in, contracting States. This was held inconsistent with the very purpose of the Convention which sought to ensure uniformity.[105]

49. It was further observed by Spain that application of the reservation 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 had not made the reservation, depending on which country the court considering the case was situated in.[106] Spain therefore suggested that article V of the Convention on International Sales should be deleted.

50. With particular regard to article 3 of the Uniform Law on Sales, Spain, although not objecting to the general principle of the freedom of contract which that article recognizes, expressed the view that article 3, in its present wording, made it possible for the parties to exclude, entirely or partially, the application of the Uniform Law on Sales without indicating what provisions were 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 was under the contract.[107] For that reason, Spain expressed preference for article 6 of the 1963 draft[108] which accords freedom of contract only when the parties make it sufficiently clear what provisions are applicable to the contract.[109] A similar view was expressed by the representatives of Mexico,[110] Argentina and the United Arab Republic.[111]

51. A similar view was expressed by Hungary. Article 3 supported the autonomy of the will of the parties, but was at variance with the 1955 Hague Convention on the Applicable Law and the 1963 draft, in that it allowed the implied exclusion, in part or in whole, of the Uniform Law. This would give rise to uncertainties and legal disputes and widely extended the possibility for the forum to base interpretations on implications to the detriment of uniformity.[112]

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[98] A/CN.9/11/Add.2, p. 4.

[99] A/7618, annex I, para. 20.

[100] Australia, *ibid.*, para. 21.

[101] Japan, *ibid.*, para. 22.

[102] A/CN.9/11/Add.3, p. 26.

[103] A/CN.9/11, p. 5.

[104] A/CN.9/11/Add.1, p. 26.

[105] A/7618, annex I, para. 12.

[106] *Ibid.*, p. 27.

[107] *Ibid.*

[108] 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/Prep.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."

[109] A/CN.9/11/Add.1, pp. 27-28; and A/7618, annex I, para. 15.

[110] A/7618, annex I, para. 19.

[111] *Ibid.*, para. 18.

[112] A/CN.9/11/Add.3, pp. 12-13.

52. The representative of Ghana submitted that article V of the Convention conflicted with articles 1, 3 and 4 of the Uniform Law, in that articles 1 and 4 enumerated the cases where the Uniform Law "shall" apply, whereas article 3 permitted the exclusion of its application by the parties. It followed that the Uniform Law was applicable as between the parties, unless they availed themselves of the right to exclude its application under article 3. Nevertheless, under article V of the Convention, the Uniform Law would only apply where the parties had chosen the Uniform Law as the law of the contract.[113]

53. In the view of Hungary, the declaration under article V of the Convention would transform the Uniform Law into a set of general conditions of sale, whereas a law was needed in this area.[114]

54. An intermediate position was taken by the representative of Belgium and the observer of UNIDROIT at the second session of the Commission. They observed that most of the objections against article 5 where legally unassailable;[115] however, practical considerations militated in favour of its retention[116] and the consequences might not be very serious in practice.[117]

6. *Articles IX and XIII: accession to the Convention; applicability of Convention to territories for whose international relations a contracting State is responsible*

55. At the second session of the Commission, the representatives of Kenya, Tanzania and the Union of Soviet Socialist Republics objected to the provisions of these two articles.

56. The representative of the Union of Soviet Socialist Republics, supported by the representative of Kenya, submitted that article IX would deprive a number of States of the opportunity to accede to the Convention, while article XIII was a reflection of the past and had no place in a modern international instrument.[118]

57. The representative of Tanzania suggested that the wording of article IX should be amended to follow that of the corresponding article of the Hague Convention on the Applicable Law of 1955.[119]

(c) *Observations on the Uniform Law on Sales*

7. *Article 1: definition of international sale*

58. It was 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.[120]

59. Czechoslovakia considered that the provisions of article 1 were 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 did not satisfy the conditions laid down in the present text.[121] 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 was 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 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 was 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.[122]

60. Czechoslovakia, Japan, Norway and the Union of Soviet Socialist Republics expressed the opinion that the present text gave rise to certain difficulties of interpretation.

61. Czechoslovakia stated that in connexion with one of the requirements, namely that goods will be carried from one territory to another, doubts might exist at the time of conclusion of the contract (when it ought to be clear which law was applicable), whether the carriage would actually take place. Doubts might further arise in respect of the applicable law if the place of delivery was not indicated in the contract.[123]

62. According to Norway, it was 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 was sufficient that the seller understood that the goods were to be sent out of the country; clarity in this respect was particularly important in connexion with the question whether an f.o.b. sale or a sale "ex works" fell within the scope of the Uniform Law on Sales.[124]

63. A similar view was expressed, at the second session of the Commission, by the representatives of Japan and of the Union of Soviet Socialist Republics.

64. The representative of Japan stated that several trading companies which bought goods on an f.o.b. basis

[113] A/7618, annex I, para. 13.

[114] *Ibid.*, para. 16.

[115] *Ibid.*, paras. 23 and 24.

[116] Belgium, *ibid.*, para. 24.

[117] UNIDROIT, *ibid.*, para. 23.

[118] A/7618, annex I, para. 27.

[119] *Ibid.*, para. 28.

Note: Under the terms of article 11 of the 1955 Hague Convention, "any State not represented at the Seventh Session of te Hague Conference on Private International Law may accede to the present Convention. . .".

[120] A/CN.9/11, p. 19.

[121] A/CN.9/11/Add.1, pp. 6 and 7.

[122] *Ibid.*, p. 8.

[123] *Ibid.*, p. 7 and A/7618, annex I, para. 33.

[124] A/CN.9/11, p. 23.

and sold them at the same time c.i.f. to their buyers abroad agreed with the comments made by Norway.[125] In this connexion, the representative of Japan questioned the necessity, for the purpose of the application of the Uniform Law, for both parties to a contract to know that the goods were to be carried from the territory of one State to the territory of another.[126]

65. The representative of the Union of Soviet Socialist Republics suggested that the provisions of article 1 (*a*) should be extended to cover also goods already carried from the territory of one State to the territory of another, but which had not yet been sold (e.g. articles of exhibition).[127]

66. The representative of Japan suggested that it would be useful to define the expression "place of business", which had different connotations in different countries.[128] The representative of Iran, expressing the view that the Uniform Law should make no distinction between commercial and non-commercial sales, suggested that it would be appropriate to replace the words "places of business" by the term "domiciles".[129] The distinction between commercial and non-commercial sales was, however, advocated by Czechoslovakia; the Uniform Law should be made applicable to commercial sales only, excluding e.g. purchases made by tourists abroad.[130]

8. *Article 3: autonomy of the will of the parties: exclusion of the Uniform Law by contract*[131]

67. Mexico observed that the principle of the autonomy of the will of the parties had rightly been criticized; obvious reasons of justice and equity required that mandatory provisions of the law of obligation be upheld.[132] The General Conditions of the Delivery of Goods of the Council for Mutual Economic Assistance did not permit derogation from the General Conditions unless this was rendered necessary by the specific nature of the goods or the characteristics of their delivery; the non-mandatory nature of the Uniform Law on Sales might possibly produce the result that the will of the stronger party to the contract prevailed.[133]

68. At the second session of the Commission, the representative of Norway suggested that the freedom of contract, recognized in article 3, should apply only when the parties made clear which law applied to their contract.[134]

69. The representative of Hungary supported the approach of article 3, but took the view that in excluding the application of the Uniform Law the parties should be required to decide which would be the governing law.

70. The representative of Japan and the observer of the Hague Conference on Private International Law submitted that to allow the parties to exclude the application of the Uniform Law impliedly would give rise to uncertainties and might lead to litigation.[135]

9. *Article 5, paragraph 2: mandatory provisions of national law designed to protect a party to an instalment sales contract are not affected*

71. It was pointed out by Norway that this article seemed to invite an interpretation *a contrario*, namely that only the mandatory provisions relating to the protection of a party to an instalment sales contract would not be affected by the Uniform Law.[136] Furthermore, in the view of Norway, this paragraph seemed superfluous since the Uniform Law, according to article 8 of the Uniform Law, was not concerned with the validity of the contract or any of its provisions.[137]

72. In the view of Norway, paragraph 2 should be deleted or amended for the purpose of extending it to all mandatory rules amounting to international *ordre public*, and the question as to whether a national mandatory rule should be regarded as an imperative rule for purposes of international transactions should in general be governed by national law.[138] The representative of Romania expressed a similar view.

73. The representative of the United Arab Republic expressed himself in favour of excluding, in respect of both buyers and sellers, the application of mandatory rules in respect of instalment payments, in view of the growing importance of that type of sale.[139]

74. The representative of Hungary considered that it was correct to exclude from the application of the law mandatory rules in respect of instalment payments; it was, however, evident that the imperative rules (rules of *ordre public*) superseded the provisions of the Uniform Law.[140]

75. The observer of the Hague Conference on Private International Law submitted that under the present wording of paragraph 2 of article 5 difficulties might arise in ascertaining which national law would apply as to the mandatory character of the rules concerned, and suggested that the paragraph should be interpreted in the same way as the provision of article 4 relating to the application of mandatory rules.[141]

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[125] A/7618, annex I, para. 31.

[126] *Ibid.*

[127] *Ibid.*, para. 32.

[128] *Ibid.*, para. 31.

[129] *Ibid.*, para. 35.

[130] *Ibid.*, para. 33, and A/CN.9/11/Add.1, p. 8.

[131] Certain comments on this article were made with reference to the relevance of rules of private international law and may be found in paras. 47, 48, 50 and 52 above.

[132] A/CN.9/11/Add.1, pp. 17-18.

[133] *Ibid.*, p. 18.

[134] A/7618, annex I, para. 42.

[135] *Ibid.*, para. 44.

[136] A/CN.9/11, p. 23.

[137] *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".

[138] A/7618, annex I, para. 48.

[139] *Ibid.*, para. 50.

[140] *Ibid.*, para. 51.

[141] *Ibid.*, para. 52.

10. *Article 6: contracts for the supply of goods to be manufactured or produced*

76. At the second session of the Commission, the representative of Czechoslovakia expressed the view that difficulties were likely to arise in interpreting the meaning of the expression "an essential and substantial part of the materials". In addition to the difficulty of determining what were essential and non-essential materials, it should be borne in mind that violation by the purchaser of his obligation with regard to handling the materials would affect the position of the parties concerning deficiencies in the goods produced. It would therefore be desirable to subject such cases to the same legal provisions as those applicable to cases where production of the goods concerned only the seller.[142]

11. *Article 7: commercial and civil character of the parties or of the contracts*

77. At the second session of the Commission, the representative of Hungary expressed the opinion that the application of the Uniform Law should be confined to commercial matters only.[143]

12. *Article 8: matters governed by the Uniform Law*

78. At the second of the Commission, the representative of the Union of Soviet Socialist Republics suggested that rules regarding the sale of goods and rules regarding the formation of contracts of sale should be incorporated in a single instrument.[144]

13. *Article 9: commercial usages and practices*

79. In the view of Mexico, the subordination of the Uniform Laws to normative and interpretative usages and practices could 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 warrantees or in the establishment of very short time-limits for the submission of claims, which in standard contracts were usually laid down by the economically stronger party to the detriment of the weaker party.[145] This danger was deemed to be aggravated by the fact that, according to article 8 of the Uniform Law on Sales, the Uniform Law was not concerned with the validity of any usage.[146]

80. At the second session of the Commission, the representative of the Union of Soviet Socialist Republics expressed a similar view and objected to the principle laid down by article 9. Usages were often devices established by monopolies and it would hence be wrong to recognize their priority over the law.[147]

81. The representative of Czechoslovakia, while recognizing the importance of usages in the international commodity trade, observed that they were less precise than legal rules and could thus lead to uncertainties. Reference was made in this connexion to the Czechoslovak International Trade Code where the following sequence obtained: mandatory rules, direct contract stipulations, indirect contract stipulations (e.g. reference in the contract to certain usages), and general usages used in international trade for particular commodities.[148]

82. The representative of Hungary observed that different usages might obtain in the same country for the same commodities. Moreover, the usage to be applied might be that of the place of the conclusion of the contract or of the place of its execution. Finally, under article 9 even usages unknown to the parties would prevail over the law, which was a clearly unacceptable principle.[149]

83. The representative of Norway expressed the view that under article 8 of the Uniform Law the validity of usages was left to national law.[150]

84. The representative of Japan submitted that the term "usage", which was found in articles 8, 9, 25, 42 and 61 of the Uniform Law, might give rise to considerable difficulties. The definition of "usage" was too abstract and also ambiguous, and it was not clear whether "usage" meant usage in the world at large or in a particular region or country.[151]

14. *Article 10: fundamental breach of contract*

85. It was 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*" differed from the wording in the English text: "reasonable person in the same situation as the other party".[152] Moreover, the requirement that a person should be of the same character as the other party (*de même qualité*) could not, in the view of Austria, be seriously imposed.[153]

86. At the second session of the Commission, the representative of the United Arab Republic submitted that article 10 was defective in that it was left to the subjective judgement of the parties to determine whether a fundamental breach had occurred. That question could better be determined by a judge or arbitrator.[154]

87. The representative of the United Kingdom observed that article 10 attempted to define in broad terms what constituted a fundamental breach of contract. Another approach might have been to enumerate specifically the cases amounting to a fundamental breach, but this might give rise to injustice because of the possibility of automatic avoidance of the contract. A broad and flexible definition of fundamental breach had therefore certain advantages, but it would seem desirable to improve the present text.[155]

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[142] A/7618, annex I, para. 53.

[143] *Ibid.*, para. 54.

[144] *Ibid.*, para. 55.

[145] A/CN.9/11/Add.1, p. 19.

[146] *Ibid.*

[147] A/7618, annex I, para. 57.

[148] *Ibid.*, para. 58.

[149] *Ibid.*, para. 59.

[150] *Ibid.*, para. 60.

[151] *Ibid.*, para. 61.

[152] A/CN.9/11, p. 6.

[153] *Ibid.*

[154] A/7618, annex I, para. 68, and A/CN.9/11/Add.3, p. 26.

[155] *Ibid.*, para. 66.

15. *Articles 11, 12 and 13: the expressions "promptly", "short period", "current price", "according to the usage of the market", "reasonable person"*

88. Austria observed 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.[156]

89. At the second session of the Commission, the representative of the Union of Soviet Socialist Republics observed that articles 11 to 13 contained a number of vague expressions which were ambiguous and would give rise to difficulties and uncertainties. The following examples were given: "short period" (article 11), "current price" and "usage of the market" (article 12), and "reasonable person" (article 13).[157]

16. *Article 15: form of a contract of sale*

90. Austria submitted that this article was out of place in the Uniform Law on Sales and further observed that many countries prescribed 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 was concerned, it would no longer be permissible to prescribe such forms.[158]

91. At the second session of the Commission, the representative of the Union of Soviet Socialist Republics observed that, in the Soviet Union, all contracts should be in written form; be suggested that article 15 should be modified so as to provide that if, under the law of one State whose enterprises were concluding a contract, an international sales contract should be made in a written form, the contract would be valid if the offer and acceptance were made in writing.[159]

92. The representative of the United Kingdom observed that many international contracts were made by telephone and that it was therefore reasonable to provide that evidence in writing was not required. It was open to the parties to exclude the application of article 15 by availing themselves of article 3 of the Uniform Law.[160]

17. *Article 16: specific performance*

93. At the second session of the Commission, the representative of the United Arab Republic observed that the concept of specific performance was unknown in certain countries and any reference to it should, therefore, be deleted.[161]

94. The representative of Japan suggested that the concept should be defined for the benefit of countries not familiar with it.[162]

18. *Article 17: interpretation in conformity with Law's general principles*

95. Austria submitted that the requirement laid down by article 17 was of questionable practicability. Some questions of very great importance to transactions arising from contracts of sale, such as prescription, were not dealt with at all in the Uniform Law on Sales and it would be impossible to settle such questions in conformity with the spirit of the Uniform Law. Furthermore, the Uniform Law on Sales contained many terms which also occurred in national laws but it did not define these specifically, and it did not seem possible to separate their interpretation from the interpretation of the same terms as they were used in national laws.[163]

96. Norway considered the article to be unfortunate; under this provision it might not be permissible to rely on other principles even when the "general principles" of the Uniform Law on Sales provided inadequate guidance. This question was made the more acute in view of the obligation under article I of the Convention on Sales to incorporate the article literally into national legislation without any complementing provision. Norway would therefore like to see the article deleted.[164]

97. Similar views were put forward at the second session of the Commission by the representative of the Union of Soviet Socialist Republics, according to whom the expression "general principles on which the present law is based" was too vague and would give rise to difficulties of interpretation.[165] Similar views were expressed by the representative of Japan.[166]

19. *Articles 18 and 19: obligation of the seller to deliver the goods*

98. The United States cited the concept of *délivrance*, which in English had been translated erroneously, but unavoidably, by "delivery", as an example of an artificial concept giving rise to unintended consequences, in particular when considered in connexion with the passing of risk which passed on "delivery".[167]

99. Spain expressed the opinion that the inclusion of delivery among the obligations of the seller was unacceptable on the following grounds: delivery in its true sense meant the transfer of possession of the goods but such transfer was not dependent solely upon the will of the seller since it required co-operation of the buyer; it was thus a bilateral act, which consisted of the seller's applying the goods and the buyer's accepting them. In no circumstances, therefore, could delivery be regarded as an exclusive obligation of the seller.[168] Accordingly, Spain suggested: (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

156 A/CN.9/11, p. 6.
157 A/7618, annex I, para. 69.
158 A/CN.9/11, pp. 6-7.
159 A/7618, annex I, para. 70.
160 *Ibid.*, para. 71.
161 *Ibid.*, para. 72.
162 *Ibid.*
163 A/CN.9/11, p. 5.
164 *Ibid.*, p. 24, and A/7618, annex I, para. 74.
165 A/7618, annex I, para. 73.
166 *Ibid.*, para. 75.
167 A/CN.9/11/Add.4, parts D (1) and (2), pp. 8-12.
168 A/CN.9/11/Add.1, p. 29.

"*entrega*" (delivery) by the words "*puesta a disposición*" (placing at the disposal).[169] 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 was made 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 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.[170]

100. At the second session of the Commission, the representative of Spain supplemented his Government's comments by submitting that the definition of "delivery" found in earlier drafs[171] was more satisfactory and that paragraph 1 of article 19 should be replaced by the provisions of the 1939 Rome draft.[172]

101. Mexico also criticized the definition of delivery given in article 19 as an over-simplification and the term "handing over" as being vague, and stated its preference for the terminology of the 1939 draft.[173]

102. The representative of the United Arab Republic was of the opinion that the term "*remise*" ("handing over") in paragraph 1 of article 19 was correct, but agreed that it should be made clear that the seller was required to take whatever action was necessary to ensure that the goods were placed at the disposal of the buyer.[174]

103. The representative of Tunisia expressed the view that the definition of "*délivrance*" in paragraph 1 of article 19 was clear in French and could only mean the placing of the goods at the disposal of the buyer. The form of delivery would have to be in accordance with the terms of the contract.[175]

104. The representative of the United Kingdom recalled that the concept of "delivery" in the Uniform Law had been formulated in accordance with the Anglo-Saxon concept which recognized the duties of the seller to deliver the goods, but submitted that it might be desirable to define the concept of delivery more precisely.[176]

105. Concerning paragraph 2 of article 19, the representative of Spain expressed the view that its provisions were inconsistent with those of paragraph 2 of article 73: if the seller had already dispatched the goods before the difficult economic situation of the buyer envisaged in paragraph 2 of article 73 had become apparent, how could he suspend the performance of his obligations if, according to the terms of paragraph 2 of article 19, he had already effected delivery by handing over the goods to the carrier?[177] The representative

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[169] *Ibid.*, p. 30.

[170] *Ibid.*

[171] *Note by the Secretariat:*

(a) *Draft Uniform Law on International Sales of Goods (Corporeal Movables) (1939)*

Article 18. The seller undertakes to deliver the goods to the buyer. The seller is bound to consign to the buyer simultaneously with the goods, their accessories.

Article 19. Delivery is accomplished when the seller has done all the acts which he is bound to do in order that the goods be consigned to the buyer or a person authorized to receive them on his behalf. What acts are necessary for this purpose, depends on the nature of the contract.

In the case of a sale of unascertained goods delivery is not accomplished until the goods, manifestly appropriated to the contract, are set aside on behalf of the buyer, and the seller notifies the buyer of such specification. Where unascertained goods are part of an indivisible whole and are of such a nature that the seller cannot set them aside until the buyer takes delivery of them, it shall be sufficient for the seller to do all the acts necessary to enable the buyer to take delivery of them.

Where the seller is bound to dispatch the goods to a place other than that of delivery, delivery shall be effected by consigning the goods to the first carrier or forwarding agent, or, if the first part of the journey is by sea, by placing them on board ship. Where, under the contract or by usage of the trade, the seller is entitled to present a received for shipment bill of lading to the buyer it shall be sufficient to deliver the goods to the shipowner.

(b) *Draft Uniform Law on the International Sale of Goods, text prepared by the Special Commission (1956)*

Article 20. Delivery consists in the handing over of goods which conform with the contract and their accessories; the seller undertakes to effect delivery according to the terms of the contract and of the present law.

Article 21. Where the contract of sale implies the carriage of the goods, unless it is provided that delivery is to be effected at the place of destination, delivery shall be deemed to take place when the goods are handed over to the carrier. When some part of the carriage has to be effected by the seller in his own transport or in transport hired by him on his own account, delivery shall take place when the goods are handed over to the carrier with whom a contract of carriage has been made on the buyer's account. Should the carriage of the goods have to be effected by several carriers acting successively, and the contract of sale thereby required the seller to make one or more contracts to cover the whole of the carriage, delivery shall be accomplished by handing over the goods to the first carrier.

Where the goods handed over to the carrier are not clearly appropriated to performance of the contract by being marked with an address or by some other means, the seller shall be deemed to have effected delivery of the goods only if, in addition to handing over the goods, he sends to the buyer notice of the consignment, and, if necessary, some document specifying the goods.

Where the carrier to whom, in accordance with the provisions of the first paragraph, the goods have to be handed over is a carrier by water, delivery shall be effected either by placing the goods on board ship or by placing them alongside, whichever the terms of the contract provide, unless the seller shall be entitled, according to the terms of the contract or usage, to present to the buyer a received for shipment bill of lading or other similar document.

(c) *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*

Article 20 is identical with article 20 of the 1956 draft. Article 21 is identical with article 21 of the 1956 draft, except that the last paragraph (where the carrier to whom, etc.) was not retained.

(d) *Text for a Uniform Law on the International Sale of Goods, elaborated by the Drafting Committee and submitted to the Conference in plenary session*

Article 20 is identical with the present article 18. Article 21 is identical with the present article 19.

[172] A/7618, annex I, para. 76.

[173] A/CN.9/11/Add.1, p. 30, and A/7618, annex I, para. 80.

[174] A/7618, annex I, para. 78.

[175] *Ibid.*, para. 79.

[176] *Ibid.*, para. 81.

[177] *Ibid.*, para. 77.

of Italy expressed the view that there was no such inconsistency.[178]

106. The observer of the International Chamber of Commerce submitted that the wording of paragraph 2 of article 19 could give rise to difficulties as it was not clear whether the expression "handing over the goods to the carrier" applied to the first carrier or to the sea carrier.[179]

107. Austria observed that article 19, paragraph 2, of the Uniform Law on Sales conflicted 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) in so far as the sender's right of disposal during transit were concerned, and that this contradiction could in practice only produce adverse consequences.[180] A similar observation was made by the representative of Tunisia at the second session of the Commission.[181]

20. *Article 25: remedies for the seller's failure to perform his obligations*

108. At the second session of the Commission, the representative of Japan observed that the provisions of article 25, and also article 26, would seem fair in the case of commodities of which the price fluctuated rapidly, but not in the case of industrial products where the price tended to be more stable. While it seemed reasonable to prevent speculation, there seemed to be less justification for depriving the buyer of the right to require performance of the contract in cases where, owing to rapid means of communication, the risk of speculation was minimal.[182]

21. *Article 26: remedies as regards delay of delivery*

109. Norway observed that, whereas article 39 of the Uniform Law on Sales laid down strict rules for the making of notifications applicable to all remedies as regards lack of conformity, article 26 provided only for notification concerning claims for performance or avoidance of the contract, and not concerning claims for damages. This was 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 intended to claim damages on account of delay or when the goods had been delivered at a wrong place, though only after delivery had taken place.[183]

22. *Articles 27 and 30: the terms "time of reasonable length", "within a reasonable time", and "promptly"*

110. At the second session, the representative of Romania critized the expressions "reasonable" and "promptly" used in these articles as imprecise and vague concepts.[184]

111. The representative of the United Arab Republic suggested that it should be left to the courts or arbitral tribunals to interpret these terms in the light of the circumstances of each case.[185]

23. *Article 33, paragraph 2: the expression "not material"*

112. At the second session of the Commission, the representative of Japan expressed the view that under the wording of paragraph 2 of article 33 doubts could arise as to what should be regarded as "not material". This expression might be given an unreasonably broad interpretation to the detriment of the buyer's rights.[186]

24. *Article 35: lack of conformity and passing of risk*

113. At the second session of the Commission, the representative of the Union of Soviet Socialist Republics expressed the opinion that article 35, in addition to linking the responsibility of the seller to the passing of risk, should deal with the question of the seller's responsibility with regard to goods covered by a guarantee under the contract (e.g., in the case of purchase of plant, machinery, etc.).[187]

25. *Article 38: duty of the buyer to examine the goods*

114. The representative of Japan, at the second session of the Commission, expressed the opinion that the term "promptly", in paragraph 1 of article 38, could give rise to difficulties especially when read in conjunction with the provision of paragraph 2 of the same article, according to which the goods should be examined by the buyer "at the place of destination". The latter requirement could possibly give rise to uncertainties, e.g. in the case of the buyer who was a trading company, and thus a middleman between the manufacturer and the user or consumer, or one of the middlemen in a chain of contracts. The same might be true with such buyers in connexion with the requirement of "without trans-shipment" in paragraph 3 of article 38, if the goods were to be put on rail or automobile from ship.[188]

115. Norway submitted that a difficulty might arise in connexion with paragraph 3 of article 38, when goods were shipped in containers, and suggested that the deferment of the buyer's duty to examine the goods might be made subject to the condition that examination before redispatch would put an unreasonable burden on the buyer, even when there is trans-shipment.[189]

26. *Article 42, paragraph 1: requiring seller to remedy defects in the goods*

116. Sweden expressed the view that the rules on "remedies for lack of conformity" (articles 42-49), which related to a matter of great practical importance for the law on sales, were extremely complex. By way of example, it could be asked what the relation was supposed to be between the right to require perform-

[178] *Ibid.*, para. 82.
[179] *Ibid.*, para. 83.
[180] A/CN.9/11, p. 7.
[181] A/7618, annex I, para. 79.
[182] *Ibid.*, para. 85.
[183] A/CN.9/11, p. 24.
[184] A/7618, annex I, para. 86.
[185] *Ibid.*
[186] *Ibid.*, para. 87.
[187] *Ibid.*, para. 88.
[188] *Ibid.*, para. 87.
[189] A/CN.9/11, pp. 24-25.

ance of the contract by the seller (article 42) and the right to fix an additional period of time for further delivery or for remedying a defect (article 44, para. 2). These two remedies of the buyer would for practical purposes often coincide, but they were subject to different conditions under the Uniform Law.[190]

117. Norway submitted 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 would not cause the seller unreasonable inconvenience or expense. It was further suggested that the buyer's right under paragraph 1 (*c*) should be exercised only when the lack of conformity was of an essential nature, i.e. amounted 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 presented his claims within a reasonable time after giving notice in accordance with the provisions of article 39 of the Uniform Law on Sales.[191]

27. *Article 44, paragraph 2: rights of the buyer after expiration of period within which the seller should have remedied the defects in the goods*

118. Norway expressed the opinion that the provision of article 44, paragraph 2, seeemed to go too far in enabling the buyer to declare the contract avoided even if the defect was unimportant. It was proposed, therefore, to restrict the exercise of this remedy by the buyer to cases meeting the requirements laid down by article 42,[192] with the amendments suggested in respect of that article.[193]

28. *Article 49: time-limit for exercise of right to rely on lack of conformity*

119. Norway observed that it was probably correct to interpret paragraph 1 of article 49 in the sense that the one year's time-limit could only be interrupted by legal action, but submitted that this did not clearly ensue from the wording of the paragraph. In the opinion of Norway, the period of limitation of one year was too short and should be prolonged to two or three years.[194]

29. *Articles 50 and 51: handing over of documents*

120. The United Arab Republic noted that the conditions of commercial sale (e.g. sale of f.o.b., c.i.f.) have not been included in the Uniform Law and suggested that it would be preferable to delete articles 50 and 51. These articles dealt only partially with a practice which should be regulated as a whole, independently of the Uniform Law.[195]

30. *Articles 52 and 53: rights or claims of third persons over the goods sold*

121. Austria submitted that the provision of article 52 did not distinguish between cases where a right of a third person existed and those where a third person merely claimed a right; this led to the conclusion that the buyer could avail himself of the guarantees set out in the article even in cases where a third person claimed a non-existent right over the goods. This provision was too wide, since the seller could not be held responsible for unwarranted claims. Moreover, article 52 did not set any time-limit for claims to the goods by a third person.[196]

122. At the second session of the Commission, the representative of Tunisia, in the context of a general reference to section III of the Uniform Law, expressed the opinion that articles 52 and 53 dealt only with the transfer of property in case of litigation, and that it might be desirable to include in the Uniform Law also provisions for the transfer of property in general.[197]

31. *Articles 54, 55 and 56: other obligations of the seller and the buyer*

123. Austria pointed out that whereas article 55 attached penalties to non-performance by the seller of any obligations not mentioned in articles 20 to 53, article 54 arbitrarily singled out two of those obligations which were not otherwise dealt with.[198]

124. The representative of Czechoslovakia, at the second session of the Commission, submitted that the provisions in articles 55 and 56 concerning the obligations of the seller and the buyer were not complete and suggested that the obligation of the creditor to cooperate in the fulfilment of the transaction should be more fully regulated. In this connexion, he referred to the Czechoslovak International Trade Code which contained provisions concerning all contractual obligations in the context of a sale of goods.[199]

32. *Article 57: fixing the price*

125. Austria expressed the opinion that 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 left also unsolved the case where the purchase price had 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 was that the purchase price meant the usual price generally agreed on for similar goods at the same place. It was 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 was intolerable in the light of prevailing commercial practice.[200]

126. The representatives of the Union of Soviet Socialist Republics and Hungary, at the second session of the Commission, criticized that article on the ground that a law should not permit the conclusion of a contract

[190] A/CN.9/11/Add.5, p. 4.
[191] A/CN.9/11, p. 25.
[192] *Ibid.*
[193] See under sub-section 26, para. 117.
[194] A/CN.9/11, p. 25.
[195] A/CN.9/11/Add.3, p. 27.
[196] A/CN.9/11, pp. 7-8.
[197] A/7618, annex I, para. 90.
[198] A/CN.9/11, p. 8.
[199] A/7618, annex I, para. 91.
[200] A/CN.9/11, pp. 8-9.

without a price or at least a clear indication as to the means for determining the price.[201] In the view of the representative of the Union of Soviet Socialist Republics, article 57 in its present wording would lead to arbitrariness.[202] The representative of Hungary stated that an exception to the rule that the price is an essential element of the contract should only be made where the price could be inferred from a previous contract between the same parties for the same goods.[203]

33. *Article 62: remedies of the seller for non-payment*

127. Norway suggested that there should be included in this article a provision regarding the right of interpellation in favour of the buyer, corresponding to what had been provided in favour of the seller in article 26, paragraph 2, of the Uniform Law on Sales, and that the seller should be obliged to inform the buyer of his decision if payment was made later than on the date fixed and he nevertheless wished to declare the contract avoided. It was noted by Norway that, under paragraph 1, the contract would be *ipso facto* avoided if the seller did not inform the buyer within a reasonable time whether he required payment or declared the contract avoided. Norway suggested that this rule should be confined to cases where the goods had not been delivered. In cases where delivery had taken place, it should be sufficient that the seller had the right to declare the contract avoided.[204]

128. As to paragraph 2 of the article, Norway did not regard the requirement that the seller should make his declaration of avoidance promptly as a well-founded general rule for all cases. The suggestion was made that in cases where the price has not been paid and where delivery had not taken place, the right of the seller to declare the contract avoided should be maintained as long as the delay continued.[205]

129. Sweden noted that under the wording of article 62, a delay in notification by the seller may deprive the seller of his right to payment for the goods, although the goods have been delivered to the buyer. As a practical matter, it seemed entirely unsuitable that a seller who had delivered the goods would after a certain time only have the right to retake the goods from the buyer. The present rule — which had no counterpart in the text of the 1963 draft — seemed, according to Sweden, to be based on an unjustified analogy of the corresponding rule for the case that the buyer omitted to inform the seller of his decision when goods were not delivered in time (cf. article 26, para. 1 of the Uniform Law on Sales).[206]

34. *Article 69: other obligations of the buyer*

130. At the second session of the Commission, the representative of Japan submitted that the provisions of article 69 made no provision for the many disputes that could arise between buyers and sellers regarding documentary credits, e.g. disputes over contracts providing for a letter of credit without specifying its precise contents, the time of opening the credit or the amount involved.[207]

35. *Article 70, paragraph 1* (a)*: other obligations of the seller*

131. Austria expressed the view that it was difficult to understand why the seller could only declare the contract avoided if he did so promptly; an additional period of time for the buyer to perform would be in the latter's interest.[208]

36. *Article 73, paragraph 2: prevention by the seller of the handing over of the goods*

132. In the opinion of Austria, paragraph 2 of article 73, in imposing obligations upon the carrier, was in conflict with provisions of municipal and international law concerning the carriage of goods, and also placed an inreasonable burden on the carrier.[209]

133. The United Arab Republic criticized this provision on the ground that it would enable a seller to prevent the delivery of goods already dispatched if he considered that the economic situation of the buyer justified such stoppage *in transitu*. Such a unilateral decision would open the door to arbitrary action and might have serious consequences for the buyer, in particular where the buyer was of a developing country having a vital need for certain goods.[210]

37. *Article 74: liability for non-performance of an obligation*

134. Norway suggested that the party who wished 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.[211]

135. According to Austria, the party who was the beneficiary of the obligation which was not performed and was liable for reciprocal performance, retained the possibility of declaring the contract void. In many cases he could only do so if he acted "promptly"; if for any reason he failed to act promptly he was obliged to perform without being entitled to reciprocal performance. In the view of Austria, this would constitute a hardship for that party.[212]

136. At the second session of the Commission, the representative of Czechoslovakia expressed the view that article 74 did not deal with sufficient precision with the consequences of governmental interference in private contractual relations, for example where a government prevented goods sold to a foreign buyer from being shipped to that buyer. The problems which arose then was whether the seller could disclaim liability. Ar-

[201] A/7618, annex I, paras. 92-93.
[202] *Ibid.*, para. 92.
[203] *Ibid.*, para. 93.
[204] A/CN.9/11, p. 26.
[205] *Ibid.*
[206] A/CN.9/11/Add.5, p. 4.
[207] A/7618, annex I, para. 94.
[208] A/CN.9/11, p. 9.
[209] *Ibid.*
[210] A/CN.9/11/Add.3, p. 24, and A/7618, annex I, para. 95.
[211] A/CN.9/11, p. 26.
[212] *Ibid.*, p. 9.

ticle 74 did not, in the view of the representative of Czechoslovakia, provide a clear-cut solution. He added that the Czechoslovak International Trade Code sought to solve problems of this nature by providing that the seller was responsible for obtaining export and related permits and the buyer for obtaining import and related permits.[213]

137. The representative of Argentina criticized article 74 for being insufficiently clear and for having an excessively subjective character.[214]

38. *Article 84: damages in cases of avoidance*

138. Austria submitted that the provision of paragraph 1 of article 84 would make it possible for the party avoiding the contract by declaration to engage in speculation and suggested that the applicable date should be the date on which the goods were delivered or should have been delivered.[215]

139. The United Arab Republic called attention to the following language of article 84: "prevailing in the market in which the transaction took place". It was not clear what the term "transaction" signified. This term might be construed as the place where preliminary negotiations took place, the place where the contract was concluded or the place where the contract was to be executed.[216]

39. *Articles 97 and 98: passing of the risk*

140. Mexico considered that the provisions in the Uniform Law concerning the passing of the risk were adequate. These provisions indicated clearly the effects which they produced and provided for different possibilities, such as goods in transit, sales of unascertained goods and cases of non-performance or lack of conformity of the goods and made the passing of the risk a consequence not of passing of property, but of delivery of the goods. Mexico further pointed out that these provisions allowed the parties to arrange for the risk to be assumed in a manner other than that provided for in the Uniform Law on Sales.[217]

141. The United States objected to the way the problem of passing of the risk had been approached in the Uniform Law which obliged one to refer to the definition given to "*délivrance*" in article 19 of the Uniform Law. The difficulties arising in respect of that definition were in turn a source of difficulties in important specific transactions such as contracts in which the seller retained control of the goods by a bill of lading.[218]

142. Similarly, the observer of the International Chamber of Commerce, at the second session of the Commission, noted that under that article the risk would pass to the buyer when delivery of the goods was effected. No problem would arise where the parties had agreed to accept well-known delivery clauses, such as INCOTERMS. Where this was not the case, the Uniform Law failed to provide a clear solution, e.g. where the goods were delivered to a carrier or in the case of subsequent trans-shipment.[219]

143. In the opinion of Austria, paragraph 1 of article 98, could possibly produce unfair consequences: if the handing over of the goods was delayed owing to non-performance of accessory obligations of the buyer, but through no fault of his, then the buyer had not 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.[220]

(d) *Observations on the Uniform Law on Formation*

40. *General comments on the Uniform Law on Formation*

144. The United States submitted that it seemed 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.[221]

145. Mexico, referring to the various theories on the question at which moment contracts were concluded, stated 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.[222]

146. Austria expressed the view that the Uniform Law on Formation did not regulate the most important questions in connexion with the formation of contracts, namely, the time and place at which the contract came into being.[223] This absence was also noted by Mexico.[224] Austria further observed that the Uniform Law on Formation applied to transactions up to the coming into being of the contract, while the Uniform Law on Sales applied to the consequences of the formation of the contract. Between the two instruments there remains therefore a gap which would have to be filled by municipal law and this constituted, according to Austria, another reason for the necessity of rules of private international law.[225]

41. *Article 2: application of the provisions of the Uniform Law*

147. Austria noted that the purpose of the Uniform Law was to establish the validity, not only of the expressly agreed terms of the contract, but also of what might be deemed to be the legal intention of the parties. However, only intentions shared by both parties had any effect and the fixing of the terms of the contract by one party was excluded. The fact that article 2 of

[213] A/7618, annex I, para. 97.
[214] *Ibid.*, para. 98.
[215] A/CN.9/11, pp. 9-10.
[216] A/CN.9/11/Add.3.
[217] A/CN.9/11/Add.1, p. 22.
[218] A/CN.9/11/Add.4, pp. 11-12.
[219] A/7618, annex I, para. 100.
[220] A/CN.9/11, p. 10.
[221] A/CN.9/11/Add.1, p. 34.
[222] *Ibid.*, pp. 22-23.
[223] A/CN.9/11, p. 11.
[224] A/CN.9/11/Add.1, p. 22.
[225] A/CN.9/11, p. 11.

the Uniform Law on Formation singled out a specific case of unilateral fixing of the terms of the contract and declared it without effect, might, in the opinion of Austria, lead to the conclusion *a contrario* that the provisions contained in the offer and reply could have effect unilaterally.[226]

42. *Article 4: communication constituting an offer*

148. Austria suggested that it should be made clear what essentials of a contract must be included in a communication so that it could be regarded as an offer.[227]

149. Hungary stated that, in accordance with paragraph 1 of article 4, the offer had to be sufficiently definite and had to express the offeror's intention to be bound by the contract. It appeared from the preparatory work that the Uniform Law on Formation did not in any way provide for "public offers". In such cases it remained doubtful whether there was an offer or only an invitation for an offer. This inevitably resulted in uncertainty.[228]

43. *Article 5: when the offer is binding*

150. According to Hungary, the binding character of the offer resulted from the offeror's declaration to that effect, but such an indication might also be inferred from the circumstances, from primary negotiations, from any practices which the parties had established between themselves, or from usages. The offer could be revoked only in good faith or in conformity with fair dealing. The exceptions were therefore unlimited in principle, and discrepancies of application are likely to result as courts apply their own conceptions about which offers are revocable.[229]

151. At the second session of the Commission, the representative of the Union of Soviet Socialist Republics submitted that it was inappropriate to provide in a law that an indication to the extent that the offer was firm or irrevocable might be "implied from the circumstances, the preliminary negotiations, in practices which the parties have established between themselves, or usage". It was for the offer itself to indicate clearly that it was firm or irrevocable.[230]

152. In the opinion of Austria the rule in this article would be a source of disputes and difficulties.[231]

153. In the view of Hungary it would be difficult to decide whether the discrepancies contained in the acceptance were essential or not.[232]

154. At the second session of the Commission, the representative of the Union of Soviet Socialist Republics suggested deletion of the provision of article 7 under which a contract might be concluded even when the acceptance contained additions to or limitations or modifications of the offer.[233]

44. *Article 10: Revocation of an acceptance*

155. At the second session of the Commission, the representative of Norway criticized the wording of this article on the ground that it would not permit national legislation to grant a buyer a period of reflection during which he could revoke the acceptance. This was particularly important in instances where the sales resistance of a buyer was too weak as compared to modern methods of salesmanship, as, for example, in the case of unsolicited offers.[234]

45. *Article 13: Definition of usage*

156. At the second session of the Commission, the representative of the Union of Soviet Socialist Republics expressed his disagreement with the definition of usage given in this article. In his view, the priority of law over the applicability of usage in commercial transactions should be established.[235]

[226] *Ibid.*
[227] *Ibid.*
[228] A/CN.9/11/Add.3, pp. 19-20.
[229] *Ibid.*
[230] A/7618, annex I, para. 106.
[231] A/CN.9/11, p. 11.
[232] *Ibid.*, p. 20.
[233] A/7618, annex I, para. 106.
[234] *Ibid.*, para. 113.
[235] *Ibid.*, para. 106.

2. *Report of the Working Group on the international sale of goods, first session, 5-16 January 1970**

CONTENTS

* A/CN.9/35.