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.

CONTENTS *(continued)*

I. INTRODUCTION: MANDATE; ORGANIZATION OF WORK PROGRAMME

1. The Working Group on the International Sale of Goods was established by the United Nations Commission on International Trade Law at its second session in March 1969. The Working Group consists of the following fourteen members of the Commission: Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland, and the United States of America. Under the Commission's decision,[1] the Working Group shall:

"(*a*) Consider the comments and suggestions by States as analysed in the documents to be prepared by the Secretary-General[2] ... in order to ascertain which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose, or what other steps might be taken to further the harmonization or unification of the law of the international sale of goods;

"(*b*) Consider ways and means by which a more widely acceptable text might best be prepared and promoted, taking also into consideration the possibility of ascertaining whether States would be prepared to participate in a Conference;

"(*c*) Submit a progress report to the third session of the Commission;"

2. The Working Group met at the United Nations Headquarters in New York from 5 January to 16 January 1970. All the members of the Working Group were represented except Tunisia. The list of representatives is contained in annex I to this report.

3. The meeting was also attended by observers from the Democratic Republic of the Congo, Czechoslovakia, Italy, Romania and Spain and the following intergovernmental and international non-governmental organizations who were invited pursuant to the Commissions's decision: the Council of the European Economic Community, the Hague Conference on Private International Law (hereinafter referred to as Hague Conference), the International Institute for the Unification of Private Law (UNIDROIT) and the International Chamber of Commerce (ICC).

4. At its first meeting on 5 January 1970, the Working Group elected the following officers by acclamation:

Chairman: Mr. Jorge Barrera Graf (Mexico);

Rapporteur: Mr. Emmanuel Sam (Ghana).

5. The documents placed before the Working Group were in part concerned with the two Hague Conventions of 1964: the Convention relating to a Uniform Law on the International Sale of Goods (hereinafter referred to as the 1964 Hague Convention) to which the Uniform Law on the International Sale of Goods (hereinafter referred to as ULIS or Uniform Law) is annexed and the Convention relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods to which the Uniform Law on the Formation of Contracts for the International Sale of Goods (here-

[1] Report of the Commission on the work of its second session (1969) (A/7618), para. 38.

[2] The documents to be prepared by the Secretary-General were described in paragraphs 1 and 2 of the Commission's decision. These documents are described more fully in this report at paragraph 5, *infra*.

inafter referred to as ULF) is annexed. The documentation with respect to these Conventions and Uniform Laws included the replies and studies by States concerning the Hague Conventions of 1964 (A/CN.9/11 and Add.1-6), annex I to the report on the second session of UNCITRAL (A/7618), and an analysis by the Secretary-General of the studies and comments by Governments on the Hague Conventions of 1964 (A/CN.9/31). Documents concerned with the 1955 Hague Convention on the Law Applicable to the International Sale of Goods (hereinafter referred to as the 1955 Hague Convention) included replies by States concerning this Convention (A/CN.9/12 and Add.1-4), annex II to the report on the second session of UNCITRAL (A/7618 and an analysis by the Secretary-General of the replies and comments by Governments on the 1955 Hague Convention (A/CN.9/33). The Working Group also had before it the report of the Working Group on Time-Limits and Limitations (Prescription) in the International Sale of Goods (A/CN.9/30). An analysis of the issues raised by these various documents and suggestions with respect to the order for their consideration was presented in the Working Paper prepared by the Secretariat (A/CN.9/WG.2/WP.1) (hereinafter referred to as the Working Paper). A note by UNIDROIT with respect to the Hague Conventions of 1964 (A/CN.9/WG.2/WP.3) was also placed before the Working Group.

6. The Working Group adopted the following agenda (A/CN.9/WG.2/WP.3):

1. Election of officers.
2. Adoption of the agenda.
3. Working methods.
4. Consideration of substantive issues under the Commission's mandate.
5. Adoption of the report.

7. With respect to item 3 of this agenda, it was noted that problems of working methods would arise in connexion with the consideration of substantive issues under item 4. It was therefore agreed by the Working Group that problems of working methods could be considered under item 4.

8. The Working Group decided to consider the substantive issues in the order in which they were presented in part III of the Working Paper which appears as annex II to the report and to consider later which of these issues might call for a sub-group or rapporteur. It was suggested that proposals to the Working Group be submitted in writing.

9. In connexion with the discussion of specific provisions of the uniform laws annexed to the Hague Conventions of 1964, one representative expressed the view that the Working Group should first consider whether the unification and harmonization of the law of the international sale of goods could not better be promoted by the preparation of a new text. Other representatives were of the view that this question could best be considered after the discussion of the existing provisions, since this would indicate the number and nature of any modifications required for the production of a more widely acceptable text. It was agreed that the discussion of provisions of the existing texts did not foreclose the basic question of approach.

II. Consideration of substantive issues

A. *Principles on choice of law in uniform legislation on sales; the relationship between the 1955 Hague Convention and the Hague Conventions of 1964*

10. The Working Group considered first the issue analysed in part III chapter A of the Working Paper: What (if any) rules should a uniform law for international sales contain with respect to the law's application to transactions involving one or more States that had not adopted the uniform law?

11. The discussion at the outset considered the relative merits of the four following alternative approaches (Working Paper, para. 17):

Alternative I. Application of the uniform law by courts of contracting States without regard to the relationship between the transaction and a contracting State (cf. arts. 1 and 2 of ULIS).

Alternative II. Inclusion in the uniform law of choice of law rules, possibly comparable to those of the 1955 Hague Convention prescribing the relationship between the international sale transaction and a contracting State under which a contracting State would apply the uniform law.

Alternative III. Restriction of the field of application of the uniform law to cases where parties to the transaction are located in different contracting States (cf. art. III of the 1964 Hague Convention).

Alternative IV. Omission of any rule on choice of law from the uniform law thereby remitting the question to the rules on choice of law of the *forum*.

12. In discussing alternative I, above, several representatives pointed out that article 2 of ULIS calls for the *fora* of contracting States to apply ULIS even in cases where the transaction involved in the litigation has no connexion whatsoever with a State that has adopted the uniform law. The opinion was voiced that the Uniform Law should be applied only if its application is warranted by sufficient connexion between the sale and at least one contracting State.

13. Other representatives referred to the reservations permitted by the 1964 Hague Convention and expressed the view that this possibility provided in articles III, IV and V, and especially in article III of the Convention, greatly mitigated the "coercive effect" of the Uniform Law. On the other hand it was noted that the possibility of numerous reservations derogating from the basic rules of the Convention was a serious departure from the principle of uniformity and could lead to uncertainties and complexities.

14. Some representatives who disapproved of the current approach of the Uniform Law (alternative I, above), suggested the deletion of article 2 of that law, or the inclusion in the Uniform Law of the principle now optional under article III of the 1964 Hague Convention that the Uniform Law would only apply to transactions between parties in different "contracting States".

One representative suggested that the same result could be achieved without modifying the existing text: under this suggestion UNCITRAL might recommend that contracting States make the reservation under article III of the 1964 Hague Convention when ratifying or acceding to it.

15. Some representatives considered that the deletion of article 2 of the Uniform Law and the reintroduction of rules of private international law (alternative IV) would cause uncertainly as to the law applicable to the contract. It was also pointed out that the unification of substantive rules obviates the need for conflict rules. Other representatives, however, were of the opinion that rules of conflict of laws continue to be needed after ratification of the 1964 Hague Convention; in support of this view it was noted that the Uniform Law (article 8) excludes many questions from its field of application such as the rights of third persons and the validity of the contract.

16. Several representatives noted that, apart from the merits of article 2 of ULIS, this provision was impeding the ratification of both the 1955 and 1964 Hague Conventions. In this connexion it was also observed that the reservation under article IV of the 1964 Hague Convention can only be made by those States which have "previously" adopted the 1955 Hague Convention; ratification of that Convention is not possible after the States has adopted the 1964 Hague Convention. One representative considered that this difficulty might impede the ratification of the 1964 Hague Convention.

17. To permit more detailed work towards solving this problem, on 6 January 1970, at the third meeting of the Working Group, the Chairman established a Working Party consisting of the representatives of Ghana, Hungary, Norway and the United Kingdom. Other representatives and observers, including the representatives of the international organizations concerned, were invited to participate in the work of the Working Party. (This group was designated as Working Party I.)

18. Working Party I presented to the Working Group its written report, which appears as annex III to this report.

19. The Working Party reported to the Working Group that it recommended the revision of article 2 of ULIS. After minor stylistic changes suggested in the course of discussion, the proposed substitute for article 2 reads:

In the English text:

"1. The Law shall apply where the places of business of the contracting parties are in the territory of States that are parties to the Convention and the law of both these States makes the Uniform Law applicable to the contract;

"2. The Law shall also apply where the rules of private international law indicate that the applicable law is the law of a contracting State and the Uniform Law is applicable to the contract according to this law."

In the French text:

"1. *La présente loi est applicable lorsque les parties contractantes ont leur établissement sur le territoire d'Etats parties à la Convention et qu'au regard de la loi de chacun de ces deux Etats, le contrat est régi par la loi uniforme;*

"2. *La présente loi est également applicable lorsque les règles du droit international privé désignent la loi d'un Etat contractant comme étant la loi applicable et qu'au regard de cette loi, le contrat est régi par la loi uniforme.*"

20. It was pointed out that the proposed text should be supplemented by a provision to cover the event of one or both parties having no place of business; in such cases reference should be made to the place of residence of the party or parties.

21. To illustrate the application of the language in paragraph 19 above, the report of Working Party I (paras. 7-8) set forth a number of examples.

22. One member of the Working Party proposed retention of the present language of the Uniform Law; he stated that the existing text of the 1964 Hague Convention would be more widely acceptable if States proposing to ratify the Convention took advantage of the reservation permitted by article III.

23. A majority of the representatives approved the above-quoted revision of article 2. Certain of the reasons for revision, stated above, were developed further. In addition, it was noted that although the language of the proposal might seem more complex than the present language of article 2, this was true only because the present language concealed the complications resulting from numerous and conflicting reservations. In addition, the present provision was an impediment to widespread adoption of the 1964 Hague Convention.

24. Three representatives supported the proposal to retain article 2 of ULIS and to recommend reservations under article III of the 1964 Hague Convention. In their view the reintroduction of rules of conflict of laws into the Uniform Law would detract from unification, and would introduce into ULIS such uncertainty that businessmen for whom ULIS was intended would often not know whether their contracts were covered by it. The opportunity to make the article III reservation should overcome objections to article 2 of ULIS.

25. One representative was of the view that article 2 should be deleted so that the rules of conflict of laws would govern the applicability of the Uniform Law. Other representatives stated that they would be inclined to support this view if the proposed revision of article 2 of ULIS were not to be adopted. Another representative, however, was of the opinion that ULIS should apply only to contracts concluded between traders of contracting States.

26. It was then proposed that consideration be given to article IV of the 1964 Hague Convention permitting a reservation by a State "which has previously ratified or acceded to one or more Conventions on conflict of laws in respect of the international sale of goods. . .". It was suggested that the word "previously" made the article too restrictive; ratification of such a convention subsequent to ratifying the 1964 Hague Convention should be possible.

27. One representative submitted a proposal for revision of article IV of the 1964 Hague Convention. The proposal appears as annex IV to this report.

28. The sponsor of the proposed revision noted that his proposal was presented in two alternatives. Alternative A made a slight change in article IV to remove the restriction that only States that had "previously" adopted a convention on conflict of laws could make the reservation in favour of a convention on conflict of laws. Alternative B was offered to deal with the possibility that article 2 of the Uniform Law might not be so amended as to give adequate recognition to the principles of private international law.

29. After preliminary discussion, at the suggestion of the sponsor, it was decided not to take action on these proposals, and to refer the matter to the Commission for consideration at its third session.

B. *The character of the international sale that will invoke a uniform law*

30. The Working Group considered the issue presented in part III, chapter B of the Working Paper: the definition of the international sale of goods for the purpose of defining the scope of a uniform law. Early attention to this problem responded to the request by the Working Group on Time-Limits that the Working Group on Sale and the Commission give priority attention to the definition of international sale so that a convention on prescription could "contain the same definition of scope as a convention on the substantive law governing the international sale of goods" (A/CN.9/30, para. 11).

Expression of parties' expectation concerning international carriage

31. The Working Group considered these questions: Where carriage of goods from one State to another State is made a necessary element for the applicability of a uniform law, must such carriage be expected by the parties at the time of the making of the contract? If such carriage must be expected by the parties, must this expectation be expressed in the contract?

32. The Working Group considered a question of interpretation on this point presented by the French and English versions of article 1, paragraph (*a*) of the Uniform Law. Under the provision, one test for applicability is fulfilled.

In the English version:

"(*a*) Where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another;"

In the French version:

"(a) *Lorsque le contrat implique que la chose fait, lors de la conclusion du contrat, ou fera l'objet d'un transport du territoire d'un Etat dans le territoire d'un autre Etat;"*

33. The view was expressed that, under the French version, this test is satisfied if at the time of contracting it may be objectively believed that the parties expect that the goods are then in the course of international carriage or that such carriage will occur in response to the contract. It was further observed, however, that this expectation need not be expressed in the contract.

34. A broader reading was given to the English version. Under this language ("involves... goods which... will be carried..."), it was suggested that the Uniform Law may be applicable if there is no understanding (or expectation) that the goods will be the subject of international carriage if such carriage in fact occurs. Some representatives did not accept this interpretation and considered that the English version bore the same meaning as that set out in paragraph 33.

35. In discussing the above question it was observed that events occurring after the making of the contract would not affect the applicability of the Uniform Law; thus, unanticipated shipment of the goods from one State to another should not bring the contract within the law's coverage.

36. It was suggested that if the buyer takes personal delivery in the seller's State, the transaction seemed not necessarily to have an international character sufficient to justify coverage even though the seller expects the buyer to remove the goods to another State. It would be necessary that such expectation be reflected in the contract.

37. It was also noted that clarity was of greater importance than whether the law, should be slightly broader or slightly narrower in scope. However, the view was expressed that adoption might be more difficult if the law's scope were substantially broadened.

38. Other observations were made with respect to definition of scope set forth in article 1 of the Uniform Law. One was that simplification might be gained by having fewer criteria than those specified in paragraphs 1 (*a*), 1 (*b*) and 1 (*c*). On the other hand, it was suggested that the Uniform Law should include the sales of stocks of goods brought by the seller to the buyer's country before the sale. Two representatives submitted written proposals for the revision of article 1.

39. After preliminary discussion of these proposals, the Working Group decided to refer the question to a Working Party (Working Party II) consisting of the representatives of France, India, Norway, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America. The observers from UNIDROIT, the Hague Conference and the ICC were also invited to participate.

40. Working Party II submitted a written report which appears as annex V. This report, in paragraph 4, noted that the English text of article 1, paragraph 1 (*a*) of ULIS did not correspond with the French text, and suggested the following as a more accurate translation:

"(*a*) Where the contract contemplates that the goods are, at the time of the conclusion of the contract, or will be the subject of transport from the territory of one State to the territory of another."

41. The Working Group considered that, in general, the definition set forth in article 1 of ULIS was satisfactory.

42. However, certain representatives noted the reservations expressed in paragraphs 7, 8, 9 and 10 of Working Party II's report. An amendment proposed by the USSR appears in annex C to the report. In addition, the representative of Norway offered proposals to revise article 1 in the interest of simplicity and clarity. These proposals and accompanying explanations appear as annex B to the attached report of the Working Party. In addition, one observer espressed doubt about the clarity of the definition as applied to sales "ex works" and the like.

43. A majority of the Working Group approved the recommendation of Working Party II.

44. One representative noted his reservation to the effect that the rewording of article 1 (*a*) of ULIS should be considered to enable the inclusion of commodities (such as fish) sold on the high seas and carried by the buyer to his territory; under the present text such commodities might not be deemed "carried from the territory of one State to the territory of another".

C. *Relationships among Unification Projects Reconciliation or Consolidation*

1. *The Uniform Law on Sales and the Uniform Law on Formation*

45. The question of the relationship among various unification projects was analysed in part III, chapter C 1, of the Working Paper.

46. One specific issue examined by the Working Group was whether ULIS and ULF should be consolidated. (Working Paper, paras. 24-33.)

47. In the initial discussion of this question attention was called to certain duplications and discrepancies between these two laws; it was suggested that brevity and clarity could be gained by consolidation. On the other hand it was noted that States willing to adopt one of these laws might have objections to the other; consolidation therefore might impede ratification and accession. The Working Group was of the view that the discussion of specific provisions of the uniform laws might shed light on these questions, and decided not to take action on this question at the present session.

2. *The Uniform Law on Sales and the proposed convention on time-limits and limitations (prescription)*

48. The issues under this heading were discussed in part III, chapter C 2, of the Working Paper (paras. 34-49). A problem concerning the relationship between the Uniform Law and the proposed convention on prescription arose from these facts: (*a*) The Working Group on Prescription proposed, in response to the Commission's mandate, to prepare unified rules on prescription applicable to claims of both the buyer and seller; (*b*) The Uniform Law in article 49 sets a limit (one year) for one type of claim by buyers against sellers; it was suggested that this was a prescriptive limit governing actions in court.

49. The Working Paper suggested the following three alternative approaches to the relationship between ULIS and the proposed convention on prescription:

Alternative I. The convention on prescription should be conformed to the rules of article 49 of ULIS;

Alternative II. Omission of rules on prescription from the uniform rules on sales so that all problems of prescription could be dealt with in a single convention;

Alternative III. Merger of a uniform law on sales and general rules on prescription in international sales.

50. After preliminary examination of this problem it was decided to defer further discussion until later in the session. When the issue was taken up again it was suggested that the one-year period prescribed in article 49 of ULIS was not a prescriptive limit in the sense that action before a court was necessary to interrupt it. Thus, it was thought that the requirement of this article could be satisfied by action other than instituting a claim before a tribunal as by other energetic or unequivocal action showing that the buyer proposed to press a claim.

51. There was general agreement that under this interpretation of article 49 there might be no acute conflict with the project to prepare a convention on prescription in the field of international sale of goods. It was suggested, however, that, under this reading of article 49, there were problems of reconciliation between article 49 and article 39 of ULIS on notice of non-conformity. In addition, it might be necessary to revise the language of article 49 to make clear that it was not a prescriptive limit governing actions in court. A Working Party consisting of France, Ghana, Hungary, Japan and Norway (Working Party V) was established to deal with this problem.

52. Working Party V presented a written report that appears as annex VI. For reasons explained in the report, it was recommended that article 49 of the Uniform Law should be deleted; certain subsidiary recommendations are also set forth in the report.

53. The Working Group approved the recommendation set forth in the report.

3. *Possible consolidation with other projects for unification with respect to international sale of goods*

54. In response to a suggestion that other pending unification projects might be consolidated, the Working Paper in part III, chapter C 3 (paras. 50-54) discussed the status of other pending unification projects and analysed the problems that might be encountered in attempts at consolidation.

55. There was general agreement that the Working Group would not consider the consolidation of these pending projects. The observer from UNIDROIT stated that his organization would shortly present a draft to the Commission on the consolidation of various pending projects. The observer of the Hague Conference thought that it would be useful to harmonize the 1964 Hague Convention with that of 1955. This, however, would depend on the outcome of the discussion of the problem dealt with in part III, chapter A of the Working Paper.

D. *Recourse to General Principles: article 17 of the ULIS*

56. The Working Group considered the issues, introduced in part III, chapter D of the Working Paper, concerning article 17 of ULIS. Article 17 provides as follows:

"Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."

57. A number of representatives pointed to difficulties that, in their view, were presented by article 17. It was stated that matters not expressly settled by ULIS although governed by it cannot be settled "in conformity with the general principles on which the present Law is based" because it is difficult or impossible to identify such general principles particularly due to the fact that ULIS has no domestic legal background. There might also be a danger that lacking such a legal background the courts might in fact fall back on the *lex fori*. This reference to unidentified general principles therefore gives rise to ambiguity and uncertainty.

58. Some representatives expressed doubt about whether article 17 was concerned merely with the interpretation of provisions of the Uniform Law or whether article 17 authorized the filling of gaps on which ULIS set forth no rule. Some of these representatives suggested the deletion of article 17, others supported revision of the language to clarify its meaning, others suggested a provision that gaps or unsolved problems under the law would be decided pursuant to the rules of private international law or the law of the *forum*.

59. Some representatives expressed their approval of article 17. It was explained that the drafters of the ULIS wished it not to be narrowly and restrictively interpreted and were aware of the fact that in many legal systems rules on solving gaps and questions of interpretation are narrow and restrictive. They wished to free judges from having to look to national law for the solution of these problems, an avenue that would lead to disunity. The general principles in article 17 are the general ideas which inspired the Uniform Law. These principles can be gathered from the provisions of the Uniform Law, from the legislative history of the 1964 Hague Convention and from commentary on the Uniform Law.

60. One representative referred to the special problems which are faced in some common law systems as a result of traditions favouring literal interpretation, the use of national rules in filling gaps, and the resistance to the use of *travaux préparatoires* and other legislative history as aids to interpretation; he suggested that article 17 or a similar provision was needed. Another representative stressed that since article I of the Convention states that the Uniform Law shall be incorporated into national legislation, there is a danger that judges may not give full effect to its international origin. For this reason, article 17 was useful as a reminder that the provisions of the Uniform Law reflect common elements arrived at as a result of negotiation among numerous delegations.

61. Several alternatives to the present language of article 17 were suggested. One was that gaps in ULIS be filled by recourse either to the rules of private international law or to the *lex fori*. Another suggestion was to restate article 17 in such a way as to direct the Court's attention to the international nature of ULIS and its goal of unification, and the need to promote a system of international case-law.

62. The Working Group requested representatives who were concerned about the present language of article 17 to prepare a proposed revision that would meet these difficulties.

63. One delegate proposed that article 17 be revised to read as follows:

In the English text:

"The present law shall be interpreted and applied so as to further its underlying principles and purposes, including the promotion of uniformity in the law of international sales."

In the French text:

"La présente loi sera interprétée et appliquée conformément aux principes généraux dont elle s'inspire et à ses objectifs, en particulier la promotion de l'uniformité du droit en matière de vente internationale."

64. In support of this proposal, the delegate recalled the earlier discussion of the dangers of construing international uniform legislation in terms of local rules and understandings. This proposal did not authorize extension of the scope of the Uniform Law; it was concerned with the approach to solving problems falling within the law. This language could be useful to encourage an international and unifying (rather than local) approach to the law, and could encourage courts to consult legislative history of the Uniform Law and constructions of the law in other States. Some other delegations supported this proposal.

65. On the other hand, it was suggested that this proposal, like ULIS article 17, referred to principles and purposes that were not stated, and therefore was unclear.

66. A second proposal called for the revision of article 17 to read:

In the English text:

"Private international law shall apply to questions not settled by ULIS."

In the French text:

"Le droit international privé sera applicable aux questions non réglées par la présente loi."

67. It was noted that this proposal had the advantage of using the same approach for interpreting the law as for filling gaps; this was advisable since it is difficult or impossible to distinguish the one from the other. Two other delegations supported this proposal.

68. In opposition to the proposal it was suggested that this language dealt with areas excluded from ULIS. The provision might be helpful in connexion with article 8 of the Uniform Law, which excluded subjects from the Law, but was not a substitute for article 17 as a rule of interpreting the Uniform Law. On the other hand, it was mentioned that the text intends to cover both questions not governed and governed but not settled by ULIS. If this would create difficulties, the text put forward in paragraph 66 above could be amended as follows: ". . . shall apply to questions governed but not settled by ULIS".

69. In opposition to the proposal mentioned in paragraph 66 above, it was stated that this text would be

useless and dangerous. It is useless in so far as it refers to subjects which are excluded from the scope of ULIS by article 8. However, in so far as it provides a rule to be applied whenever a jurist could observe that the text does not specifically resolve a given problem or that it raises difficulties of interpretation it would be an invitation to disregard this law for those who would wish to avoid its application.

70. Two representatives suggested that the two proposals set out in paragraphs 63 and 66 above dealt with different problems and were not inconsistent. It was therefore suggested that, at the end of the first proposal (paragraph 63) it might be possible to add language such as, "otherwise, the rules of private international law shall apply".

71. One representative considered that a proposal which was made during the discussion of this question to delete article 17 altogether should also be mentioned in the report.

72. No one of the various proposals was supported by a majority of the Working Group. The Working Group therefore decided to refer the matter to the Commission.

E. *The binding effect of general usages*

73. Issues raised by States and organizations with respect to provisions of ULIS concerning usages were analysed in part III, chapter E, of the Working Paper (paras. 59-63).

74. Paragraph 1 of article 9 of ULIS provides in part:

> "1. The parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract. . ."

75. Discussion was primarily concerned with paragraph 2 of the article, which provides:

> "2. They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present law, the usages shall prevail unless otherwise agreed by the parties."

76. Several representatives objected to paragraph 2 of article 9 on the ground that this provision gave excessive effect to usages. It was noted that under this language usages became binding without any reference to them in the contract. Under some circumstances a party might be bound by a usage without knowing of its existence, since the language gives effect to usages which "reasonable persons in the same situation as the parties usually consider as applicable". It was suggested that the possibility of being bound by unknown usages led to uncertainty with respect to the obligations of the parties.

77. It was also observed that the language of article 9, paragraph 2, was unclear and could lead to divergent interpretations. For these reasons several representatives were of the opinion that paragraph 2 should be deleted. Certain of these representatives suggested that paragraph 1, in giving effect to usages which the parties had "impliedly made applicable to their contract" might be so broadly construed as to be subject to criticisms directed at paragraph 2.

78. One representative expressed the view that paragraph 3 of article 9, on the interpretation of expressions commonly used in commercial practice, was subject to similar criticism as paragraph 2 of that article and should be modified.

79. Several representatives supported the objective of paragraph 2 of article 9. It was noted that much commerce was conducted quickly and informally through the exchange of telegrams or other brief communications; it was not convenient or customary to make specific references to usages which the parties regarded as applicable.

80. Attention was drawn to the references to usage in articles 25, 42-1(*c*), 50, 60 and 61-2. Even in parts of the Uniform Law where usage was not mentioned, recourse to usage was necessary to make the law workable; an example was article 19-2, since the provision failed to take account of the usage that, in carriage by sea, risk did not pass on delivery of the goods to the "carrier" but only when the goods were loaded on the vessel.

81. Some representatives who objected to the role of usage called attention to the following provision in article 9-2: "In the event of conflict with the present law, the usages shall prevail unless otherwise agreed by the parties." In reply, it was noted that under article 3, the Uniform Law generally yielded to the parties' agreement, and therefore the usages made binding by the Uniform Law could be regarded as an aspect of the agreement of the parties.

82. Attention was also drawn to article 8 which provides that the Uniform Law "shall not. . . be concerned. . . with the validity of the contract or of any of its provisions or of any usage". It was observed that mandatory rules of a State that would invalidate an unreasonable or oppressive provision of an agreement would also be operative to invalidate an unreasonable or oppressive provision of a usage. Attention was also drawn to the term "reasonable" in article 9-2.

83. Several representatives supported the suggestion that attempts should be made to redraft paragraph 2 of article 9 to remove the objections that had been directed to the present language. Written proposals were made by three representatives; the sponsors of these proposals were requested to consult with a view to securing agreement on a single text.

84. The Working Group later resumed consideration of this question. Two specific proposals were offered.

85. One proposal would retain the present language of paragraphs 1 and 3 of article 9, and substitute for paragraph 2 the following,

In the English text:

> "2. Among the usages which the parties shall be considered to have impliedly made applicable to their contract shall be any usage which has such regularity of observance and the existence of which is so widely known as to justify an expectation that it will be observed with respect to an international sale such as

the one in question as, for example, in sales on internationally recognized commodity markets and exchanges, and at trade fairs and auctions of an international character."

In the French text:

"2. *Sont notamment considérés comme des usages auxquels les parties sont réputées s'être tacitement référées ceux qui sont si régulièrement observés et si largement connus qu'on doit s'attendre a ce qu'ils soient observés dans une vente internationale telle que la vente en question, s'agissant par exemple de ventes effectuées sur des marchés internationalement reconnus et dans les foires ou ventes aux enchères de caractère international.*"

86. A second proposal, also retaining paragraphs 1 and 3 of article 9, would revise paragraph 2 to read as follows,

In the English text:

"2. The parties shall also be bound by any usage which has such regularity of observance and the existence of which is so widely known as to justify an expectation that it is observed by the parties to the contract involved [in particular, in sales on internationally recognized commodity markets and exchanges, and at trade fairs and auctions of an international character]."

In the French text:

"2. *Les parties sont également liées par les usages qui sont si régulièrement observés et si largement connus qu'on doit s'attendre à ce qu'ils soient observés par elles [en particulier dans les ventes effectuées sur des marchés internationalement reconnus, et dans les foires ou ventes aux enchères de caractère international].*"

87. A sponsor of this second proposal noted that it was narrower in invoking usage than the first proposal quoted above. A majority of the representatives supported the second proposal; some noted that the language was an acceptable compromise among divergent positions.

88. Some representatives expressed doubt about the illustrations contained in the second proposal. It was suggested that the illustrations were not typical of important types of commercial practices, and hence did not clarify the text. Some doubt was expressed about when an auction was "of an international character". To indicate these doubts so that the matter could be considered further, the illustrations were put in brackets.

89. One representative noted its view that effect should only be given to usages to which the parties had specifically referred. The proposal referred to in paragraph 2 above goes beyond this acceptable scope.

90. One representative commented on the proposal set out in paragraph 86 above. In his opinion article 9-1 of ULIS mentions "impliedly" and article 9-2 does not, a difference which might lead to the improper conclusion that only usages that fall within article 9-1, and not those that fall within article 9-2, may effect the "implied" exclusion of ULIS contemplated by article 3. This conclusion would be unfortunate and would be counter to the second sentence of the present article 9-2. To carry out the sense of the proposal, the language "expectation that it is observed" should read "expectation that it will be observed" or "expectation that it would be observed".

F. *Continuing need for uniform rules on choice of law: the 1955 Hague Convention*

91. The Working Group gave preliminary attention to the problems under this heading presented in part III, chapter F, of the Working Paper (paras. 64-67). The Working Group noted that a decision on this matter depended on the prior resolution of issues presented by article 2 of the Uniform Law (see part II, chapter A, *supra*). At the time of this discussion, the problems presented by article 2 of ULIS had not yet been resolved. For this reason, it was not feasible to reach a decision at this session on the present topic. Some delegations however stressed the interest the 1955 Hague Convention could have apart from matters covered by ULIS.

G. *Use of abstract or complex legal terms in drafting:* ipso facto *avoidance and notice to the other party to a sales transaction*

92. The problem discussed under this heading was analysed in the Working Paper in part III, chapter G (1) (*a*) (paras. 68-73).

93. One representative drew attention to the problem presented by the example stated in the Working Paper at paragraph 71. In this example, a seller delays making a demand for payment for goods which he has delivered to the buyer. It was observed that *ipso facto* avoidance of the contract in such situations cast doubt on the seller's right to recover the price for goods which the buyer had received; under the present text of the Uniform Law a solution seemed difficult. Other representatives expressed support for this view.

94. The concept of *ipso facto* avoidance without a corresponding declaration was questioned by some representatives. It was put forward that the legal hypothesis in articles 25, 26, 30 and 62 leaves considerable uncertainties and, therefore, a declaration as to avoidance on the part of the buyer in articles 25, 26 and 30 and on the part of the seller in article 62 should be required.

95. Several representatives expressed the view that the expression "*ipso facto* avoidance" was abstract and confusing; the difficulty of translating this expression into other languages was also noted. It was suggested that the language "shall be *ipso facto* avoided" might be more clearly expressed in English as "shall be considered as cancelled".

96. Other representatives defended the concept of *ipso facto* avoidance within the context of a fundamental breach of contract, since the concept of *ipso facto* avoidance was, in certain sales, consistent with commercial practice. The Uniform Law had incorporated the measures necessary to ensure that *ipso facto* avoidance was only applied with the desired flexibility (e.g., articles 26 and 3). Moreover, to require notice in every case would deprive one party of his rights if he had not complied with a formality that would be completely

unnecessary in certain circumstances. Finally, the party who had to give notice would be obliged to retain proof of it; thus, a simple clarification of the situation by telephone would be rendered impossible.

97. The Group referred the problem to a Working Party (Working Party III) consisting of the representatives of France, Hungary, Japan, Norway and the United States of America. The observers of international organizations concerned were also invited to participate.

98. Working Party III later reported its recommendation that article 62 of the Uniform Law be amended to read as follows,

In the English text:

"1. (Unchanged)

"2. If the buyer requests the seller to make known his decision under paragraph 1 of this article and the seller does not comply promptly, the contract [shall be *ipso facto* avoided] [be considered as cancelled].

"3. If, however, the buyer has paid the price before the seller has made known his decision under paragraph 1 of this article and the seller thereafter does not exercise promptly his right to declare [the contract avoided] [the cancellation of the contract] the contract cannot be [avoided] [considered as cancelled].

"4. Where the seller has required the buyer to pay the price and does not obtain the payment within a reasonable time, the seller may declare the contract [avoided] [cancelled].

"5. (Identical with the present paragraph 2.)"

In the French text:

"1. *(Sans changement)*

"2. *Si l'acheteur demande au vendeur de lui faire connaître sa décision et que le vendeur ne lui répond pas dans un bref délai, le contrat est résolu de plein droit.*

"3. *Si cependant l'acheteur a payé le prix avant que le vendeur ait fait connaître sa décision et que le vendeur ne déclare pas la résolution du contrat dans un bref délai, toute résolution du contrat est écartée.*

"4. *Lorsque le vendeur a choisi l'exécution du contrat et qu'il ne l'obtient pas dans un délai raisonnable, il peut déclarer la résolution du contrat.*

"5. *(Semblable au paragraphe 2 actuel).*"

99. The Chairman of the Working Party reported that the above revision was designed to make article 62 (on avoidance by the seller) correspond with the provisions of article 26 (on avoidance by the buyer).

100. One representative submitted a proposal to modify paragraph 3 of the above revision to read as follows,

In the English text:

"3. If, however, the buyer has paid the price *or the goods have been handed over to him* before the seller has made known his decision under paragraph 1 of this article and the seller thereafter does not exercise promptly his right to declare [the contract avoided] [the cancellation of the contract] the contract cannot be [avoided] [considered as cancelled]."

In the French text:

"3. *Si cependant l'acheteur a payé le prix* ou si la chose lui à été remise *avant que le vendeur ait fait connaître sa décision et que le vendeur ne déclare par la résolution du contrat dans un bref délai, toute résolution du contrat est écartée.*"

101. The sponsor of this modification noted that this proposal would insert in paragraph 3 the phrase "or the goods have been handed over to him". In support of this modification it was noted that where the goods have been handed over to the buyer the effect of "*ipso facto* avoidance" would be unjustly to jeopardize the seller's right to recover the price for the goods. Other representatives supported this position.

102. The Chairman of Working Party III stated that the Working Party had not considered this proposal. Hence he suggested that this proposal be reported to the Commission without a recommendation; the problem is complex since under the Uniform Law the goods may be deemed to be "delivered" or "handed over" to the buyer while they are in the course of carriage. One representative stated his opposition to the proposal particularly because its notion of delivery of the goods might be vague in this context.

103. The Working Group approved the recommendation of Working Party III, but noted that the underlying problem seemed to present difficulties that deserved further attention. The Working Group therefore recommended that the Commission request the Secretariat to prepare an analysis of the problem for later consideration at a subsequent session of the Working Group on Sales. The Working Group also noted that further consideration should be given to the suggested substitute for the phrase "*ipso facto* avoided".

104. In the course of the discussion, some representatives called attention to the fact that avoidance of the contract required the application of the concept of "fundamental breach of contract". These representatives noted that the definition of this concept in article 10 of ULIS presented difficulties that needed further consideration.

H. *Time and place for inspection; time for notification of defects in delivered goods*

105. The present problem was analysed in the Working Paper in part III, chapter G 1 (*b*) (paras. 74-75).

106. Several representatives stated that article 38 of the Uniform Law required buyers to inspect goods under circumstances that would often be inconvenient or impractical. The difficulty centred on paragraph 3 of the article, which seemed designed to modify the general rule of paragraph 1 in a manner that was unworkable when the buyer reshipped goods to a customer, and was particularly difficult to apply to a series of resales ("chain contracts"). The problem was also serious in containerized shipments when it would be impractical to break into the general container.

107. It was noted that a failure to inspect and discover defects within the time prescribed in article 38 of the Uniform Law led to serious consequences since under article 39, if the buyer fails to notify the seller promptly after he ought to have discovered a lack of conformity in the goods, the buyer "shall lose the right to rely" on this lack of conformity. One representative observed that delay in notifying the seller of defects when goods are reshipped might properly bar the buyer from rejecting the goods, but the same strict rule should not govern a buyer's claim for damages or for reduction of the price with respect to goods that prove to be defective.

108. The Working Group decided to constitute a Working Party to consider the problem. This Working Party (Working Party IV) included the representatives of France, Japan, Kenya, Norway and the United States of America. The observers of international organizations concerned were also invited to participate.

109. Working Party IV later reported to the Working Group its recommendation that article 38 of the Uniform Law should be revised as follows,

In the English text:

"1. (no change)

"2. In the case of carriage of the goods, examination may be deferred until the goods arrive at the place of destination.

"3. If the goods are redispatched by the buyer without a reasonable opportunity for examination by him and the seller knew or ought to have known, at the time when the contract was concluded, of the possibility of such redispatch, examination of the goods may be deferred until they arrive at the new destination.

"4. (no change)."

In the French text:

"1. *(sans changement)*

"2. *En cas de transport de la chose, l'examen peut être retardé jusqu'à son arrivée au lieu de destination.*

"3. *Si la chose est réexpédiée par l'acheteur sans qu'il ait eu raisonnablement la possibilité de l'examiner et que le vendeur ait, lors de la conclusion du contrat, connu ou dû connaître la possibilité d'une telle réexpédition, l'examen peut être retardé jusqu'à l'arrivée de la chose à sa nouvelle destination.*

"4. *(sans changement).*"

110. In discussing this recommendation it was noted that in paragraph 2 the phrase "may be deferred" was employed to make clear that in the carriage of the goods there may be need to defer inspection; the present language of the Uniform Law ("shall examine") might not be understood in this sense. It was also reported that the revision of paragraph 3 was made primarily because the provisions of the Uniform Law with reference to "trans-shipment" proved difficult to construe and, under some readings, might require inspection when this was neither contemplated nor feasible. The more flexible language of the proposal was also designed to meet new conditions presented by the development of containerized shipment, during which it would often be difficult or impossible to effect an inspection.

111. The Working Group approved this recommendation.

I. *The concept of "delivery"* (délivrance) *and the definition of the seller's obligations*

112. The problem under this heading was introduced in the Working Paper in part III, chapter G 1 (*c*) (paras. 76-77).

113. Various representatives noted difficulty with the application of the term which, in the English version, is "delivery" and the French version is *"délivrance"*. One representative reported that business circles in his country had expressed doubt about the meaning of the definition in article 19 of the Uniform Law, and expressed concern as to its application to various important international contracts, such as contracts F.O.B. Buyer's City, F.O.B. third party's City, C.I.F. and the like. Another noted that, as used in the Uniform Law, the term was difficult to translate and in the setting of specific rules seemed to produce circular expressions or tautologies. The history of this expression in earlier drafts was also mentioned.

114. One representative noted that lawyers and merchants in his country had become accustomed to a more direct and concrete approach to legislative drafting; the abstract and artificial character of this aspect of the Uniform Law would be a barrier to adoption.

115. In reply, it was noted that the difficulties noted resulted from the fact that "*délivrance*" was a term of art. This, however, was an advantage in an international text since such a term emphasized that local and divergent understandings should not be employed. Caution was also advised with respect to changing this term since it was employed in many parts of the Uniform Law and referred to a fundamental concept of this law.

116. To assist in further examination of this problem, the Working Group decided to request the Secretariat to prepare an analysis of the use of the concept of delivery *(délivrance)* in the Uniform Law. The Working Group noted that the time for the preparation and presentation of this analysis would need to take account of the current work programme of the Secretariat; if the study cannot be prepared in time for consideration at the third session of the Commission it could be made available for consideration at a subsequent session of the Working Group.

117. The Secretary-General of UNIDROIT offered to assist with the analysis by preparing a study of the historical background of the use of this term in the drafts which led to the version adopted at the Hague Conference of 1964. One representative noted that he had prepared a brief analysis of the use of this concept in the Uniform Law and agreed to make this analysis available to the members of the Working Group and to the Secretariat.

J. *Consumer protection and mandatory or regulatory rules of national law*

118. A representative raised the problem of the extent to which the Uniform Law would override na-

tional regulation for the benefit of consumers, in those situations in which sales to consumers might be subject to the Law. Attention was drawn to article 7 of the Uniform Law which provides that the law shall apply "regardless of the commercial or civil character of the parties or of the contract".

119. It was noted that articles 4 and 8 indicated that the Uniform Law did not mean to override such protective legislation. Such legislation is primarily designed to invalidate oppressive and unfair contracts and contract clauses; hence these laws would seem to relate to "validity" of the contract and thus were protected by article 8. It was noted that such was the understanding expressed at the Hague Conference of 1964. On the other hand, article 5, paragraph 2, of ULIS specifically protects only one type of mandatory law - "a national law for the protection of a party to a contract which contemplates the purchase of goods by that party by payment of the price by instalments". This provision might lead to the conclusion that article 5, paragraph 2, implies that other mandatory rules will be overriden by the Uniform Law. The meaning of the Uniform Law on this point was thus left in doubt.

120. One representative suggested that the above difficulty might be met either by repealing article 5-2, or by broadening its scope to preserve all national mandatory rules for the protection of consumers. He offered the following formulation which could be substituted for article 5-2: "2. The present law shall not affect the application of any mandatory provision of national law for the protection of a party to a contract which contemplates the purchase of consumer goods primarily for personal, family or household purposes."

121. Another representative noted that the underlying problem was exceedingly difficult. Different legal systems follow differing approaches in deciding what rules are mandatory or imperative, and these concepts have no generally understood meaning. A general exception for local mandatory rules would undermine the uniformity of the law. On the other hand, it was recalled that at the Hague Conference many felt that the present solution was not wholly satisfactory.

122. It was suggested that members of the Working Group provide examples of national rules that were regarded as mandatory to aid in further work on the problem. The Working Group decided to recommend to the Commission that further attention be given to this problem in the light of this and other material that might be available.

123. One representative noted that in the replies and comments and in earlier discussion, the Union of Soviet Socialist Republics had noted its objection to article 15 of the Uniform Law on the ground that this provision would override its national mandatory rules that specified contracts must be expressed in writing. It was noted further that article 15 seemed to present a barrier to adoption of the Uniform Law by certain States.

124. The Working Group considered that the merits of article 15 presented a serious problem that merited careful consideration at the third session of the Commission.

III. Recommendations as to further work

125. Due to the limited time available to it, the Working Group was not able to complete the work assigned to it by the Commission at its second session, as referred to in paragraph 1 above. Accordingly the Working Group submits this progress report to the Commission and recommends that the Commission should consider at its third session what further steps it wishes to take in order to further unification of the law in this field.

ANNEX I

List of participants

BRAZIL

Representative

Mr. Nehemias DA SILVA GUEIROS, Professor of Law, Ambassador.

Expert

Mr. Evaldo L. CABRAL DE MELLO, Second Secretary, Brazilian Mission to the United Nations.

FRANCE

Representative

Mr. André TUNC, Professor of Law, Faculté de Droit et des Sciences économiques de Paris.

GHANA

Representative

Mr. K. K. DEI-ANANG, Lecturer in Commercial Law, University of Ghana.

Alternate

Mr. E. SAM, Legal Counsellor, Permanent Mission of Ghana to the United Nations.

HUNGARY

Representative

Mr. Gyula EÖRSI, Professor of Law, "Eötvös Loránd" University, Budapest.

Alternate

Mr. Ivan SZASZ, Head of the Legal Department, Ministry for Foreign Trade.

INDIA

Representative

Mr. D. A. KAMAT, Assistant Legal Adviser , Ministry of External Affairs.

IRAN

Representative

Mr. Mansour SAGHRI, Professor of Commercial Law, University of Teheran.

JAPAN

Representative

Mr. Shinichiro MICHIDA, Professor of Law, University of Kyoto.

KENYA

Representative

Mr. Raphael Joseph OMBERE, Second Secretary, Permanent Mission of the Republic of Kenya to the United Nations.

MEXICO

Representative

Mr. Jorge BARRERA-GRAF, Professor of Law, University of Mexico.

NORWAY

Representative

Mr. Stein ROGNLIEN, Head of Department of Legislation, Ministry of Justice.

Experts

Mr. Jan HELLNER, Professor of Law, University of Stockholm;

Mr. A. VINDING KRUSE, Professor of Law, University of Copenhagen;

Mr. Heikki JOKELA, Professor of Law, University of Helsinki.

UNION OF SOVIET SOCIALIST REPUBLICS

Representative

Mrs. A. P. STRELIANOVA, Expert on Juridical Matters, Ministry of Foreign Trade.

UNITED KINGDOM

Representative

Mr. Anthony G. GUEST, Professor of English Law, University of London.

Alternate

Mr. Henri G. DARWIN, Legal Counsellor, United Kingdom Mission to the United Nations.

UNITED STATES

Representative

Mr. E. Allan FARNSWORTH, Professor of Law, Columbia University, School of Law.

Observers

A. GOVERNMENTS

Congo (Democratic Republic)

Mr. Nicolas BOFUNGA, Minister Counsellor, Permanent Mission of the Democratic Republic of the Congo to the United Nations.

Czechoslovakia

Mr. Jiri MLADEK, First Secretary, Permanent Mission of the Czechoslovak Socialist Republic to the United Nations.

Italy

Mr. Joseph NITTI, First Secretary, Permanent Mission of Italy to the United Nations.

Romania

Mr. Nita CONSTANTIN, Third Secretary, Permanent Mission of the Socialist Republic of Romania to the United Nations.

Spain

Mr. Ricardo CORTES, First Secretary, Permanent Mission of Spain to the United Nations;

Mr. Fernando ARIAS-SALGADO, Second Secretary, Permanent Mission of Spain to the United Nations.

B. INTERGOVERNMENTAL ORGANIZATIONS

Council of European Economic Community

Mr. Jean-Pierre PUISSOCHET, Director of the Legal Department, Legal Adviser of the Council.

Hague Conference on Private International Law

Mr. Matthijs VAN HOOGSTRATEN, Secretary-General.

International Institute for the Unification of Private Law

Mr. Mario MATTEUCCI, Secretary-General.

C. INTERNATIONAL NON-GOVERNMENTAL ORGANIZATIONS

International Chamber of Commerce

Mr. Lars A. E. HJERNER, Professor of International Law, Rapporteur to the ICC Commission on Law and Commercial Practices.

Secretariat of the Working Group

Mr. Blaine SLOAN, Representative of the Secretary-General, Director of the General Legal Division, Office of Legal Affairs;

Mr. John HONNOLD, Secretary of the Working Group, Chief, International Trade Law Branch;

Mr. Peter KATONA, Assistant Secretary of the Working Group, Senior Legal Officer;

Mr. Gabriel WILNER, Assistant Secretary of the Working Group, Legal Officer.

ANNEX II

Working Paper prepared by the Secretariat

CONTENTS

CONTENTS *(continued)*

I. THE WORKING GROUP ON SALES: ESTABLISHMENT; MATERIALS

1. The United Nations Commission on International Trade Law (UNCITRAL) at its second session decided to establish a Working Group of fourteen members to consider proposed measures to unify the law with respect to international sales of goods. Thus, the Commission's Report[1] recorded the decision:

"3. To establish a Working Group — composed of the following fourteen members of the Commission: Brazil, France, Ghana, Hungary, India, Iran, Japan, Kenya, Mexico, Norway, Tunisia, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America — which shall:

"(*a*) Consider the comments and suggestions by States as analysed in the documents to be prepared by the Secretary-

[1] Report of the United Nations Commission on International Trade Law on the work of the second session (1969), *Official Records of the General Assembly, Twenty-fourth Session, Supplement No. 18* (A/7618), para. 38.

General[2] ... in order to ascertain which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social and economic systems, or whether it will be necessary to elaborate a new text for the same purpose, or what other might be taken to further the harmonization or unification of the law of the international sale of goods;

"(*b*) Consider ways and means by which a more widely acceptable text might best be prepared and promoted, taking also into consideration the possibility of ascertaining whether States would be prepared to participate in a Conference;

"(*c*) Submit a progress report to the third session of the Commission;".

2. The meeting of the Working Group on Sales has been set for 5 to 16 January 1970 at the United Nations Headquarters in New York. In accordance with other portions of the Commission's resolution, invitations to attend this meeting of the Working Group have been addressed to members of the Commission not represented on the Working Group, to UNIDROIT, the Hague Conference on Private International Law and to other international organizations concerned.[3]

3. In accordance with a request by the Commission,[4] the Secretary-General has completed two studies. One was a completion of an initial analysis that had been presented to the second session of the Commission;[5] this analysis dealt with replies and studies of the Hague Conventions of 1964 received prior to the second session of the Commission. Thereafter, additional States submitted studies on this subject. In addition, during the second session of UNCITRAL there was substantial discussion of these Conventions; this discussion was summarized in annex I to the Report on the second session. In response to the request by the Commission this initial study has been superseded by an expanded Report on the Hague Conventions of 1964 by the Secretary-General: Analysis of the Studies and Comments by Governments (A/CN.9/31). A second study, made by the Secretary-General at the Commission's request, is the Analysis of the Studies and Comments on the Hague Convention of 1955 (A/CN.9/33).[6]

4. The Working Group on Time-limits and Limitations (Prescription) met in Geneva on 18 to 22 August 1969. At this meeting the Working Group requested the Working Group on Sales to give priority attention to one problem of common interest: the definition of international sale of goods for the purpose of defining the scope of uniform laws in this area (A/CN.9/30, para. 11 (ii)). This matter will be discussed further *infra* at paragraphs 34 to 49.

5. This Working Paper is designed to assist the Working Group on Sales in deciding on its programme. The documentation relevant to the Group's work is voluminous. Replies and studies on the Hague Conventions of 1964 and the appended uniform laws (herein termed the Uniform Law on Sales and the Uniform Law on Formation) have been transmitted by forty States.[7] As has been noted, further comments on the 1964 Hague Conventions were made during the second session of the Commission and are summarized in annex I to the Commission's Report. These comments range widely over numerous provisions of the two 1964 Hague Conventions, the Uniform Law on Sales and the Uniform Law on Formation. In addition, several States transmitted comments or studies on the 1955 Hague Convention on the Law Applicable to the International Sale of Goods (A/CN.9/12 and Add.1 to 4); further observations made in the course of the second session of the Commission are summarized in annex II of the Commission's Report. As will be seen from the Secretary-General's analysis of these studies and comments (A/CN.9/31; A/CN.9/33) the Hague Conventions of 1955 and 1964 present related problems that expand the field of consideration by this Working Group.

6. In the interest of brevity, these various documents will be cited as follows: The Replies and Studies concerning the Hague Conventions of 1964 (*A/CN.9/11*) will be cited as *Replies: 1964*. This document (*A/CN.9/11*) is supplemented by six addenda; these will be cited *Replies: 1964, Add.1, Add.2*, etc. The Report of UNCITRAL on the work of its second session will be cited as *UNCITRAL Report*. The Secretary-General's analysis of these replies and studies concerning the 1964 Hague Conventions (A/CN.9/31) will be cited as *Analysis 1964*. Similarly, the replies with respect to the Hague Convention of 1955 (A/CN.9/12) will be cited as *Replies: 1955;* the addenda to that document will be cited as *Replies: 1955, Add.1, Add.2*, etc. The Secretary-General's analysis of these replies (A/CN.9/33) will be cited as *Analysis: 1955*.

II. The Commission's mandate to the Working Group; considerations bearing on choice among working methods

7. The Commission's decision, quoted in paragraph 1, *supra*, expressed agreement on the goal of "harmonization or unification of the law of international sale of goods" but reflected doubts concerning the most effective route to reach this goal. These doubts primarily concerned the part that should be played by the Hague Conventions of 1955 and 1964.

8. The initial task assigned to the Working Group by the Commission's decision (para. 3 (*a*) quoted in para. 1, *supra*) was to "consider the comments and suggestions" that States have submitted with respect to these conventions. Presumably, the Working Group is expected to do more than catalogue these comments and suggestions, or express general opinions about the suitability of these conventions to promote the harmonization or unification of the law of international sales; this had already been done in the Replies and Analyses and in the debates at the second session of UNCITRAL.

9. It seems probable that one important contribution which the Commission expects from the Working Group is to subject the most important and basic issues raised by these replies and studies to intensive examination. By such an examination it may be possible for the Working Group to develop a clearer view concerning the substantiality of the objections and suggestions that have been expressed with respect to these conventions. It may be hoped that through such an intensive examination the Working Group may be able to help the Commission reach a wider consensus either supporting the provisions of the existing texts, or to ascertain (in the language of para. 3 (*a*) of the Commission's decision) "which modifications of the existing texts might render them capable of wider acceptance by countries of different legal, social or economic systems, or whether it will be necessary to elaborate a new text for the same purpose, or what other steps might be taken to further

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[2] The documents to be prepared by the Secretary-General were described in paragraphs 1 and 2 of the Commission's decision. These documents are described more fully in this Working Paper at paragraph 3, *infra*.

[3] The organizations invited to attend the meeting of the Working Group are listed in annex I to this Paper.

[4] UNCITRAL, Report on Second Session (1969), *supra* note 1, para. 38, at paras. 1 and 2 of the Commission's decision.

[5] A/CN.9/17.

[6] As will be noted *infra*, for the sake of brevity these two studies will be cited, respectively, as *Analysis: 1964* and *Analysis: 1955*.

[7] A/CN.9/11 and Add.1 to 6; A/CN.9/L.9. Some of the communications were brief reports on intent with respect to ratification of or accession to the Convention. On the other hand, some studies are voluminous; some States submitted two studies.

the harmonization or unification of the laws of the international sale of goods".

10. Although, as we have seen, the Commission requested the Working Group to "consider the comments and suggestions" that have been submitted, the number of issues that have been raised in these comments and suggestions makes it impossible for the Working Group to give intensive examination to all of these issues within the alloted time. Some principle of selection is needed.

11. The Working Group may, therefore, wish to consider first those issues that are basic, in the sense that a decision on these issues would affect the method of approach to other issues. Part III of this Working Paper presents first those issues which seem to meet this test, and which also have been the subject of attention in a significant number of the replies and studies.

12. There are other issues which may well be deemed to be more suitable for this purpose; the Working Group probably will wish to consider, at the outset, whether there are other problems which should be added to or substituted for those listed in Part III.

13. The intensity of the treatment in this Working Paper is influenced by the degree to which the issues have been developed in the replies and studies and in the discussions before the Commission. Thus, the first of these issues (Part III A, *infra,* on choice of law) has been fully developed; consequently, the treatment of this issue in this Working Paper is relatively brief. In contrast, the third issue (Part III C, *infra,* on co-ordination among unification projects) seemed to require a fuller presentation. This is primarily the result of problems of relationship between the scope of (1) proposed uniform rules on the substantive laws of sales and (2) the proposed convention on time-limits and limitations (prescription) considered by the Working Group in August 1969 (A/CN.9/30), discussed *supra* at para. 4 and *infra* at paras. 34-49). These problems emerged only as the Working Group on Prescription developed the subject; therefore, these problems were not fully presented in the earlier papers presented to the Commission. Nevertheless, the relationship between conventions in this field present issues that will affect the further work on both subjects, and therefore may require careful attention at this stage.

14. Even where it is necessary to give careful attention to specific statutory provisions, it should not be necessary for the Working Group at this stage to attempt to solve problems of detail. In each case, the specific legal provisions probably should be examined only to the extent necessary to enable the Working Group to make an informed recommendation concerning the acceptability of the provision and, in some instances, concerning the choice of methods for future work on the problem. Where such specific problems or objections are analysed, the Working Group may wish to concentrate on this fundamental question: Is the problem presented by the present text of sufficient substance to interfere with wildespread acceptance — the ultimate objective stated in the Commission's resolution. The Working Group may indeed consider it proper to suspend judgement on this fundamental question until the Group has considered all or most of the substantial problems that have been raised in the replies and studies.

15. It will be noted that this Working Paper, under most of the major problems, gives separate attention to (1) the issues and (2) methods of work. Under the second of these headings the Working Group is invited to consider whether the problem in question is ready for discussion by the entire Working Group, or whether the problem poses difficulties that could more effectively be approached with the help of a report and recommendation by a small working party. The different issues may call for varying working methods; the Group will probably wish to choose an approach that it deems suitable to the problem at hand.

III. Issues raised by the studies and comments

A. *Principles on Choice of Law in Uniform Legislation on Sales; The Relationship between the Hague Convention of 1955 and the Hague Conventions of 1964*

1. *The issues*

16. The issue that received the most widespread attention in the Studies and Comments is the following: What (if any) rules should a uniform law for international sales contain with respect to the law's application to transactions involving one or more States that had not adopted the uniform law? The discussion of this issue centred on articles 1 and 2 of the Uniform Law on Sales and the Reservations permitted in articles III, IV and V of the 1964 Conventions.[8] See *Analysis: 1964,* paras. 25-27 (art. III of the 1964 Convention); paras. 28-40 (art. IV of the 1964 Conventions, art. 2 of the Uniform Law on Sales, and art. 1 of the Uniform Law on Formation); paras. 41-54 (art. V of the 1964 Convention on Sales); *Analysis: 1955,* paras. 8-14.

17. The principal alternative approaches seem to be these:

Alternative I. The approach of the Uniform Law on Sales, article 2, directing the *fora* of contracting States to apply the Uniform Law to international sales without regard to the relationship between the transaction and a contracting State. *Analysis: 1964,* paras. 25-27, 32-40; *UNCITRAL Report,* annex I, paras. 36-40; *Replies: 1964,* p. 22 (Norway); *Add.1,* pp. 4-5, paras. 4-5 (Cz.); *Add.3,* pp. 4-8, paras. 1-4 (Hungary).

(*a*) Analysis of this approach presumably should include the effect of the opportunity for contracting States to make one or more of the reservations provided in articles III, IV and V of the Convention on Sales (cf. articles III and IV of the Convention on Formation). *Analysis: 1964,* paras. 25-27 (art. III); paras. 28-40 (art. IV); paras. 41-54 (art. V); *Replies: 1964,* p. 5 (Austria); p. 22 (Norway); *Add.1,* pp. 26-27 (Spain).

Alternative II. The inclusion in a uniform law of choice of law rules (cf. the Hague Convention of 1955) prescribing the relationship between the international sales transaction and a contracting State that would invoke the uniform law.

(*a*) The application of such rules could be illustrated as follows: Seller in State A sells to Buyer in State B. Assume further that the rules on choice of law are like those of the Hague Convention of 1955 and the transaction is such that these rules select the law of the seller (e.g. the order was not received in the buyer's country under the exception of paragraph 3 of Article 3 of the Hague Convention of 1955). Under this alternative, the uniform law on sales would be applicable if (and only if) State A — the seller's country — has adopted the uniform law.

(*b*) If the rules on choice of law set forth in the uniform law on sales are not the same as those of the Hague Convention of 1955, consideration would have to be given to the possibility of a reservation by States that adhere to that Convention. (Cf. the reservation allowed under Article IV of the 1964 Convention on Sales.)

Alternative III. A provision that the uniform law will apply only if parties to the transaction are located in different contracting States. (Cf. the reservation allowed under Article III of the 1964 Convention.)

(*a*) It should be noted that this approach might restrict the scope of the uniform law more narrowly than the use of

[8] Substantially the same problems are presented by article 1 of the Uniform Law on Formation and the reservations permitted under articles III and IV of the accompanying Convention.

traditional rules on choice of law. e.g. Seller in State A sells to Buyer in State B; State A has adopted the uniform law but State B has not; assume further that traditional rules on choice of law would point to the law of State A. This alternative (following Article III of the 1964 Conventions) would seem to call for application of the local law of State A rather than the uniform law.

Alternative IV. Omitting any rules on choice of law from the uniform law and thereby remitting the question to the rules on choice of law of the *forum:* i.e., if the rules of the *forum* (whether under the Hague Convention of 1955 or other rules on choice of law of the *forum*: i.e., if the rules of the law on sales would be applicable to an international sale if (and only if) State A has adopted the uniform law.

(*a*) It is apparent that adoption of this alternative would increase the need for unification of the rules on choice of law applicable to international sale of goods. Cf. the discussion, in Part III F, paras. 64-67 *infra*, of the 1955 Hague Convention on the Law Applicable to the International Sale of Goods. *Replies: 1955*; *Analysis: 1955.*

2. *Method of work*

18. The above alternatives present differing levels of technicality and complexity.

(*a*) At one level are issues of general policy which have been examined in the Studies by States and Organizations and have been discussed at the second session of the Commission. In view of this preparation, the Working Group may wish to commence discussion of these issues without submitting them first to a small working party. Perhaps the discussion at this stage could be most effectively directed towards whether there is a substantial consensus either supporting or rejecting any of the alternatives as outlined in paragraph 17.

(*b*) If the Working Group as a whole can narrow the field of acceptable alternatives but cannot agree on a single approach, the Group may then wish to consider whether (i) to postpone work on the issue, or (ii) to designate a small working party to give closer attention to the problem with a view to developing a recommendation for consideration by the Working Group.

B. *The character of the international sale that will invoke a uniform law; questions arising out of Article 1 of the Uniform Law on Sales and Article 1 of the Uniform Law on Formation*

1. *The issues*

19. Several comments have been directed to the definition of the "international sale of goods" as a term that determines the applicability of the uniform laws. *Analysis: 1964,* paras. 58-66. In addition, the Working Group on Time Limits and Limitations (Prescription) requested the Working Group on Sales and UNCITRAL to give priority attention to this definition; this request reflected the decision of that Working Group (A/CN.9/30, para. 11) that "It would be desirable for a convention on prescription to contain the same definition of scope as a convention on the substantive law governing the international sale of goods".

20. The principal questions with respect to this definition fall under these headings:

(*a*) Under Article 1 (*a*) of the Uniform Law on Sales one alternative test for the Law's applicability is "where the contract involves the sale of goods which are at the time of the conclusion of the contract in the course of carriage or will be carried from the territory of one State to the territory of another".[9] Studies and Comments have raised questions concerning the applicability of the uniform laws where the parties expect that the goods will be (or may be) supplied by the carriage of goods from one State to another, but where such an obligation (or expectation) is not expressed in the contract. More specifically, must the contract express such an obligation? Is it sufficient if the contract indicates an expectation of such carriage but imposes no obligation to this effect? (E.g., the contract permits the seller either to ship or to deliver locally.) Is the Law applicable if the parties expect carriage from one State to another but that expectation is not mentioned in the contract? Is the Law applicable if there is no understanding (or expectation) that the goods will be the subject of international carriage but such carriage in fact occurs?[10] *Analysis: 1964,* paras. 61-66; *Replies: 1964,* p. 23 (Norway); *Add.1,* p. 7, para. 14 (Cz.); *UNCITRAL Report,* annex I, para. 31 (Japan), para. 33 (Cz.).

(i) The foregoing questions seemed to be primarily concerned with the clarity of the definition rather than the breadth or narrowness of coverage. Therefore, the Working Group may wish at the outset to give principal attention to the question of clarity.

(*b*) It was suggested that the Uniform Law be extended to include sales in the following situation: Seller, having his principal place of business in State A, brings stocks of goods into State B and then sells these goods in State B. *Analysis: 1964,* para. 65; *UNCITRAL Report,* Annex I, para. 32 (USSR).

(*c*) It was suggested that a requirement with respect to international shipment should be omitted. *Analysis: 1964,* para. 59; *Replies: 1964, Add.1,* p. 8, para. 18 (Cz.). Under this suggestion, the one controlling test would be whether the places of business of seller and buyer were in different States. (This view, standing alone, would broaden coverage, but was coupled with the suggestion (noted in sub-paragraph (*e*) *infra*) to restrict coverage to commercial transactions.)

(*d*) Attention was directed to article 1, paragraph 1, of the Uniform Law on Sales, under which the Law would apply only to contracts by parties "whose places of business are in territories of different States". It was suggested that the term "place of business" should be defined. *UNCITRAL Report,* para. 31 (Japan). Cr. *Analysis: 1955,* paras. 34-35. This suggestion seemed to raise the question whether the term "place of business", in relation to some legal systems, might refer to either (*a*) the location of central management or (*b*) a branch office.

(*e*) It has been suggested that the uniform laws should apply only to commercial transactions, as contrasted with sales to consumers for personal, non-business purposes. Cf. Uniform Law on Sales, art. 7; Uniform Law on Formation, art. 1 (8). *Analysis: 1964,* paras. 66, 76-77; *UNCITRAL Report,* Annex 1, paras. 33, 35, 54; *Replies: 1964, Add. 1,* p. 8 (Cz.).

(f) A similar query was directed to the Uniform Law on Formation in relation to local legislation giving consumers a period to disavow contracts negotiated at their homes. *Analysis: 1964,* para. 155; *UNCITRAL Report,* annex I, para. 113; *Replies: 1964,* p. 20 (Norway).

(ii) A closely related question concerns local rules designed to protect unwary buyers from clauses limiting their rights (e.g. by printed form clauses or technical language not likely to be understood by ordinary consumers). If such a domestic rule is stated in terms of "validity", presumably it would be preserved under article 8 of the Uniform Law on Sales; but if the rule is one of interpretation, the impact of the uniform laws may

[9] Under paragraph 1 the parties must also have their "places of business in the territories of different States". The Uniform Law on Formation sets forth similar rules in article 1.

[10] This last question may call for comparison of the English and French texts of article 1 (para. 1 (*a*)) of the Uniform Law on Sales. *Compare* "involves the sale of goods which are ... in the course of carriage or will be carried ..." *with* "implique que la chose fait ... ou fera l'object d'un transport ...".

be more doubtful. Cf. *Replies: 1964, Add.1*, p. 19, Part III-5 (Mexico).

21. Further problems as to scope have been noted. See *Analysis: 1964*, paras. 58-66. One such problem concerned doubt about whether the uniform laws would apply to contracts for the supply and erection of plant and machinery. *Replies: 1964, Add.5*, p. 6 (Sweden). The basis for this question seems to be doubt about whether a contract which was primarily one of engineering services would constitute a "sale" of goods, and whether a contract to build a permanent structure, like a manufacturing plant, would be a sale of "goods" within the meaning of articles 1 and 6 of the Uniform Law on Sale and article 1 (paras. 1 and 7) of the Uniform Law on Formation.

2. *Method of work*

22. The above problems call for careful analysis of rather complex statutory language in the light of various studies and comments. The Working Group may wish to consider whether its deliberations would be aided by advance study and report by a small working party.

C. *Relationships among Unification Projects: Reconciliation or Consolidation*

23. Replies and studies have suggested that certain of the pending uniform laws contain overlapping and conflicting provisions. Some studies have raised the question whether these provisions should be reconciled. *Replies: 1964*, p. 6 (Austria); *Add.3*, p. 91 (Hungary); *Add.4*, p. 7 (USA). Others have suggested that closely related laws should be integrated into a single text. *Replies: 1964, Add.3*, p. 28 (UAR); *Add.4*, pp. 6-8 (USA); (A/CN.9/L.9 (USSR).

1. *The Uniform Law on Formation and the Uniform Law on Sales*

(a) *Background*

24. Questions have been raised concerning the relationship between the two uniform laws attached to the Hague Conventions of 1964. *Analysis: 1964*, paras. 78, 90, 144, 146; *Replies: 1964*, Add.4, Part C (2). These questions seem to arise because of the following: (i) the Uniform Law on Formation and the Uniform Law on Sales were designed to apply to the same transactions, international sales of goods; (ii) at some points problems of formation merge into the substantive rules; (iii) the close relationship has raised questions as to gaps and the construction of overlapping provisions.

25. Further analysis of the relationship between these two uniform laws may be aided by the following table:

Uniform Law on Sales	*Uniform Law on Formation*	*Subject of Article*	*Relationship*
Art. 1 (1)–(5)	Art. 1 (1)–(5)*	Scope of law	Substantially the same**
2	1 (9)	Exclusion of rules of private international law	Identical
3	2 (1)	Exclusion of uniform law by parties	Differences in approach
5 (1)	1 (6)	Law inapplicable to specified sales	Substantially the same
6	1 (7)	Goods to be manufactured	Identical
7	1 (8)	Non-commercial sales included	Substantially the same
9 (1)	4 (2)*	Usages and practices made applicable by parties	Differences in approach
9 (2)	13 (1)	General usages; definition	Differences in approach
9 (3)	13 (2)	Commercial terms: interpretation	Identical
14	12 (2)	Means of communication	Identical
15	3	Writing; form	Substantially the same

* See also Art. I (3) of the Convention on Formation and the alternative Article 1 in annex II to the Uniform Law on Formation.

** Where the provisions are substantially the same the verbal difference usually resulted from the fact that the Uniform Law on Formation was unable to refer to a "contract" or "sale".

26. The degree of overlap can be viewed from two perspectives. The Uniform Law on Sales, which extends to 101 articles, is duplicated in minor part by the Uniform Law on Formation. On the other hand, the Uniform Law on Formation is overlaped in whole or in part with respect to six of its thirteen articles.

27. Studies have noted that the close relationship between the two laws creates problems of interpretation arising from divergencies in approach or language. In specific settings, the question has been raised whether such divergencies were accidental or whether they should be construed as deliberate rejection of the rule of the related statute.

28. One of these is whether a court should make fuller use of national law in construing the Uniform Law on Formation than in construing the Uniform Law on Sales. The Uniform Law on Sales contains a provision (Article 17) that is designed to limit such references to national, non-uniform law; the Uniform Law on Formation has no such provision. This has led to the question whether this difference compels a different approach in construing the two laws. *Replies: 1964, Add.3*, page 19, para. 11 (*a*) (Hungary).

29. A similar question was whether the Uniform Law on Formation will override domestic legislation assuring to certain types of buyers a period of reflection before the contract becomes binding. *Replies: 1964*, page 20 (Norway). (Compare the discussion on whether the uniform laws should apply to non-commercial transactions, *supra*, at part III B, para. 20 (*e*).) In analysing this problem it will be noted that the Uniform Law on Sales provides (Article 8) that it is not concerned with the validity of the contract, whereas the Uniform Law on Formation has no such provision.[11] Thus the continuing effect

[11] The only reference to validity in the Uniform Law on Formation appears in Article 2 (2); and this is a rule which

of domestic regulatory law may depend on whether it is deemed to relate to the formation of the contract, or to the contract after formation.

30. It has also been suggested that some problems relating to definiteness are dealt with in the Uniform Law on Sales while related problems are dealt with in the Uniform Law on Formation. Thus it is noted that the Uniform Law on Formation (Article 4) states a general rule on whether an offer is sufficiently definite to permit the conclusion of a contract by acceptance, while the Uniform Law on Sales (Article 57) deals with the related problem of the effect of the failure to specify a price. Cf. Uniform Law on Sales, Article 67 on failure to specify "the form, measurement or other features of the goods"; *Replies: 1964, Add.4,* page 7, sec. C (2) (United States of America).

(b) *The issue*

31. The basic issue is whether the Working Group is of the opinion that uniform rules on international sales and on the formation of contracts for international sales would be more widely acceptable if they are presented as separate laws or as a single law.

(c) *Method of work*

32. This basic issue may well prove susceptible of treatment by the Working Group as a whole. If preliminary discussion proves that this is not the case, the Working Group may wish to request a small working party to bring a report and recommendation to the larger group.

33. In approaching this general issue it probably will be necessary to examine the specific questions that have been raised with respect to possible conflicts or gaps between the two uniform rules. However, the Working Group may well decide that working out ways to reconcile any divergencies between the two laws calls for technical drafting which would be premature at this stage.

2. *The Uniform Law on Sales and the proposed Convention on Time Limits and Limitations (Prescription)*

(a) *Background*

34. The Working Group on Prescription, at its meeting in August 1969, noted certain preliminary questions concerning the relationship between the scope of a proposed convention on prescription and that of a uniform law on sales. Certain basic lines of demarcation were laid down by UNCITRAL at its second session. The resolution that created the Working Group on Prescription noted that this "Working Group should not consider special time-limits by virtue of which particular rights of the buyer or seller might be abrogated (e.g. to reject the goods, to refuse to deliver the goods, or to claim damages for non-conformity with the terms of the contract of sale) since these could most conveniently be dealt with by the Working Group on the international sale of goods".[12]

35. The Working Group on Prescription approved the following draft provision on the scope of the proposed convention:[13]

> "This Convention shall apply to the prescription of the rights of the seller and the buyer arising from a contract for the international sale of goods.
>
> "The Convention shall govern the prescription of the rights and duties of the buyer and seller under such a contract, their successors and assigns, and persons who guarantee their performance. This Convention shall not apply to the rights and duties of other third persons."

36. This decision, to prepare a unified set of rules on prescription applicable to claims of both the buyer and seller, poses problems concerning the relationship between the Uniform Law on Sales and the proposed convention on prescription.

37. No serious problems of relationship between the two fields is presented by the various rules of the Uniform Law on Sales which set time-limits for notices by one party to the other party. See, e.g., Articles 26, 30 and 39. Such rules are placed outside the field of the proposed convention on prescription by the Commission's resolution quoted in paragraph 34, *supra.* Although legal rights may be lost by failure to give notice to the other party under the Commission's resolution, such defaults may be analogized to other defaults in performance under the contract, and are assimilated to the substantive law of sales. The convention on prescription was to deal with a different problem: the effect of delay in presenting claims to a *tribunal* for legal redress.

38. A problem of reconciliation is, however, presented by Article 49 of the Uniform Law on Sales. This article provides:

> "1. The buyer shall lose his right to rely on lack of conformity with the contract at the expiration of a period of one year after he has given notice as provided in Article 39, unless he has been prevented from exercising his right because of fraud on the part of the seller.
>
> "2. After the expiration of this period, the buyer shall not be entitled to rely on the lack of conformity, even by way of defence to an action. Nevertheless, if the buyer has not paid for the goods and provided that he has given due notice of the lack of conformity promptly, as provided in Article 39, he may advance as a defence to a claim for payment of the price a claim for a reduction in the price or for damages."

39. The above provision sets an outer limit for recourse to a tribunal for legal redress, and thus falls within the scope of the proposed convention on prescription.

40. The Commission's resolution creating the Working Group on Prescription requested the Group to deal with nine specified problems; these were listed as clauses (*a*) through (*i*) in paragraph 3 of the Commission's decision. *UNCITRAL Report,* paragraph 46. The rules embodied in Article 49 of the Uniform Law on Sales, quoted above in paragraph 38, touch on the first three of these problems specified by the Commission. These are:

"(*a*) The moment from which time begins to run"; (i.e., the giving of notice);

"(*b*) The duration of the period of prescription"; (i.e., one year);

"(*c*) The circumstances in which the period may be suspended or interrupted"; (i.e., the effect of fraud by the buyer; other problems falling under this heading but not dealt with in the Uniform Law on Sales are discussed in the Report of the Working Group on Prescription (A/CN.9/30) at paragraphs 63-66, 72-73 and 74-81).

41. The Uniform Law on Sales does not deal with other problems specified in the Commission's resolution creating the Working Group on Prescription. See *UNCITRAL Report,* paragraph 46, sub-paragraph 3 (*d*), (*e*) and (*f*). Cf. sub-paragraphs 3 (*g*), (*h*) and (*i*).[14]

42. Problems of interpretation may arise from the fact that the prescriptive limit provided in Article 49 of the Uniform

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specifies a rule of invalidity with respect to terms of an offer stipulating that silence shall amount to acceptance. The term "invalid" as used in the English text (cf. "*est nulle*") may have a different meaning (cf. "ineffective") than the concept of "validity" in Article 8 of the Uniform Law on Sales.

[12] UNCITRAL report on second session (1969) (*supra* note 1), para. 46.

[13] A/CN.9/30, para. 13.

[14] The point raised in sub-paragraph (*d*) of the Commission's resolution, just quoted, was dealt with by the Report of the Working Group on Prescription in paragraphs 82-89; the point

Law on Sales deals specifically with some, but not all, of the problems posed by a prescriptive period. Article 17 of the Law provides:

"Questions concerning matters governed by the present law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."

If the prescriptive limit for claims by buyers with respect to conformity of the goods is (in the language of Article 17) one of the "matters governed by the present Law"; it might be suggested that the Law's general principles must be sought to deal with the effect on the prescriptive period of events like acknowledgement of the obligation (verbally or by part payment), agreements extending the period, and other questions not deal with in the Law. But cf. *Analysis: 1964*, paragraph 35.

43. It will also have been noted that the prescriptive limit (statute of limitations) set forth in Article 49 of the Uniform Law on Sales covers only one of the various types of claims that may arise from an international sales transaction.

44. Thus, Article 49 deals only with buyer's claims arising from "lack of conformity with the contract"; this may refer only to claims with respect to defects in goods that have been "handed over" to the buyer.[15] Thus, Article 49 of the Uniform Law on Sales may not set a prescriptive limit for claims by a buyer where a seller fails or refuses to hand over any goods, or where the seller's delay in delivery leads to a rightful cancellation ("avoidance") of the contract by the buyer.

45. Article 49 sets no prescriptive limit for seller's claims against the buyer, Such claims by seller may include: (*a*) recovery of the price of delivered goods; (*b*) claims for damages for buyer's failure to accept the goods either (i) by the buyer's wrongful advance notice that he will not receive the goods, or (ii) by a refusal to accept the goods based on an unfounded claim that the goods are defective. In this last situation, and in suits for the price under (*a*), the question of the conformity of the goods may be indispute; claims for damages by the buyer might be governed by the one-year prescriptive limit specified in article 49, while the claim by the seller would not be governed by any prescriptive limit under the Uniform Law on Sales.

46. The recommendations of the Working Group on Prescription call for unified rules on prescription applicable to all claims by both buyers and sellers arising from an international sale. This approach is shown by the draft provision approved by the Working Group, which was quoted in paragraph 35, *supra*.

47. The recommendations of the Working Group on Prescription vary in other respects from the specialized rule on prescription in article 49 of the Uniform Law on Sales:

(*a*) The Working Group on Prescription favoured a period within the range of three to five years. *Report of the Working Group on Prescription* (A/CN.9/30), para. 50. (The reasons given by the Working Group are summarized in the above report at paras. 51-53; cf. *Analysis: 1964*, para. 119.) The Uniform Law on Sales states a period of one year.

(*b*) Members of the Working Group on Prescription supported alternative tests for the beginning of the period of prescription, none of which was the time of giving notice. See the above report at paragraphs 17 to 48. The Group specifically considered article 49 of the Uniform Law on Sales, and decided that the running of the prescriptive period should not be affected by the time the claimant gave notice to the other party. See the report of the Working Group, *supra*, paragraphs 46 to 47.

(b) *Issues; alternative approaches*

48. The relationship between the Uniform Law on Sales and the proposed convention on prescription presents the following alternative approaches:

Alternative I. The Commission might decide that the convention on prescription should be conformed to the rules of article 49 of the Uniform Law on Sales.

(*a*) This approach might be implemented either (1) by repeating the rule of article 49 or (2) by providing that States adhering to the Uniform Law on Sales could apply the prescription rule of article 49 rather than the rules of the conventions on prescription (cf. article IV of the Hague Conventions of 1964 with respect to States that had adhered to a convention on conflict of laws in respect of the international sale of goods).

Alternative II. A second approach would recommend omission of rules on prescription from the uniform rules on sales, so that all problems of prescription could be dealt with in a single convention.

Alternative III. A third approach would recommend steps leading to a merger of a uniform law on sales and general rules on prescription in international sales.

(*a*) In evaluating this alternative, the following considerations may be relevant:

(i) It might be concluded that merger into a single law would contribute to simplicity and clarity of terminology. Thus, definition of the time of the commencement of the period of prescription and the effect of advance repudiation and cancellation ("avoidance") of the contract could be more clearly stated in reference to a given structure of substantive law.

(ii) On the other hand, it might be concluded that producing a single law would increase the difficulty of securing adherence to the convention. Thus, adherence might be difficult if a State has serious objection to either (1) the substantive rules on the law of sales or (2) the rules on prescription.

(*c*) *Methods of work*

49. The Working Group may decide to deal with the broad issues of the relationship between substantive sales and prescription on the basis of general discussion by the entire Group. (This presumably would call for choices among alternatives such as those outlined in paragraph 48 above.) If preliminary discussion by the Working Group discloses that the Group cannot deal with these issues without further preparation, the Group may wish to refer the matter to a small working party for a report and recommendation.

3. *Possible consolidation with other projects for unification with respect to the international sale of goods*

(a) *Background*

50. In view of the foregoing suggestions for the consolidation of related projects, it may be relevant to note certain other projects related to international sales of goods that are in the course of preparation by the International Institute for the Unification of Private Law (UNIDROIT).

51. These projects include:

(*a*) A draft Uniform Law on the Protection of the *Bona Fide* Purchaser of Corporeal Moveables. This draft has been submitted to Governments for comments.

raised in sub-paragraph (*e*) is dealt with in the Working Group's report at paragraphs 93-107; point (*f*) is dealt with in paragraphs 122-123 of the Working Group report. Other points raised by the Commission were deferred for further study.

[15] The limitation starts from the time when the buyer "has given notice as provided in Article 39"; Article 39 deals with the inspection of goods that have been "handed over" to the buyer.

(*b*) A preliminary draft Uniform Law on the conditions of Validity of Contracts for the International Sale of Goods. This preliminary draft is approaching a third review by a Working Committee.

(*c*) A draft Uniform Law on Agency in Private Law Relations of an International Character. UNIDROIT has decided to submit this draft, together with comments by Governments, to a Governmental Experts Committee to prepare a final text to be submitted to a diplomatic conference.

52. The Working Group may wish to consider whether such projects should be considered as part of a more inclusive approach to unification of the law of international sales. In this regard, the following considerations may be noted:

(*a*) The draft on *Bona Fide* Purchases (paragraph 51 (*a*) *supra*) treats of one aspect of the rights of third persons. The subject of third-party claims merges into problems raised by security interests (conditional sale, hire-purchase, pledge, etc.). The entire field of third-party claims has been specifically excluded from the Uniform Law on Sales (article 8). The field is complex and difficult and touches various types of national regulatory laws. The Working Group might consider whether adding this subject to uniform legislation dealing with the rights and obligations of the parties to a sales transaction might unduly delay completion of the work and jeopardize acceptance of the resulting legislation.

(*b*) The preliminary draft on Validity (paragraph 51 (*b*) *supra*) also deals with a problem explicitly excluded from the Uniform Law on Sales (article 8). The subject of validity of contracts is also complex and touches sensitive issues of domestic policy. The Working Group might consider whether including this subject would also impede completion and acceptance of the final product.

(*c*) The draft on Agency (paragraph 51 (*c*) *supra*) is not precisely confined to the international sale of goods. The relationship between this draft and the present project may well be deemed insufficient to justify the delays resulting from joint consideration.

(b) *Issues; method of work*

53. The Working Group may wish to decide:

(*a*) Whether the field of work should be expanded beyond the rights and obligations of the parties to an international sale, and

(*b*) Whether questions of validity of the contract should be considered.

54. The Working Group might well feel in a position to approach these broad issues without advance preparation by a small working party.

D. *Recourse to general principles: article 17 of the Uniform Law on Sales*

1. *The issues*

55. An issue of general scope that has received substantial attention in the studies and comments is presented by article 17 of the Uniform Law on Sales, which provides:

> "Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based."

56. Observations with respect to this provision are summarized in *Analysis: 1964* at paras. 95-97, cf. *id.* at paras. 34-35. One of the possible applications of article 17 has been mentioned in para. 42, *supra*, in connexion with questions regarding the prescriptive limit for buyers' claims. See also *Replies: 1964*, p. 5, Part I (2) (Austria).

57. In considering the effect of article 17, it may be useful to consider whether this provision:

(*a*) Would have the relatively narrow effect of guarding against the use of local (and divergent) legal concepts in construing specific provisions of the Uniform Law; or

(*b*) Would have the broader effect of authorizing tribunals to create new rules not directly based on provisions of the Uniform Law.

2. *Method of work*

58. Article 17 presents general issues of policy concerning the effect and acceptability of uniform legislation on sales; these issues have been developed in the underlying studies and in the discussion at the second session of UNCITRAL. Therefore, the Working Group may well decide that it is prepared to discuss these issues without a report by a small working party.

E. *Binding effect of general usages*

1. *The issues*

59. Another general issue that has received attention in the studies and comments is the binding effect of general usages. *Analysis: 1964*, paras. 79-84, 156.

60. Article 9 of the Uniform Law on Sales, after giving effect in paragraph 1 to usages which the parties "have expressly or impliedly made applicable to their contract . . .", adds:[16]

> "2. They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present Law, the usages shall prevail unless otherwise agreed by the parties."

61. In considering the effect of this provision it may be helpful to consider whether this language:

(*a*) Comprises a relatively narrow extension of the implied undertakings of the parties made effective under paragraph 1, or

(*b*) Gives legal effect to general usages which the parties to the contract in question may not have considered binding in their case.

62. The studies have also raised this related question: Does the Uniform Law override a national rule that a usage is invalid? See Uniform Law on Sales, article 8: ". . . the present Law shall not, except as otherwise expressly provided therein, be concerned . . . with the validity of the contract or of any of its provisions or of any usage". *Analysis: 1964*, paras. 79. 83.

2. *Method of work*

63. Although this question has been discussed in the underlying studies and at the second session of the Commission, further attention to the problem might be aided by close attention to the relationship between various provisions of the Uniform Law. To facilitate this study, the Working Group may consider it appropriate to refer the problem to a small working party for advance consideration.

F. *Continuing need for uniform rules on choice of law: the Hague Convention of 1955*

1. *The issues*

64. An important general issue, raised in several of the studies and discussed at the second session of UNCITRAL, is this: Would the adoption of uniform rules on the substantive law of international sales obviate the need for uniform rules on choice of law? More specifically, the question involves the need for provisions such as those contained in the Hague Convention of 1955. *Analysis: 1964*, paras. 29-40; *Analysis: 1955*, paras. 8-17.

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[16] Similar questions may arise under article 13 of the Uniform Law on Formation although this language is substantially different from that of article 9 of the Uniform Law on Sales.

65. Although this question bears some relationship to the issues raised above in part III A (paras. 16-18), the precise issue is different. Part III A above, presented this question: What rules on applicability should be contained in a uniform law on the substantive law of sales? The present issue concerns the need for uniform rules on choice of law apart from and in addition to such a uniform law.

66. This issue was not listed immediately following part III A above, since the Group's work on the problems noted in parts III C and III D, above, may shed light on the present question. Thus, the need for separate rules on choice of law is affected by the extent to which the various problems arising from international sales transactions are solved by uniform substantive rules. The Uniform Law on Sales annexed to the Hague Convention of 1964 is concerned with the mutual rights and obligations of the parties to the sales contract. Questions of formation of the contract are left to another uniform law offered for separate consideration; questions of validity of the contract, the rights of third persons and most problems of prescription are also excluded. The scope of unification of the substantive rules may also be affected by the Group's views with respect to article 17 of the Uniform Law on Sales (part III D *supra*), since article 17 was designed, to some extent, to displace national rules on questions related to the provisions of the uniform law.

2. *Method of work*

67. After examination of the above-mentioned related issues as to the scope of proposed substantive rules on sales, the Working Group may feel that it is prepared to consider this issue without advance study by a small working party.

G. *Use of abstracts or complex legal concepts in drafting;* ipso facto *avoidance and notice to the other party to a sales transaction*

68. Studies and comments have raised the question whether the Uniform Law on Sales may, at certain points, use concepts that are abstract or complex; it has been suggested that such concepts, when applied to concrete situations, may produce unintended results or may lead to divergency of interpretation.

69. Since these questions are difficult to dicuss in general terms, it may be advisable to examine certain of the specific provisions that have given rise to the above suggestions. One group of provisions that may be helpful for this purpose is the rules on required notices by one party to another, since these rules call for application of the Law's concept of *ipso facto* avoidance.

1. *Issues*

(a) Ipso facto *avoidance*

70. Several studies and comments have raised questions as to the practical effect of "*ipso facto* avoidance" of the contract when the buyer fails to pay for goods he has received. *Replies: 1964, Add.5,* p. 4 (Sweden); *UNCITRAL Report,* annex I, paras. 62-67 (Hungary, Japan, Australia, United Kingdom, International Chamber of Commerce).

71. It may be helpful to approach these questions in the setting of the following facts: Seller delivers goods to Buyer on 1 January; the contract permits payment as late as 1 February. Buyer does not pay on that date or for a substantial period thereafter, and Seller does not demand payment until six months later. On such facts, it has been suggested that, because of Seller's delay in requiring Buyer to pay the price, under article 62 "the contract shall be *ipso facto* avoided" (*résolu de plein droit*), with these consequences:

(*a*) The seller may recover the goods from the buyer (article 78, para. 2);

(*b*) The seller may not recover the price from the buyer. (Article 78, para. 1. The seller, under article 63, para. 1, may claim damages, but these are measured (article 84, para. 1) by "the difference between the price fixed by the contract and the current price". *Analysis: 1964,* para. 129.)

72. It has been suggested, however, that these consequences were probably unintended and therefore some other construction of the Act must be found. *Replies: 1964, Add.4,* part D (3), p. 14 (USA).[17]

73. "*Ipso facto* avoidance" has led to this further comment: When avoidance occurs by operation of law and without a notice or declaration, a party may be left in uncertainty as to his rights under the contract. Article 62 (para. 1) provides that if the buyer's "failure to pay the price at the date fixed amounts to a fundamental breach of contract" and the seller fails to inform the buyer of his choice of remedies within a reasonable time, "the contract shall be *ipso facto* avoided". It has been suggested that whether a breach is "fundamental" may not be clear to the parties, and the buyer needs to know that the seller is going to refuse to ship so the buyer may make arrangements to purchase elsewhere. It has been suggested that a buyer who is in doubt about his position should have the right to insist that the seller make known his decision ("interpellation"); attention has been directed to such a right given sellers in article 26, para. 2. *Analysis: 1964,* paras. 127-129; *Replies: 1964,* p. 26 (Norway); *Add.4,* p. 14, Section D (3) (USA).

(b) *Notification by buyer to seller concerning defects in delivered goods; place for inspection*

74. A further problem raised in the *Replies* may be analysed in relation to the following facts: A contract calls for Seller to send goods to Buyer in City X. Before the goods arrive, Buyer finds a customer for the goods in City Y; on arrival of the goods in City X, Buyer directs the carrier to send the goods to the customer in City Y. Buyer does not inspect the goods in City X or on their arrival in City Y. A month later, when the customer uses the goods he finds they are defective, and demands redress from Buyer. Has Buyer lost his claim against Seller because of his failure to inspect the goods?

75. It has been suggested that under article 38, the carriage of the goods from City X to City Y may be deemed "transshipment", and that Buyer has violated the law's obligation to inspect the goods at "destination" (City X); from this it may follow that the notice of defects was not given "promptly" after Buyer "ought to have discovered" the defect. Under article 39, para. 1, on failure to give prompt notice after inspection at the place prescribed in article 38 above, the "buyer shall lose the right to rely on a lack of conformity of the goods"). It has been noted that although "transshipment" to a more distant place might appropriately cut off the buyer's right to reject the goods, there is no justification for cutting off his right to reduce his payment of the price or to claim damages because of defects in the goods. *Analysis: 1964,* paras. 114-115; *Replies: 1964, Add.4,* pp. 14-16 (USA); *UNCITRAL Report,* Annex I, para. 89 (Japan).

(c) *The concept of "delivery"* (délivrance) *and the definition of the seller's obligations*

76. Questions of approach similar to those raised with respect to *ipso facto* avoidance have been raised in connexion with the concept of *délivrance* as employed in the Uniform Law on Sales. *Analysis: 1964,* paras. 98-107, 140-143. One suggestion was that the Uniform Law would be clearer if the *délivrance*

[17] It has been intimated that a flexible reading of the concept of "damages" provided in article 63 might meet the problem. *Replies: 1964, Add.4,* Part D (3), p. 14 (USA), cf. article 96 (obligation to pay the price where the risk has passed). Conceivably the instant problem might be avoided by concluding that articles 61-64 deal with the situation prior to the handing over of the goods.

concept were supplanted by specific terms speaking more directly to the commercial act required by the parties. *Replies: 1964, Add.1,* p. 29, part II (Spain); *Add.4,* pp. 8-12, Part D (1)-(2) (USA).

2. *Method of work*

77. The above questions concern the interrelationship of several provisions of the Uniform Law on Sales. General discussion by the Working Group might therefore be aided by a report of a small working party.

IV. Other issues for possible consideration

78. If the Working Group decides to give attention to the issues listed in part III above, there may not be sufficient time at this session to reach other questions raised in the studies and comments. However, the Group may decide that some issues listed in part III are not appropriate for consideration or that others should be given priority. Following are certain further issues which the Group may wish to consider.

A. *Obligation to incorporate uniform law into national legislation versus use of uniform law as model*

79. The above issue was raised in several of the comments, and was also discussed at the second session of the Commission. *Analysis: 1964,* paras. 20-23. These questions related to the requirement, expressed in article I of both 1964 Hague Conventions, "that a contracting State shall 'incorporate' the annexed Uniform Law into its legislation"; under paragraph 2 of article I, the contracting State may incorporate the Uniform Law "into its own legislation either in one of the authentic texts or in a translation into one of its own language or languages". A subsidiary question is whether it would be consistent with this undertaking to enact the uniform law with a definition of scope that would make the law applicable to domestic transactions excluded by the terms of the Uniform Law. (Cf. the definition of international sale in article 1 of the Uniform Laws on Sales and on Formation.) *Analysis: 1964,* para. 21.

B. *Exclusion of the uniform law by agreement*

80. Certain studies raised questions about the power of the parties, under article 3, of the Uniform Law, to exclude the Law's provisions, either (*a*) by implied rather than express agreement or (*b*) without indicating the rules or law that should be applicable. *Analysis: 1964,* paras. 67-70. Cf. *Analysis: 1955,* para. 30.

C. *Deterioration of economic situation by one party: suspension of performance; stoppage in transit*

81. Article 73 of the Uniform Law on Sales gives certain powers to one party when the other's economic situation has seriously deteriorated; these provisions have been the subject of comment. *Analysis: 1964,* paras. 132-133. Cf. Uniform Law on Sales, article 76; *Replies: 1964, Add.3,* p. 24 (UAR).

D. *The Uniform Law on Formation; circumstances under which offers are irrevocable*

82. Various studies and comments raised questions about the rules of article 5 of the Uniform Law on Formation concerning the circumstances under which an offer cannot be revoked. *Analysis: 1964,* paras. 150-154.

E. *Uniform Rules on Choice of Law; choice between the Law of Residence of Seller or Buyer*

83. Article 3 of the Hague Convention of 1955 states a basic rule (paragraph 1) choosing the domestic law of the country in which the vendor has his habitual residence; this rule is subject to certain exceptions (e.g. para. 2) invoking the domestic law of the country in which the purchaser has his habitual residence. Cf. article 3, para. 3 (sale at an exchange or public auction); article 4 (place of inspection). Studies and comments reflected conflicting views concerning the correctness and clarity of these provisions. *Analysis: 1955,* paras. 32-41.

V. Procedures for implementing conclusions with respect to unification

84. At some point, consideration will need to be given to the choice of procedure to implement the Commission's objective to further the harmonization or unification of law for the international sale of goods. The Working Group, however, may well conclude that it would be most efficient to defer consideration of this question until after the Commission has considered the recommendations of the Working Group with respect to the more specific issues that have been presented in the studies and comments of States and organizations.

APPENDIX

Organizations invited to attend meeting of the Working Group

Asian-African Legal Consultative Committee.
Commission of the European Communities.
Council for Mutual Economic Assistance.
Council of Europe.
Council of the European Communities.
European Economic Community.
Food and Agriculture Organization of the United Nations.
Hague Conference on Private International Law.
Institute of International Law.
Inter-American Juridical Committee.
Inter-American Institute of International Legal Studies.
International African Law Association.
International Association of Comparative Law.
International Association of Legal Science.
International Bar Association.
International Chamber of Commerce.
International Institute for the Unification of Private Law.
International Law Association.
Law Association for Asia and the Western Pacific.
Organisation for Economic Co-operation and Development.
Organization of American States.
Organization of African Unity.
United Nations Conference on Trade and Development.
World Peace through Law Center.

ANNEX III

Report by Working Party I to the Working Group on the International Sale of Goods

1. Working Party I established by the Working Group on the International Sale of Goods at its third meeting on 6 January 1970 held three meetings: on 7, 8 and 9 January 1970. Representatives of the members of the Working Party, i.e. of Ghana, Hungary, Norway, and the United Kingdom, took part in all meetings of the Working Party. Observers for the International Institute for the Unification of Private Law (UNIDROIT), the Hague Conference on Private International Law and the International Chamber of Commerce also attended the meetings of the Working Party and took part in its work.

2. The Working Party had as its task the study of the question raised under part III, chapter A of the Working Paper, that reads: "Principles on choice of law in uniform legislation on sales; the relationship between the Hague Convention of 1955 and the Hague Conventions of 1964".

3. The Working Party had before it written proposals by Hungary (annex A) and Norway (annex B) both submitted on

6 January 1970 and a further proposal by Norway (annex C) submitted on 9 January 1970.

4. After thorough discussions the Working Party decided to recommend to the Working Group the substitution of article 2 of ULIS by the text set forth in paragraph 5 below. One representative, however, stated that the existing text of the 1964 Hague Convention would be more widely acceptable if States proposing to ratify the Convention took advantage of the reservation permitted by article III. In his opinion the reintroduction of the rules on conflict of laws into the text of ULIS would tend to weaken uniformity, and would be unnecessary if the States generally utilized the article III reservation.

5. The Working Party recommended that in place of article 2 of ULIS the following text should be substituted:

"The law shall apply

"1. Where the places of business of the contracting parties are in the territory of States that are parties to the Convention and the law of both these States makes the Uniform Law applicable to the contract;

"2. Where the rules of private international law indicate that the applicable law is the law of a contracting State and the Uniform Law is applicable to the contract according to this law."

6. To illustrate the application of the text introduced in paragraph 5 above, the Working Party set up a number of examples. The examples are contained in paragraphs 7 and 8 below.

7. Illustrations for paragraph 1 of the recommended text:

(*a*) State X and State Y are both parties to the 1964 Hague Convention without reservations. S and B are parties to the contract; S has its place of business in State X, and B has its place of business in State Y:

(i) If litigation is brought before the courts of either X or Y, the courts of both States shall always apply the Uniform Law without looking into rules of private international law.

(ii) State Z is also a party to the Convention. If litigation is brought in State Z, the court of State Z will apply the Uniform Law. (Whether State Z has enacted the Uniform Law with reservation is immaterial.)

(*b*) State X and State Y are both parties to the 1964 Hague Convention. One of these States has enacted the Convention with reservation. S and B are parties to the contract; S has its place of business in State X and B has its place of business in State Y.

(i) Assume the reservation under article II of the Convention is made by State X with reference to a third State A; X and Y are to be considered as different States and consequently the courts of all contracting States will apply the Uniform Law.

(ii) Assume the reservation is made under article III of the Convention: the courts of all contracting States will apply the Uniform Law.

(iii) Assume the reservation is made under article IV or V of the Convention; paragraph 2 of the recommended text (paragraph 5 above) will apply.

8. Illustrations for paragraph 2 of the recommended text:

(*a*) State X and State Y are both parties to the 1964 Hague Convention. State X has ratified the Convention with the reservation permitted under article V of the Convention. S and B are parties to the contract; S has its place of business in State X and B has its place of business in State Y.

If suit is brought in State X, Y or Z, the courts of each State must decide which law is invoked by the rules of private international law. If these rules point to the law of State X, the court will only apply ULIS if chosen by the parties.

(*b*) State X is a party to the 1964 Hague Convention; State Y is not a party. Suit is brought in State X.

(i) If the rules of private international law of State X point to the law of State Y, the domestic law of the latter State will apply.

(ii) If the rules of private international law of State X point to the law of State Z which State is party to the Convention, ULIS will apply. If, however, Z has ratified the Convention with reservation under article III of this Convention, the domestic law of Z will apply.

(*c*) State X is a party to the 1964 Hague Convention, State Y is not. Suit is brought in State Y.

(i) If the rules of private international law of State Y point to the law of X, ULIS will apply. If, however, X has ratified the Convention with the reservation permitted under article III of the Convention, the domestic law of X will apply.

(ii) Assume the rules of private international law of State Y point to the law of Z and Z is a party to the Convention: ULIS will apply. If, however, Z has ratified the Convention with the reservation permitted under article III of the Convention, the domestic law of Z will apply.

(*d*) State X is party to the 1964 Hague Convention, State Y is not. Suit is brought in State Z.

(i) Assume the rules of private international law of State Z point to the law of X or any other State that is party to the Convention. The result is the same, *mutatis mutandis,* as in paragraph 8 (*b*) above.

(ii) Assume the rules of private international law of State Z point to the law of Y or any other State that is not party to the Convention. The domestic law of that State will apply.

Annex A to the Report of Working Party I

PROPOSAL BY HUNGARY

1. The proposal concerning article 2 reads as follows:

(1) Unchanged.

(2) If the place of business of any of the contracting parties is in the territory of a State not being a member to the Convention the rules of private international law shall apply.

2. The idea of the above text is that:

(*a*) ULIS should always apply, irrespective of the conflict rules, between contracting parties from member States of the Convention.

(*b*) If one or both of the parties to the contract is/are from States not member(s) to the Convention, ULIS shall apply only where the conflict rule of the *forum* points to a member State of the Convention.

3. The possibility of reservation, article III should be preserved, as its main point is that a State having made this reservation will never apply ULIS in relation to non-contracting State(s).

REMARK: The problem of article 17 and other possible applications of conflict rules should be discussed separately.

Annex B to the Report of Working Party I

PROPOSAL BY NORWAY

ULIS article 2

Add the following provision as a new *paragraph 2:*

2. The provision of paragraph 1 of this article shall not apply where the parties or one of the parties have their

place of business or, in the absence of such place, their habitual residence outside the territory of any contracting State [and, according to the contract, the goods are to be delivered outside such territory].

Convention article III

Delete.

Annex C to the Report of Working Party I

PROPOSAL BY NORWAY

Article 2

The Law shall apply in each of the following cases:

(*a*) Where the principles of private international law indicate that the proper law of the contract is the law of a contracting State and the Uniform Law is applicable to the contract according to this law,

(*b*) Where the places of business of the contracting parties are in the territory of States that are members to the Convention and the law of both these States make the Uniform Law applicable to the contract.

NOTE: This text is intended to convey the same meaning as that of the Hungarian proposal. However, it also intends to avoid the misunderstanding that where the applicability of the Uniform Law is limited by reservations such as those permitted by articles II and V of the Convention, the Uniform Law shall apply without regard to these reservations when applied by a court belonging to a country which has itself ratified the Uniform Law.

ANNEX IV

Proposal of the Norwegian Delegation

ARTICLE IV OF THE 1964 HAGUE CONVENTION

Alternative A

1. Any State which *is a party or may intend to become a party* to one or more Conventions on conflict of laws in respect of the international sale of goods may, at the time of the deposit of its instrument of ratification of or accession to the present Convention, declare by a notification addressed to the Government of the Netherlands that it will apply the Uniform Law in cases governed by one of those Conventions only if that Convention itself *will lead to* the application of the Uniform Law.

2. Same as ULIS.

Alternative B

Any State may, at the time of deposit of its instrument of ratification of or accession to the present Convention, declare by a notification addressed to the Government of the Netherlands that it will only apply the Uniform Law whenever its rules of private international law declare applicable the law of a State which adopted the Uniform Law without any reservation which would preclude its application to the contract.

ANNEX V

Report by Working Party II to the Working Group on the International Sale of Goods

1. Working Party II established by the Working Group on the International Sale of Goods, at its 4th meeting on 6 January 1970, held four meetings: on 7, 8, 9 and 12 January 1970. Representatives of the members of the Working Party, i.e., of France, Norway, the Union of Soviet Socialist Republics, the United Kingdom and the United States, took part in all meetings of the Working Party. Observers for the International Institute for the Unification of Private Law and the International Chamber of Commerce also participated in the work of the Working Party.

2. The Working Party had as its task the study of the question raised under part III, chapter B of the Working Paper that reads: "The character of the international sale that will invite a uniform law; questions arising out of article 1 of the Uniform Law on Sale and article 1 of the Uniform Law of Formation".

3. The Working Party had before it, among others, written proposals by Norway (annex A and B) and the Union of Soviet Socialist Republics (annex C).

4. The Working Party noted that the English text of article 1, paragraph 1 (*a*), did not correspond with the French text of that paragraph. It recommends, therefore, that by considering the text of article 1, paragraph 1 (*a*) of ULIS, the Working Group should base its considerations on the French text. A more accurate translation of the text is as follows:

"(a) *Where the contract contemplates that the goods are, at the time of the conclusion of the contract, or will be the subject of transport from the territory of one State to the territory of another.*"

5. With regard to article 1, paragraph 1 (*a*) the Working Group considered the question raised by the USSR (annex C) of extending the application of ULIS also to goods which had been carried from the territory of one State to the territory of another before the conclusion of the contract.

6. The Working Group, after consideration of the questions mentioned in paragraph 5 above, came to the conclusion that ULIS should not govern sales where the offer and acceptance have been effected in the territory of one State and the goods sold under the contract are in the territory of the same State at the time of the conclusion of the contract. In such cases the fact that one of the parties has its place of business in the territory of another State may not alone justify the application of ULIS. Consequently sales at exhibitions and fairs and sales of specific goods which are on stock in buyer's country will not be governed by ULIS.

7. Several members of the Working Party considered that ULIS should apply in cases where the contract leaves open the question whether the goods to be delivered under the contract are, at the time of the conclusion of the contract, in stock in buyer's country, or are in the course of transport or will be transported from the territory of any country to the territory of the buyer's country. To illustrate this suggestion the following example was given: A foreign trade organization of the Soviet Union sells vodka to a buyer in the United States. In order to expedite deliveries, the trade organization usually keeps a certain quantity of vodka on stock in the United States; after the contract, the organization will decide whether it will deliver the vodka which is at the time of the conclusion of the contract in stock or in the course of transport or whether it will ship vodka from the Soviet Union to the United States. The Working Party could, however, not find any adequate formulation which would unambiguously differentiate between cases mentioned in this paragraph and those mentioned in paragraph 6 above.

8. The representative of the United States expressed his concern about this problem: When does the transport end? Suppose that goods have arrived at a place of storage (like a bonded warehouse) but have not yet been delivered to the addressee: Are these goods to be considered as goods in the course of carriage or as goods for which the carriage has already been completed? Several members expressed the opinion that before the handing over of the goods to the addressee the transport cannot be considered as completed. The Working Party agreed, however, that this question calls for further study.

9. With regard to the preamble of article 1, one of the delegates observed that the term "place of business" was open to different interpretations in cases where one of the parties has establishments in different countries. Should the international character of the transaction be determined by reference to the principal place of business or to a place of the establishment that concluded the contract? The Working Party was of the view that this problem should be studied further.

10. A further problem discussed by the Working Party was that of the delivery of plants. It was observed that contracts for the sale of plants often include construction of buildings, the installation of machines in existing buildings, and the combined construction of a plant and machinery. There was general agreement that contracts for the construction of buildings or installation services without sale of goods did not fall in the scope of ULIS. However, ULIS would apply if the main purpose of the contract was the sale of goods and the construction of buildings or the installation services were only an incidental duty of the seller. The Working Group came, however, to the conclusion that the question is difficult and calls for further study.

Annex A to the Report of Working Party II

PROPOSAL BY NORWAY

Article 1, para. 1

. . ., where the contract implies

(*a*) That the goods, before or immediately after delivery, are to be carried from the territory of one State to the territory of another State, or

(*b*) That the goods are imported and that the seller is authorized to deliver goods regardless of whether they are imported before or after the time of the conclusion of the contract.

Annex B to the Report of Working Party II

PROPOSAL BY NORWAY

Definition of international sale

The definition of international sale in article 1 should be *simplified* so as to make it easier to be applied in practice and enable merchants to keep in mind on what conditions ULIS would come into play to the exclusion of national laws. In his opinion the essential thing was not to extend or restrict the scope of the present text, but to make the definition less complex and less dependent on so many different criteria.

The present text is based — besides on the place of business — on the three different criteria in sub-paragraphs (*a*), (*b*) and (*c*). Each one of these criteria contains terms which are not defined and which are open to different interpretations, and in some cases it will also be difficult to ascertain whether the facts fall within the scope of the different terms. For instance, in sub-paragraph (*a*) it will often be uncertain what the contract "implies" (involves) especially in relation to "ex works" sales, or how long the goods are "in the course of carriage" to (or through?) the territory of the second State. In sub-paragraph (*b*) there will be uncertainties as to the place where the contract has been concluded, especially where one party has an agent or an establishment in the State where the other party is situated. In sub-paragraph (*c*) there may be questions as to the term "delivery".

Questions of interpretation and ascertainment of facts are of course always unavoidable in borderline cases. But the present text of ULIS, by combining so many different criteria, could confuse the public. It would simplify the Law and reduce the number of uncertainties to rely on a limited set of criteria and leave out the rest. This may result in a more restricted scope of the law, but that is no major objection, especially since the parties may place their contract subject to the Law (article 4).

In such a spirit Norway suggests the following alternatives to article 1:

Alternative I

1. The present law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, where the contract contemplates transport of the goods from the territory of one State to the territory of another.

2. Same as ULIS.

3. Same as ULIS.

4. Delete.

5. Same as ULIS.

Alternative II

1. The present law shall apply to contracts of sale of goods entered into by parties whose places of business are in the territories of different States, unless (*a*) the acts constituting the offer and the acceptance have been effected in the territory of one and the same State and (*b*) the goods are to be delivered in the territory of that same State without contemplated transport from the territory of another State.

2.-5. Same as ULIS.

Alternative I is based on the criterion inter-State *carriage* or *transport* in ULIS, paragraph 1 (*a*), deleting the criteria in sub-paragraphs (*b*) and (*c*) and paragraph 4. Compared to ULIS sub-paragraph (*a*) the formulation is less restrictive by not mentioning the different stages and timing of carriage in relation to the time of the conclusion of the contract. This will be indifferent, provided the contract contemplates (implies) inter-State transport. The term "contemplates" ("implies") is of course quite vague, but will cover cases where the contract contemplates export or import effected by either party. Contrary to the present ULIS text, it is envisaged that the contract according to the circumstances may contemplate inter-State transport where the goods are already imported by the seller and the seller under the contract is authorized to deliver goods regardless of whether they are imported before or after the time of the conclusion of the contract.

Alternative II is based on the criteria in ULIS paragraph 1 (*b*) and (*c*), combined with a reference to inter-State transport. The scope of this alternative may be somewhat broader than the present text in ULIS, but simpler formulated. It will cover sales when the parties have their places of business in different States, unless all the other elements mentioned point to one and the same State.

Annex C to the Report of Working Party II

PROPOSAL OF THE UNION OF SOVIET SOCIALIST REPUBLICS

The provisions of sub-paragraph (*a*) of article 1, paragraph 1, should be extended to cover also the goods which have already been carried from the territory of one State to the territory of another but not yet sold (e.g., the goods stored at warehouses, exhibits).

Therefore, it would seem appropriate to word sub-paragraph (*a*) as follows:

(*a*) Where the contract involves the goods in the course of carriage or the goods which will be carried from the territory of one State to the territory of another, or the goods already carried before the conclusion of the contract but not yet sold.

ANNEX VI

Report of Working Party V: Article 49 of ULIS

1. There was a considerable doubt as to the correct interpretation of article 49 of ULIS. The Working Party has given the following explanation of the meaning of this article:

Explanation in English:

The right of the buyer to rely on lack of conformity with the contract shall lapse upon the expiration of a period of one year after he has given notice as provided in article 39, unless he continues to manifest an unequivocal intention to maintain the existence of this right whether by the commencement of legal proceedings or otherwise (except where he has been prevented from so doing by the fraud of the seller).

Explanation in French:

L'acheteur est déchu de ses droits s'il ne les fait pas valoir par une action en justice ou de toute autre manière manifestant sa volonté continue d'obtenir leur respect, un an au plus tard après la dénonciation prévue à l'article 39 (à moins qu'il n'en ait été empêché par suite de la fraude du vendeur).

2. In the light of the above explanation the Working Party was of the opinion that article 49 does not constitute a case of prescription and recommends its deletion. It is thought that the notice required under article 39 and the term of prescription whatever it may be provides for a sufficient technique to enforce the rights of the buyer and protect the interests of the seller. A third term as provided by the present article 49 seems to be unnecessary and may lead to difficulties in respect of its application to the individual cases.

3. If article 49 is regarded as providing for a term of prescription, it should be co-ordinated with the findings of the Working Group on prescription and its further consideration should be postponed. It is, however, thought that even in that case there might be no need for its conservation, for

(*a*) If the buyer goes to court or to arbitration, this case would be covered by the general rules on prescription,

(*b*) If the buyer manifests its intention otherwise, then a term of prescription is needed for the enforcement before the courts or arbitration.

4. If article 49 is maintained, the reference to fraud should be deleted.

B. Uniform rules on choice of law

Analysis of replies and comments by Governments on the Hague Convention of 1955: report of the Secretary-General

CONTENTS

I. INTRODUCTION

1. The United Nations Commission on International Trade Law (UNCITRAL) at its second session requested the Secretary-General to prepare an analysis of observations, outlined below, regarding the Hague Convention of 1955 on the Law Applicable to the International Sale of Goods (corporeal movables) and to submit the analysis to the Working Group on the International Sale of Goods set up by the Commission.[1]

2. Part of these observations resulted from the request made by the Commission at its first session that States be invited to indicate whether they intended to

* A/CN.9/33.

[1] Report of the Commission on the work of its second session, (A/7618), para. 2.