

F. Report of the Secretary-General: analytical compilation of comments by Governments and international organizations on the draft Convention on the Formation of Contracts for the International Sale of Goods as adopted by the Working Group on the International Sale of Goods and on the draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods prepared by the International Institute for the Unification of Private Law (A/CN.9/146 and Add.1-4)

I. COMMENTS BY AUSTRIA, AUSTRALIA, CZECHOSLOVAKIA, FINLAND, THE FEDERAL REPUBLIC OF GERMANY, GHANA, THE NETHERLANDS, SWEDEN AND THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND, AS WELL AS BY THE ECONOMIC COMMISSION FOR EUROPE, THE ECONOMIC AND SOCIAL COMMISSION FOR ASIA AND THE PACIFIC, THE CARIBBEAN COMMUNITY, THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, THE INTERNATIONAL CHAMBER OF SHIPPING, THE INTERNATIONAL CIVIL AVIATION ORGANIZATION AND THE CENTRAL OFFICE FOR INTERNATIONAL RAILWAY TRANSPORT (A/CN.9/146)*

CONTENTS

	Paragraphs
Introduction	1-6
Analytical compilation of comments	7-130
A. Comments on the draft Convention as a whole	7-32
1. General comments on the draft Convention ...	7-15
2. Relationship to the draft Convention on International Sale of Goods	16-19
3. Relationship to the UNIDROIT draft	20-30
4. Terminology	31-32
B. Comments on specific provisions of the draft Convention	33-130
Article 1	33-38
Article 2	39-55
Article 3	56-58
Article 4	59-63
Article 5	64-79
Article 7	80-81
Article 8	82-91
Article 9	92-94
Article 10	95-104
Article 12	105-112
Article 13	113-117
Article 15	118-120
Article 18	121-127
Article [X]	128-130

INTRODUCTION

1. The text of the draft Convention on the Formation of Contracts for the International Sale of Goods (hereafter referred to as the draft Convention)¹ adopted by the Working Group on the International Sale of Goods at its ninth session (Geneva, 19-30 September 1977) was transmitted to Governments and interested international organizations for their comments.²

2. The Working Group also requested the Secretary-General to circulate the draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods prepared by the International Institute for the Unification

of Private Law (UNIDROIT) (hereafter referred to as the UNIDROIT draft)³ to Governments and interested international organizations for their comments as to whether any matters in that text which had not been included in the draft Convention should be included.⁴

3. As at 19 April 1978 comments have been received from the following States: Austria, Australia, Czechoslovakia, Finland, Germany, Federal Republic of, Ghana, Netherlands, Sweden and United Kingdom of Great Britain and Northern Ireland.

4. Comments have also been received from the following regional commissions of the United Nations and other international organizations: Economic Commission for Europe (ECE), Economic and Social Commission for Asia and the Pacific (ESCAP), Caribbean Community (CARICOM), Hague Conference on Private International Law, International Chamber of Shipping (ICS), International Civil Aviation Organization (ICAO) and the Central Office for International Railway Transport (OCTI).

5. This report contains an analytical compilation of these comments. Comments received after 19 April will be reproduced in an addendum to this report.

6. In preparing the analytical compilation, general comments on the draft Convention precede comments on the individual provisions of the draft. Comments on the provisions of the draft Convention have been arranged by articles and within each article by paragraphs or subparagraphs or, where appropriate, by subject matter. Where the comments concern the article as a whole, and not a particular paragraph of an article, they are analysed under the heading "article as a whole".

ANALYTICAL COMPILATION OF COMMENTS

A. *Comments on the draft Convention as a whole*

1. *General comments on the draft Convention*

7. Australia considers that the Working Group at its ninth session improved the draft Convention in several important respects, particularly by incorporating the concept of acceptance by conduct (art. 12) and by deleting article 7 (3) of the previous draft which dealt with confirmation of a prior contract of sale.⁵

8. Czechoslovakia notes with pleasure that the draft Convention supplies a good basis for preparation

³ The text of the UNIDROIT draft is to be found in document A/CN.9/143 (reproduced in the present volume, part two, I, C).

⁴ A/CN.9/142, para. 305.

⁵ A/CN.9/128, annex I (Yearbook ... 1977, part two, I, B). The text of this provision was as follows:

"[(3) If a confirmation of a prior contract of sale is sent within a reasonable time after the conclusion of the contract, any additional or different terms in the confirmation [which are not printed] become part of the contract unless they materially alter it, or notification of objection to them is given without delay after receipt of the confirmation. [Printed terms in the confirmation form become part of the contract if they are expressly or impliedly accepted by the other party.]]"

Article 7 of the previous draft has been renumbered as article 13.

* 26 April 1978.

¹ The text of the draft Convention is to be found in document A/CN.9/142/Add.1 (reproduced in the present volume, part two, I, A, annex).

² Report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977), A/CN.9/142, para. 304 (reproduced in the present volume, part two, I, A).

of a definitive draft which may result in uniform rules capable of achieving much wider acceptance than the Hague Uniform Law on Formation of Contracts for the International Sale of Goods of 1964.

9. Finland notes that the draft Convention forms a good basis for further work within UNCITRAL on the preparation of a new Convention.

10. The Federal Republic of Germany welcomes the efforts of UNCITRAL to standardize legislation relating to the international sale of goods also with regard to the formation of contracts of sale. It considers the draft Convention prepared by the Working Group to be a good basis for discussion at the forthcoming UNCITRAL session. It particularly welcomes the compromise on the question of revocability as embodied in article 10.

11. Ghana views the draft Convention as an acceptable framework for a Convention on the formation of international contracts of sale of goods.

12. Sweden welcomes the work currently being carried out within UNCITRAL with a view to framing an international set of rules on the sale of goods which could be more widely accepted by States than the 1964 Hague Conventions. Last year UNCITRAL concluded its work on the revision of the Uniform Law on the International Sale of Goods by adopting a new draft Convention on the International Sale of Goods. Sweden considers it logical that the Commission should pursue its work by taking up the question of formation of contracts for the international sale of goods. The text of the draft Convention which has been drawn up by a working group set up by the Commission provides, in the Swedish Government's view, a suitable basis for the Commission's continued work. Generally speaking, this draft text is based on the same principles as the Uniform Law on the Formation of Contracts for the International Sale of Goods. The compromises between the different systems of contract law reflected in the draft can, to a large extent, be accepted by Sweden.

13. All these respondents indicate that particular problems still exist which are not resolved in the draft in its present form, and suggest appropriate solutions to resolve these problems.⁶

14. The secretariat of CARICOM is in general agreement with the text "even though the usefulness of Article 5 may be questioned".

15. The Legal Bureau of ICAO notes that the draft Convention appears to deal with the subject matter of the formation of contracts for the international sale of goods in a satisfactory manner.

2. *Relationship to the draft Convention on the International Sale of Goods*

16. The secretariat of CARICOM states that there should be one convention covering not only the rights of contracting parties in international sale of goods but also dealing with formation and validity of contracts for the international sale of goods.

17. Finland notes that it would be of importance that the scope of application of the draft Convention is the same as the scope of application of the draft Con-

vention on the International Sale of Goods. One way of achieving this would be to amalgamate these two draft Conventions but efforts to amalgamate the two drafts should be refrained from if that would render the amalgamated Convention less acceptable to States than the draft Convention on the International Sale of Goods as presently drafted.

18. The Federal Republic of Germany notes that the draft Convention settles only some of the legal issues that may arise in connexion with the international sale of goods, whilst other aspects of this area of law have already been covered by the conventions on the international sale of goods. With a view to establishing a world-wide standardized law on the sale of goods, it is urgently necessary to consider all these projects together and at all costs eliminate any contradictions between them. As far as the draft Convention and the draft Convention on the International Sale of Goods are concerned, it would seem necessary to deal with both projects at one and the same diplomatic conference in order to achieve the greatest possible measure of consistency.

19. Sweden states that the draft Convention on the International Sale of Goods and this draft Convention should be submitted to one conference of plenipotentiaries because it is most important that the various provisions be co-ordinated, especially as regards the scope of application. Sweden also states that it would be desirable for the rules regarding sale and the formation of contracts for sale to be combined in one and the same convention, thus achieving greater clarity and providing further guarantees that the scope of application would be identical. However, should it appear that certain States which would be prepared to accept a future Convention based on the draft Convention on the International Sale of Goods would be unable to accept a convention which also contains rules on formation of contracts, the idea of a single convention should be abandoned. The same applies if a merger would considerably delay the adoption of an international set of rules in this field.

3. *Relationship to the UNIDROIT draft*

20. Austria regrets that it was not possible to consider the rules on validity contained in the UNIDROIT draft because of the urgent need to obtain agreement on a text on formation to supplement the draft Convention on the International Sale of Goods.

21. The secretariat of CARICOM notes that the parts of the UNIDROIT draft dealing with mistake, fraud and threat should be incorporated into the text adopted by the Working Group on Sales.

22. Finland, Ghana, Sweden and the United Kingdom state that further provisions of the UNIDROIT draft should not be included in the draft Convention.

23. Finland notes that the UNIDROIT draft deals with an area in which unification of national law would seem hard to achieve. The draft as it stands would seem to be less mature for finalizing deliberations. It does not seem necessary to include any of the provisions of the UNIDROIT draft into the draft Convention.

24. Ghana does not consider it desirable to include in the draft Convention any rules of validity and consequently agrees with the decision of the Working Group

⁶ These observations are noted below under the respective articles of the draft Convention.

to exclude from the draft Convention all the matters dealt with in the UNIDROIT draft.

25. Sweden does not think it advisable to examine further the question of rules relating to validity of contracts in this context. It would seem particularly difficult to achieve unification in this area and the existing material (the UNIDROIT draft) does not provide a satisfactory basis for the studies necessary.

26. The United Kingdom emphasizes that it would not wish to see the provisions in the UNIDROIT draft relating to mistake included in the draft Convention as these provisions are unacceptably broad.

27. The Hague Conference notes that it might be useful if the draft Convention contained provisions dealing with the consequences of the violation of the principles of fair dealing and the requirement of acting in good faith (art. 5) along the lines of articles 8 to 11 of the UNIDROIT draft. (See further the comments of the Hague Conference on art. 5 of para. 79 below.)

28. The Legal Bureau of ICAO notes that it would be possible to have a single convention (thus avoiding the present different scope of application provisions) dealing with both formation and validity even though, strictly speaking, the question of the validity of contracts appears to be separate from the question of formation of contracts.

29. The Netherlands, has no objection to the incorporation of rules governing validity, but would urge only the inclusion of articles 9 and 16. Article 9, in particular, would have a useful function similar to article 34 of ULIS, which has not been included in the draft Convention on the International Sale of Goods.⁷

30. OCTI states that it would be advisable to include certain provisions of the UNIDROIT draft regarding the legal consequences of errors, in particular the provisions of article 6 in order to avoid a settlement of this question by means of the national laws.

4. Terminology

The draft Convention

31. ESCAP recommends that, in the English text, the words "he", "his", and "him" which indicate the masculine form be replaced by words which are neutral as to gender. These suggestions are to the following effect:

Article 1(7)(b): replace the words "his habitual residence" by "that party's habitual residence".

Article 3(2), 12(4) and 18(3): replace the words "his place of business" by "a place of business".

Article 4(1): replace the words "his intent" by "that party's intent".

Article 13(2): replace the words "If he does not so object" by "If the offeror does not so object".

Article 15(2): replace the words "he considers his

offer as having lapsed" by "the offer is considered to have lapsed".

The UNIDROIT draft

32. ESCAP recommends that, in the English text, the words "he", "his", "him" and "himself" which indicate the masculine form be replaced by words which are neutral as to gender.⁸

B. Comments on specific provisions of the draft Convention

Article 1

Paragraph (1), subparagraph (b)

33. Czechoslovakia notes that in order to achieve maximum acceptability of the draft Convention it is advisable to admit a possibility of any Contracting State to formulate at the time of signature, ratification or acceptance a reservation to the effect that the provisions of the Convention shall apply to the formation of contracts for the international sale of goods only between parties whose places of business are in different Contracting States. Contracting States should have a possibility to exclude in this way the application of subparagraph (b).

Paragraph (3)

34. The Secretariat of ECE notes that the wording of this paragraph may deserve further attention. The application of the draft Convention should not depend on the nationality of the parties: this is beyond dispute. However, the "character of the parties" as well as that of the proposed contract should be taken into consideration since international sales transactions cannot be effected by individuals who, under their national legislation, lack the capacity to conclude the relevant contract.

Paragraph (4), subparagraph (a)

35. Czechoslovakia proposes that this provision read as follows:

"(a) Of goods bought for personal, family or household use, if the seller, at any time before or at the conclusion of the contract knew or ought to have known that the goods were bought for any such use."

It should thus follow that in case of doubt the Convention applies.

Paragraph (4) subparagraph (e)

36. ICS is pleased to note that contracts for the sale of ships, vessels or aircraft are not within the scope of the draft Convention.

Paragraph 6

37. The Secretariat of ECE notes that this provision is of particular importance because it correctly excludes subcontracting, i.e. all kinds of industrial co-

⁷ Article 34 of the Uniform Law on the International Sale of Goods provides: "In the cases to which article 33 relates, the rights conferred on the buyer by the present Law exclude all other remedies based on lack of conformity of the goods". Article 33 sets out the circumstances where the seller has not fulfilled his obligation to deliver the goods.

⁸ ESCAP notes that this suggestion affects arts. 1(2), 7(2), 9, 11, 14(3), 15(1) and 15(2).

operation contracts from the scope of the draft Convention, leaving the draft Convention to deal with straightforward commercial contracts.

Proposed alternate article 1

38. The United Kingdom proposes the reinstatement of the alternative text of this article as adopted by the Working Group at its eighth session. This was for use by those States which adopted the draft Convention on the International Sale of Goods and provided as follows:

“This Convention applies to the formation of contracts of sale of goods which, if they were concluded, would be governed by the Convention on the International Sale of Goods.”⁹

Article 2

Article as a whole

39. ICS is pleased to note that the parties may agree to exclude the application of the Convention or derogate from or vary the effect of any of its provisions.

Unilateral variation or exclusion of Convention

40. Czechoslovakia, the secretariat of ECE, Finland, Sweden and the United Kingdom comment on the question whether one party should be able to unilaterally exclude the application of the draft Convention or vary or derogate from any of its provisions.

41. The secretariat of ECE favours the solution adopted by the Working Group, i.e. that agreement of the parties is necessary to vary or exclude the draft Convention.

42. Czechoslovakia, Finland, Sweden and the United Kingdom are, to varying degrees, opposed to the rule contained in article 2 that the draft Convention may be varied or excluded only by agreement of the parties.

43. Czechoslovakia states that the question of whether derogation from or variation of the provisions of the draft Convention might also be permitted on the basis of a unilateral act of one of the parties should be reconsidered. Czechoslovakia notes that difficulties may arise in connexion with the application of the present article 2, in particular in respect of the complicated question concerning the rules which are to be applied to the agreement on the exclusion or derogation from the provisions of the draft Convention. For instance, example 2A.3 in the commentary¹⁰ may be interpreted in another way, namely, that a part of the offer was a condition requiring written form for the contract. If the other party purported to accept the offer by telephone, this oral form of reply meant modification of the conditions of the offer and could not be considered as an acceptance, taking into consideration article 13 of the draft Convention. The relationship between article 2 and article 13 should be clarified because the conclusion of paragraph 10 of the commentary relating to article 2 is not the only possible solution of the problem. The

⁹ A/CN.9/128, annex I.

¹⁰ Report of the Secretary-General: commentary on the draft Convention on the Formation of Contracts for the International Sale of Goods (hereafter referred to as commentary), (A/CN.9/144 (reproduced in the present volume, part two, I, D).

same difficulties arise in connexion with other examples used in the commentary.

44. Finland states that under paragraph (1) of this article the parties may agree to exclude the application of the Convention. The wording of the paragraph suggests that the offeror may not unilaterally exclude the application of the Convention. This might prove surprising to parties involved in international sale of goods. It might also be asked what happens if the offer contains a provision according to which the offer is not subject to the Convention, and the offeree does not react in any way. The result would seem to be, that a contract has been entered into according to the provisions of the Convention. It might, however, also be held, that the parties have not reached agreement on this point and that no contract has been made. Further, it might be asked how an agreement such as that envisaged in the paragraph should be made. It might be held that this is not an agreement for the international sale of goods and that the convention would not be applicable to such an agreement. Finland therefore proposes that paragraph (1) of article 2 be deleted and that a second sentence be added to the present paragraph (2) as follows:

“A party is deemed to have accepted the rules in the offer or the reply to be followed in respect of the formation of the contract unless he objects to them without delay.”

45. Sweden states that interpreted literally paragraph (1) of this article seems to require an express agreement to exclude application of the draft Convention completely. Sweden states that this requirement seems to be rather strict. Circumstances other than express agreement should also exclude application of the draft Convention in certain cases. For instance, should the parties in their prior relations have applied national rules, they should be regarded as having excluded application of the draft Convention when forming a subsequent contract.

46. The United Kingdom proposes that it should be possible for the draft Convention or any of its provisions to be excluded or varied by the unilateral act of a party, and not only by the agreement of both parties.

Paragraph (1)

47. The Hague Conference notes that this paragraph creates the impression that the right to exclude the draft Convention derives from the draft Convention. However, it might be considered illogical to allow parties to rely on a provision of a convention which they exclude. A further problem is that the formation and validity of the exclusion agreement is not dealt with. These considerations lead to the question whether the provision is really needed.

Paragraph (2)

Derogation from provisions of Convention

48. The Netherlands states that paragraph (2) lays down that in principle the parties may agree to derogate from or vary the effect of the draft Convention's provisions. The commentary points out that such agreement must precede the conclusion of the contract of sale. The following example is given: A orders goods from B, stating that (in derogation from article 3, para. 1, of the

draft Convention) acceptance must be in writing; B accepts by telephone. According to the commentary, the acceptance is effective in spite of any protest which A might make, since the parties had not agreed beforehand to derogate from article 3, paragraph (1).¹¹ The Netherlands has serious objections to this view, because the offeror must have the liberty to determine both the substance of his offer and such other modalities as the duration of its validity, the date on which it is to take effect and the manner in which it is to be accepted. The offeree must not be capable of accepting the offer without accepting these attendant conditions; if the offeree accepts the offer, it must be assumed that he also accepts any deviations from the draft Convention's basic provisions it may contain. The acceptance of an offer can therefore in itself involve deviating from the Convention, and prior acceptance of deviations proposed in the offer should not be demanded. The Netherlands notes that the other example given in the commentary must also be resolved in this manner.¹² If A states in his offer that B's written acceptance becomes effective at the moment it was sent instead of at the moment of receipt, as provided in article 12(2), and B then accepts the offer in writing, the moment of sending should then indeed be decisive. If A has, for example, set a period for acceptance, he cannot argue that the acceptance came too late if it was sent on time but received too late.

49. The Hague Conference states that paragraph (2) is possibly too wide as it gives a large scope to party autonomy although Contracting States may restrict this by virtue of the provisions of articles 3(2) and 7(2). It is noted that Contracting States which avail themselves of these provisions would probably not allow parties to exclude either the whole Convention or the mandatory provisions in those cases where the Convention applies. Similarly, it is noted that States which were of the view that the Convention should not apply to consumer sales (art. 1(4)(a)) may not wish to permit the parties to include consumer sales within the scope of the Convention. Moreover, the parties should not be permitted to waive article 5 of the draft Convention.

50. See also paragraphs 74 to 75 below on the desirability of making article 5 mandatory, paragraphs 121 to 125 below on the desirability of being able to derogate from article 18(2) and paragraphs 128 to 130 below on the operation of article (X).

Factors establishing agreement to derogate from provisions of Convention

51. Australia notes that as the words "agree to" have been retained in paragraph (2), the references to "offer" and "reply" seem to need modifying. An offer—and often also a reply—does not of itself manifest an agreement. The drafting would therefore be improved by substituting "the negotiations, including offer and reply" for "the negotiations, the offer or the reply".

52. Czechoslovakia notes that should the principle of an agreement be accepted as the basis for derogation from or exclusion of the draft Convention, "usages" mentioned at the end of paragraph (2) should be deleted

as mere usages cannot be considered to constitute an agreement between the parties. In any case, it is doubtful whether any usages apply in international trade in connexion with general questions concerning formation of contracts to which the scope of the draft Convention is limited.

53. The Netherlands objects to the wording of paragraph (2) which states that agreement "may appear from the negotiations, the offer or the reply, from the practices which the parties have established between themselves or from usage". Agreement cannot be apparent from an order alone, but only from the order and the reply taken together. Finally, the summary appears too limited: agreement can also be apparent from legal transactions other than offer and reply, such as an earlier agreement or a company's articles of association. Such transactions will sometimes but not always be covered by the expression "practices which the parties have established between themselves".

Paragraph (3)

54. ESCAP notes that, in the interest of prudent business practice, there are some matters to which undue attention should not be drawn or which should not be encouraged. One of these is the practice of acceptance of offers by remaining silent. However, article 2(3) stresses that a term of the offer stipulating that silence shall amount to acceptance is not effective unless the parties have previously agreed otherwise. ESCAP considers that article 12(1) would provide sufficient coverage of the point in question, i.e., "Silence shall not in itself amount to acceptance" without belabouring the point of the possibility that the parties might previously agree otherwise.

55. The Netherlands notes that paragraph (3) lays down that "a term of the offer stipulating that silence shall amount to acceptance is not effective, unless the parties have previously agreed otherwise"; the wording of this exception is too restrictive: practices customary between the parties and usage can also lead to the other party being bound by silence and allow the offeror to stipulate this in his offer. Strikingly, article 12, paragraph (1), also includes a regulation to the effect that silence in itself does not amount to the acceptance of an offer. Perhaps the outcome advocated above can be achieved with the help of the latter regulation. However, the relationship between the two regulations is unclear, and it would be better to cover the matter of acceptance by silence in a single provision.

Article 3

Paragraph (2)

56. Austria regrets the existence of this provision because the substantive rule in article 3(1) is contained in article 11 of the draft Convention on the International Sale of Goods. Furthermore, the possibility of making a reservation may affect the trust in the validity of agreements made by parties whose places of business are in States where article 3(1) is applicable and those parties do not know whether the other Contracting State has made a reservation under paragraph (2).

57. Australia has no strong objections to this provision but proposes an amendment to article (X) to pre-

¹¹ Commentary A/CN.9/144, example 2A.3.

¹² *Ibid.*, example 2A.4.

vent that provision from operating unfairly (see the observations of Australia on article (X) at para. 128 below).

58. The comments of the Federal Republic of Germany on article (X) at paragraph 130 below refer to this provision.

Article 4

Scope of article

59. Sweden notes that it appears from the commentary that the interpretation rule in this article only relates to questions connected with the formation of the contract. No rules regarding the interpretation of contracts already concluded are contained either in this Convention or in the draft Convention on the International Sale of Goods (except that relevance of usage is stressed). Should article 4 be accepted, the result would therefore be that the law on international sale would have to distinguish between the interpretation of communications at the time of the formation of the contract and interpretation of the contract itself. It is doubtful whether a distinction of this kind can really be made. In any event, it would seem to be very difficult and there is a risk that the interpretation rule in article 4 would also be applied to the contract as such. Sweden therefore suggests that article 4 be deleted. Sweden makes an alternate proposal which is discussed under "Nature of test for determining intent" below.

Nature of test for determining intent

60. Finland, Sweden and the United Kingdom note that this article, as presently drafted, places too much emphasis on the subjective intent of one of the parties where the other party knew or ought to have known what that intent was, i.e. the rule in paragraph (1).

61. Finland proposes that the order of the paragraphs should be altered to (2), (3) and (1). Finland also proposes that the expression "ought to have known" in the present paragraph (1) be replaced by the expression "could not have been unaware of".

62. Sweden suggests first and foremost that article 4 be deleted (see para. 59 above). Alternatively, Sweden proposes that the subjective interpretation rule referred to in this article should be modified and made more objective. The expression "ought to have known" might, for instance, be replaced by "must have known".

63. The United Kingdom states that it would be preferable to start with the objective approach laid down in paragraphs (2) and (3) and to make that subject to exceptions where account would be taken of a person's actual intent.

Article 5

Article as a whole

64. The Netherlands is pleased to see the inclusion in article 5 of a rule concerning good faith, and would welcome a similar provision in the draft Convention on the International Sale of Goods.

65. Austria notes that the article could eventually be dispensed with although there are no objections to maintaining it in its present formulation.

66. The secretariat of CARICOM questions the usefulness of this provision.

67. Finland and Sweden propose that article 5 be deleted or reformulated to indicate the consequences of a party breaching its provisions. The proposals of Finland and Sweden relating to reformulation of the article are set out below at paragraphs 77 and 78.

68. Australia proposes the deletion of article 5 if it is not possible to define more specifically the concepts of fair dealing and good faith (see the observations of Australia at para. 70 below).

69. The United Kingdom considers that it is undesirable to include in the draft Convention a provision which is so vague and unclear in its effect as this article is.

The concepts of fair dealing and good faith

70. Australia notes that although the principles of good faith and fair dealing are highly desirable principles in international commerce it considers that these concepts are so broad and lacking in precision that they will give rise to widely differing interpretations in the courts of different countries. The article is likely therefore to give rise to uncertainty in the application of the Convention, and to excessive litigation. It is noted that no corresponding provision exists in the draft Convention on the International Sale of Goods to which this draft Convention is in fact subsidiary. For these reasons, Australia prefers that the concepts be re-drafted in a much more specific fashion. If this is not possible, Australia proposes that the article be deleted.

71. The Hague Conference notes that article 5 may be considered to encompass cases where a party was induced to conclude a contract because of the fraud of the other party (art. 10 of the UNIDROIT draft) or because of an unjustifiable, imminent and serious threat (art. 11 of the UNIDROIT draft). However, it is doubtful whether the provisions of the UNIDROIT draft dealing with mistake are encompassed by article 5.

72. The Netherlands notes that while it is true that such vague concepts as "good faith" and "principles of fair dealing" may cause some uncertainty in the legal application of the draft Convention, this drawback is more than outweighed by the advantage that they enable fairer results to be achieved. The following point should nonetheless be noted. It is common knowledge that different legal systems accord very different functions to "good faith": sometimes it has only the effect of supplementing the rules of law governing relations between the parties. In other systems, "good faith" has a derogatory effect, and can therefore set aside the rules prevailing between the parties as a result of the contract. A distinction is conceivable in systems of the latter kind: the "good faith" concept may be allowed only to limit what has been agreed between the parties; on the other hand it may permit departures from custom, from non-peremptory law or even from peremptory law. Certain legal systems recognize the competence of the court to amend or dissolve contracts on grounds of "good faith". On the basis of "good faith", it is possible to declare unenforceable contracts not entered into freely (e.g. under coercion) or unwittingly entered into because of some mistake, misunderstanding or deceit; this is interesting, in view of the fact that the draft Convention contains no rules concerning the validity of the contracts of sale.

73. The Netherlands also notes that considering the theoretically very broad applicability of the "good faith" concept mentioned in article 5 (or as might be included in the draft Convention on the International Sale of Goods), the question arises as to the desirability of precisely delimiting the concept's sphere of application. If this is not done, it is to be feared that its interpretation will vary greatly from country to country, especially since the present draft Convention lacks a provision on the lines of article 13 of the draft Convention on the International Sale of Goods.¹³

Mandatory nature of article 5

74. Czechoslovakia notes that the mandatory character of this article follows only from using the expression "must".

75. Czechoslovakia and the Hague Conference are of the view that the parties should not be permitted to waive or derogate from this provision. Czechoslovakia proposes that the following sentence be added to article 5:

"The parties may not derogate from or vary the effect of this article."

Consequences of failure to comply with article 5

76. Finland, Sweden and the Hague Conference comment on the fact that the draft Convention does not deal with the consequences of a party's failure to comply with article 5.

77. Finland notes that the article as drafted seems to contain only a declaration of principle to which no consequences have been attached. If a party is not in good faith concerning a matter of relevance, a rule stating that he must observe the principles of fair dealing and act in good faith would seem to make national law on the consequences of the lack of good faith applicable. No unification would thus be achieved. Finland proposes that the provision be either deleted or reformulated by substituting the word "principles" by the word "requirements" and attaching a provision on the consequences. It might, however, be asked whether such a redrafted provision should not be placed in a future convention on validity of contracts.

78. Sweden states that there is no objection to the principle embodied in this article. However, the article does not include any provisions regarding the consequences for someone who acts in a manner that does not conform to that indicated. The provision is therefore devoid of any real substance and thus is hardly likely to contribute to unification in this matter. Sweden suggests that this article should be deleted from the draft Convention. On the other hand, an article of this kind specifying the consequences referred to above might suitably be incorporated in a possible convention on the validity of contracts.

79. The Hague Conference notes that although this provision does not indicate the consequences if a party

violates its principles, the UNIDROIT draft in dealing with cases of fraud and threat gives the injured party the right to avoid the contract. However, under the draft Convention it is not clear whether the sanction is nullity or merely that violation is a ground for annulment. The Hague Conference notes that this latter alternative creates a period of uncertainty which would only be terminated when annulment was requested. The Hague Conference concludes that failure to provide for the consequences of a breach of article 5 leaves a more or less serious gap in the text and accordingly suggests that it might be preferable to include a provision in the draft Convention which sets out the consequences of a violation of article 5.

Article 7

Paragraph (2)

80. Australia has no strong objections to this provision but proposes an amendment to article (X) to prevent that provision from operating unfairly (see the observations of Australia on article (X) at para. 178 below).

81. The comments of the Federal Republic of Germany on article (X) at paragraph 130 below refer to this provision.

Article 8

Article as a whole

82. Finland states that paragraph (3) contains an additional explanation to paragraph (1) and accordingly Finland suggests that the paragraphs be presented in the order (1), (3) and (2).

Paragraph 2

Public offers

83. Finland notes that under paragraph (2) so-called public offers are to be considered as offers under the draft Convention if it is clearly indicated that they are intended to be regarded as such. This provision is in itself acceptable. However, it might cause difficulties in connexion with article 10 as the offeror cannot know whom such an offer has reached. It might thus be impossible to revoke a public offer.

84. The Netherlands states that there would seem to be no reason for according special treatment to public offers. Public offers also constitute offers if they meet the criteria set out in paragraph (1).

85. Sweden notes that under paragraph (2) advertisements and other public offers are to be considered as offers if they are clearly indicated as such. Sweden notes that this point of view can be accepted, but that it does not seem clear whether such offers can be withdrawn or revoked and, if so, under which circumstances. Sweden states that this question should be clarified if possible.

86. The United Kingdom notes that no specific provision is made for the withdrawal or revocation of public offers. The proposals of the United Kingdom to deal with these problems are set out under articles 9 and 10 at paragraphs 94 and 99 below.

¹³ Article 13 provides: "In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity". (Report of the United Nations Commission on International Trade Law on the work of its tenth session, *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17 (A/32/17)*, para. 35 (Yearbook... 1977, part one, II, A).)

*Paragraph (3)**Definition of offer*

87. Australia notes that paragraph (3) would more accurately reflect the fact that it is not possible completely to enumerate positively what is necessary to make an offer definite, if the paragraph were framed in a negative fashion so as to state the minimum requirements for an offer to be sufficiently definite. It is suggested that the article begin with the phrase "A proposal is not sufficiently definite unless..." instead of the present formulation "A proposal is sufficiently definite if...".

Failure to make provision for the determination of the price

88. Ghana notes that it expressed a formal reservation to the second sentence of paragraph (3) at the ninth session of the Working Group which adopted this text.

89. Ghana opposes the inclusion of the second sentence of paragraph (3) because it accepted the inclusion of a similar provision in the draft Convention on the International Sale of Goods only on the understanding that national legal systems were to be free to determine whether contracts could be validly formed without agreement on price. The present provision contained in the second sentence of article 8 (3) would make invalid in all the legal systems of Contracting States the formation of contracts which do not state a price or make provision for its determination, even though the national rules of particular legal systems may refuse recognition to such contracts. The Ghana Government deprecates this position. Another reason why Ghana favours the deletion of the second sentence of article 8 (3) is that its formula for the determination of price, where no price has been fixed in the contract, is too one-sided and seller-oriented. It creates the danger of sellers' prices being imposed on buyers after vague negotiations. Even if the second sentence is to be retained in the draft Convention, Ghana prefers more neutral measures, such as the prevailing "market" price or a "reasonable" price.

90. The Hague Conference states that the second sentence of paragraph (3) does not state what one would expect it to say viz., that even if no provision for determining the price is made, a proposal may still be considered as definite, whenever the price may be fixed in accordance with the second sentence. The actual text, however, is nearer a rule of substantive law on the determining of the price and would seem to belong to the scope of the draft Convention on the International Sale of Goods. Moreover, this rule may not apply in all cases, for instance where individual products or objects are sold, so that the rule in the second sentence will leave open cases where the proposal is not definite if no provision for the determination of the price is made.

91. The Hague Conference notes that paragraph (3) also refers to the time of the conclusion of the contract. This seems to confer a certain advantage on the offeree, particularly in the case of irrevocable offers. In a time of fluctuating market prices he can delay his acceptance, delaying thereby the moment of conclusion of the contract and obtaining a more favourable price. It suggests that this effect of fluctuation should be eliminated by fixing a moment (and thereby a price) which is invari-

able. The moment to which reference should be made is that of the dispatch of the offer. This does not work to the disadvantage of the offeree because he will always have the option of refusing the offer if the market price has gone in an unfavourable direction.

Article 9

92. Finland notes that, in view of its comments in relation to article 8, article 9 should apply only to offers to one or more specific persons. Finland proposes that words to that effect should be inserted in article 9.

93. Sweden accepts the compromise achieved between the theories of general revocability of offers and general irrevocability of offers. However, Sweden states that the distinction between withdrawal and revocation of an offer may be somewhat difficult to understand. Consequently, the possibility should be considered of redrafting articles 9 and 10 so that the necessity of using both these concepts is avoided.

94. The United Kingdom proposes that article 9 make provision for the withdrawal of public offers by providing that the withdrawal of such offers may be communicated by taking reasonable steps to bring the withdrawal to the attention of those to whom the offer was addressed.

*Article 10**Article as a whole*

95. The Federal Republic of Germany particularly welcomes the compromise on the question of revocability embodied in article 10.

96. Sweden states that the possibility of redrafting articles 9 and 10 to avoid using both the concepts of withdrawal and revocation should be considered (see the comments of Sweden under article 9 at paragraph 93 above).

Public offers

97. Finland notes that, in its comments in relation to article 8, it stated that since an offeror of a public offer cannot know whom such an offer has reached, it might be impossible to revoke such an offer.¹⁴ Therefore, it states that article 10 should apply only to offers to one or more specific persons. Finland proposes that words to that effect should be inserted in article 10.

98. On the other hand, the Netherlands points out that article 10 fails to take into account the possibility of revoking a public offer as referred to in the final words of article 8 (2).

99. The United Kingdom proposes that article 10 make provision for the revocation of public offers by providing that the revocation of such offers may be communicated by taking reasonable steps to bring the revocation to the attention of those to whom the offer was addressed.

Revocation of revocable offers where acceptance is by conduct

100. Australia states that paragraph (1), read to-

¹⁴ See para. 83 above.

gether with paragraph (2), makes provision for the revocation of a revocable offer "if the revocation reaches the offeree before he has dispatched his acceptance". However, in the light of article 12 (1), which now provides that acceptance is constituted either by "A declaration or other conduct indicating assent to an offer", paragraph (1) is expressed too narrowly. It is only appropriate to the case where acceptance is constituted by a declaration. It would appear to have the surprising effect that although it prevents an offeror from revoking a revocable offer after an acceptor has dispatched his acceptance, it does not prevent him from doing so where an acceptor has indicated consent to the offer in any other way—even orally. To rectify this omission it is suggested that the words "dispatched his acceptance" in paragraph (1) be replaced with the words "indicated his assent to the offer".

Paragraph (1)

101. The Netherlands notes that paragraph (1) lays down that "the offer is revoked if the revocation reaches the offeree before he has dispatched his acceptance". This wording takes no account of (a) oral acceptance, (b) acceptance by "other conduct indicating assent" which comes to the knowledge of the offeror (art. 12, paras. (1) and (2)), or (c) acceptance as a result of an act as referred to in paragraph (3) of article 12 which need not come to the knowledge of the offeror. It is explained in the Commentary that no rule is necessary to cover these cases, but the Netherlands none the less considers clarification desirable and therefore proposes for paragraph (1) some such wording as: "the offer may be revoked as long as it has not been accepted and notice of acceptance has not been dispatched".

Paragraph (2)

102. Australia does not object to paragraph (2) of this article, but draws attention to the fact that the combined effect of its three subparagraphs will be, in practice, for good or ill, virtually to eliminate the concept of the revocable offer—having regard to the fact that the overwhelming number of offers indicate that they are "firm".

Paragraph (2) subparagraph (b)

103. The United Kingdom is concerned about the provision in paragraph (2) (b) to the effect that an offer cannot be revoked if it states a fixed period of time for acceptance. It is feared that this may constitute a trap for offerors in those countries whose systems differentiate between fixing a time for acceptance (i.e. a time on the expiration of which the offer will lapse) and fixing a time within which an offer may not be revoked.

Paragraph (2) subparagraph (c)

104. The Netherlands observes that subparagraph (2) (c) uses the phrase "has acted in reliance on", while article 18, paragraph (2), uses "has relied on". The Netherlands would favour linguistic uniformity on this point, preferring the expression used in article 18, since it must be possible to cover both an action and failure to act. One could imagine a case in which a person to whom an offer is made trusts that it is being held open and therefore does not respond to an offer from a third party.

Article 12

Article as a whole

105. Australia considers that the draft Convention has been improved in several important respects one of which is the incorporation of acceptance by conduct in article 12.

Offers stipulating no time for acceptance

106. Australia notes that under article 15 if an offer stipulates no time for acceptance, that is, if the time for acceptance is a "reasonable time" under article 12 (2), an acceptor who hears nothing from the offeror after despatching his notice of acceptance, can never be sure whether the offeror regards his acceptance as:

- (i) Effective, because in time, or
- (ii) Ineffective because out of time.

In Australia's view, a provision to the effect that such an acceptance is always effective unless the offeror notifies the offeree to the contrary, would be fairer and simpler. Accordingly, Australia suggests that:

- (i) Article 15 be confined to acceptances of offers that fix a period of time for acceptance, and be re-entitled "Acceptance outside time fixed".
- (ii) A new paragraph (3) be inserted in Article 12, following paragraph (2), along the following lines:

"Where an offer does not fix a period of time for acceptance, an acceptance is effective if the indication of the offeree's assent:

- (a) Reaches the offeror within a reasonable time, or
- (b) Reaches the offeror at a later time and the offeror does not, without delay, inform the offeree orally that he considers his offer as having lapsed or dispatch a notice to that effect."
- (iii) Paragraph (2) of article 12 be amended by substituting a reference to paragraph (4) for the present reference to paragraph (3) in the first line, and deleting the words in the second sentence commencing "or if no time is fixed", to the end of the sentence, and
- (iv) Paragraph (3) of article 12—which would become paragraph (4)—be amended by deleting the introductory word "However".

Paragraph (1)

Acceptance by silence

107. See the comments of ESCAP and the Netherlands set out under article 2 (3) at paragraphs 54 and 55 above.

108. The Federal Republic of Germany states that the second sentence of article 12 (1) is a source of misgiving. It is acceptable in so far as in legal relationships silence is, in principle, to be taken as a rejection because it cannot be given a positive interpretation. However, there are cases conceivable in which, under the prevailing circumstances, the offeree would be violating the principle of good faith if he did not notify the offeror of his rejection. In such cases it would appear appropriate, by way of exception, to regard silence as acceptance. Article 12 (1), second sentence, does not permit of any such interpretation and can therefore lead

to unreasonable decisions. This provision should therefore be deleted.

Paragraph (2)

109. Finland doubts whether any distinction can be made between the acceptance becoming effective and the conclusion of the contract. Finland states that if no distinction is intended it might be more clear to substitute the words "acceptance of an offer becomes effective" with the words "the contract is concluded".¹⁵

Paragraph (3)

110. Australia observes that although the factual situations which led to the inclusion of paragraph (3) are recognized,¹⁶ it is considered that the inclusion of this paragraph unduly and unnecessarily confuses the main rule contained in paragraph (2) that acceptance by conduct should not be effective until the offeror learns of it. Australia also notes that there is unavoidable uncertainty about the scope of paragraph (3), and hardship may result to an offeror who, in ignorance of the offeree's action and on too narrow an interpretation of paragraph (3), may mistakenly assume the offer has lapsed and make other arrangements accordingly. Australia states that this uncertainty seems unjustifiable having regard to the fact that the provisions of article 2 (2) are available to the parties, under which they clearly may agree to a derogation from the strict requirements of article 12 (2).

Paragraph (4)

111. Australia has no strong objections to this provision but proposes an amendment to article (X) to prevent that article from operating unfairly (see the observations of Australia on article (X) at para. 128 below).

112. The comments of the Federal Republic of Germany on article (X) at paragraph 130 below refer to this provision.

Article 13

Article as a whole

113. Australia considers that the draft Convention has been improved in several important respects particularly by deleting the paragraph of the previous draft of this article which dealt with confirmation of a prior contract of sale (see the observations of Australia at para. 7 above).

Paragraph (1)

114. The Netherlands notes that this paragraph lays down that "a reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer". In the Commentary¹⁷ on articles 11 and 13 it is pointed out that "a

reply that makes inquiries or suggests the possibility of additional terms" should not too soon be regarded as a reply in the sense of this article, since the offeree would then run the risk of the offer being terminated (article 11). In this light the question arises whether the term "reply" in paragraph (1) is not too vague. It would be better to state that paragraph (1) relates only to a reply which is clearly intended as an acceptance of the offer. The word "reply" could perhaps be replaced with "purported acceptance" or even "acceptance" (see para. (2), which already has the term).

115. Sweden states that to avoid misunderstanding it should be indicated in paragraph (1), as has been done in paragraph (2), that the provision concerns a reply to an offer which purports to be an acceptance. In other words, it should be made clear that paragraph (1) does not refer to communications intended to explore the willingness of the offeror to accept different terms while leaving open the possibility of later acceptance of the offer.

Paragraph (2)

116. Australia states that it is in complete agreement with the policy underlying paragraph (2) that a party to a contract formed under the draft Convention should not be able to avoid that contract by relying only on immaterial differences between the offer and acceptance in the well-known "battle of the forms" situation in international commerce. However, by requiring the offeror to make a quick decision whether a reply to his offer contains such modifications as to make it a counter-offer or whether the reply is an acceptance with immaterial alterations, the paragraph places a burden on the offeror. He is left at major risk if he treats as a counter-offer a reply which a court subsequently decides constituted an acceptance. Australia considers that the present wording of paragraph 2 makes this burden unduly heavy. The problem could be alleviated by specifying more precisely the kind of additions on differences to which the paragraph is intended to apply. Australia suggests the additions to the paragraph of a sentence along the following lines:

"Additional or different terms contained in a reply do not materially alter the terms of the offer if, but only if, they deal with insignificant matters such as grammatical changes, typographical errors or the specification of detail implicit in the offer."

Australia notes that a further problem with paragraph (2) is that it gives carte blanche to an offeror to repudiate an agreement on the basis only of immaterial differences between offer and acceptance.

117. Czechoslovakia proposes that paragraph (2) be revised as follows:

"(2) However, a reply to an offer which purports to be an acceptance but which contains a different wording of the terms of the contract without modifying its contents constitutes an acceptance."

Czechoslovakia points out that it should be accepted that the principle that a reply containing any additional or different terms of the contract is not considered to be an acceptance. Czechoslovakia notes that the words "which do not materially alter the terms of the offer" are too vague and may be interpreted in different ways by courts of different countries.

¹⁵ The concept of an acceptance being effective is also used in articles 12 (3), 15 (1), 15 (2), 16 and 17.

¹⁶ See the report of the Working Group on the International Sale of Goods on the work of its ninth session (Geneva, 19-30 September 1977), A/CN.9/142, at paras. 242-249 (reproduced in the present volume, part two, I, A.).

¹⁷ A/CN.9/144 (reproduced in the present volume, part two, I, D).

Article 15

Scope of article 15

118. Australia suggests that article 15 be confined to acceptances of offers that fix a period of time for acceptance, and that the article be re-entitled "Acceptance outside time fixed". This proposal is discussed at paragraph 106 above.

Time of conclusion of contract in cases of late acceptance

119. Finland notes that it is not quite clear when a contract is concluded under this article. Finland suggests that the contract is concluded when the late acceptance reaches the offeror.

120. The Netherlands points out that article 15 (1) lays down that "a late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or despatches a notice to that effect". The Netherlands states that if the offeror gives any such notice, the contract becomes effective when the late acceptance has reached the offeror, and not—as the Commentary appears to imply¹⁸—when the offeror despatches his notice. Consequently, the Netherlands states that there is no difference between paragraphs (1) and (2) regarding the date on which the contract becomes effective.¹⁹

Article 18

Paragraph (2)

121. Czechoslovakia states that the main purpose of an agreement in a contract to the effect that such a contract may be modified or rescinded only in writing is a wish of the parties to be safeguarded against tendencies to construe a modification or rescission of the contract only on the basis of negotiations relating to such possibilities. The purpose of paragraph (2) is to grant such a protection. This aim cannot, however, be achieved if it is possible on the basis of article 2, paragraph (2), to derogate from or to vary the effect of article 18, paragraph (2), by an oral agreement as well. Paragraph (2) of article 18 should be, therefore, of mandatory character.

122. The Federal Republic of Germany expresses doubt with regard to the provisions of article 18 (2). The Federal Republic of Germany notes that speedy decisions by the parties to the contract would be impeded. In any case there would appear to be no real need for such a provision. On the one hand it is not readily apparent why parties who, by virtue of article 2, can agree to exclude the application of the whole draft Convention should be bound by provisions which they have established themselves and which, consequently, merely serve their own interests and should, therefore, be subject to their own decision to a far greater degree. Again, article 18 (2) is not borne out by the only argument brought into the discussion, i.e. that contracts must be met (*pacta sunt servanda*), for "*pacta sunt servanda*" does not imply that contracts must for overriding reasons of legal principle always be fulfilled to the

letter and that therefore the parties have no power to modify them. Accordingly, the Federal Republic of Germany proposes that article 18 (2) be deleted.

123. The Netherlands states that article 18 (2) lays down that "a written contract which contains a provision requiring any modifications or rescission to be in writing may not be otherwise modified or rescinded." The Netherlands would prefer that a written contract could be modified by mere agreement; this would be particularly important when general terms and conditions are involved. The other party is often unfamiliar with their substance, and therefore does not know if they contain a condition as referred to in paragraph (1). It is certainly in his interest that such conditions be capable of being derogated from by mere agreement.

124. The Netherlands notes that it prefers the expression "has relied on" to the expression "has acted in reliance on" used in article 10 (2) (c). This matter is discussed at paragraph 104 above.

125. Sweden notes that article 18 (2) provides that a written contract which contains a provision requiring any modification or rescission to be in writing may not be otherwise modified or rescinded. Under Swedish law such a provision is not unconditionally valid and the parties may agree to derogate from it. It is difficult to find any convincing reason for limiting the autonomy of the parties on this specific point. Sweden would therefore prefer article 18 (2) to be deleted.

Paragraph (3)

126. Australia has no strong objections to this provision but proposes an amendment to article (X) to prevent that provision from operating unfairly (see the observations of Australia on article (X) at para. 128 below).

127. The comments of the Federal Republic of Germany on article (X) at paragraph 130 below refer to this provision.

Article (X)

128. Australia states that although it has no strong objection to the inclusion of this article (and to the references thereto in arts. 3 (2), 7 (2), 12 (4) and 18) it is felt that the provision could operate unfairly against a party who negotiates a contract with a party having his place of business in a state which has made a declaration and who has no notice of that state having made a declaration under this article applicable to the subject contract. This objection would be overcome by the addition of a paragraph to the article along the following lines:

"A party to the formation of a contract for sale under this Convention who has his place of business in a contracting state which has made a declaration under this article must before negotiations for formation are entered into notify the other party of the fact that a declaration under this article has been made and that it affects the formation of the contract between them."

129. ECE staff members servicing the Working Party on Facilitation of International Trade Procedures have also studied the draft Convention and note the possibilities offered by article (X) of the draft Convention which makes it possible to overcome the differ-

¹⁸ Para. 3 of the commentary on article 15 (A/CN.9/144).

¹⁹ Compare para. 4 of the commentary on article 15 (A/CN.9/144).

ences between national legal systems as to the form required for the conclusion of a contract and related matters. In the context of the facilitation of international trade procedures the article will, however, not solve the procedural and technical difficulties linked to the requirements referred to in the special declaration mentioned therein. The obligation to conclude a contract in writing, authenticated by signature, must now be considered as an obstacle to electronic and other automatic means of transmitting data for the conclusion of a contract or during the course of an international trade transaction. Certain transport contracts are already concluded by using such means and the rapid development of the market for mini-computers is expected to influence strongly also other trade procedures having legal implications. If UNCITRAL—in view of these developments—were to initiate studies of the legal consequences of the use of electronic and other automatic means of data transmission in international trade, the Working Party on Facilitation of International Trade Procedures would be most interested to follow this work and to provide a link with national trade facilitation bodies which are familiar with the practical aspects of everyday international trade procedures. In an informal team set up by the Working Party to study the practical aspects of such problems, one of the questions raised was the possible need of an international Convention to harmonize national laws on the acceptance of computer printouts as evidence.

130. The Federal Republic of Germany notes that the wording of article 3 (2), 7 (2), 12 (4), 18 (2) and (3) and (X) appears to be somewhat formalistic. These provisions make it possible for Contracting States whose national law does not recognize verbal agreements to assert their stricter formal requirements in international trade by means of the reservation permissible under article (X). This raises doubts for several reasons. In the first place, the possibility of making a reservation in a relatively important area of law relating to the formation of contracts is an obstacle to real international standardization. Secondly, it is hard to see the need for any such reservation at all, since contracts of any economic significance would normally be concluded in writing in any case. And thirdly, if agreements made in connexion with the implementation of international contracts for the sale of goods had to be in writing, this would be an obstacle to quick decisions, which might be necessary due to changed circumstances, and thus raise unnecessary problems for international trade. The Federal Government therefore requests those countries who up to now have not been able to dispense with the reservation provided for in article (X) to reconsider and if possible modify their position.

II. COMMENTS BY MADAGASCAR, NORWAY, THE UNITED STATES OF AMERICA AND YUGOSLAVIA (A/CN.9/146/ADD.1)*

CONTENTS

	Paragraphs
Introduction	1
Analytical compilation of comments	2-48
A. Comments on the draft Convention as a whole	2-10
1. General comments on the draft Convention	2-6
2. Relationship to the draft Convention on the International Sale of Goods	7

*3 May 1978.

3. Relationship to the UNIDROIT draft	8-10
B. Comments on specific provisions of the draft Convention	11-48
Article 2	11-12
Article 3	13-14
Article 4	15-20
Article 5	21-23
Article 7	24-26
Article 8	27-28
Article 10	29-33
Article 12	34-37
Article 13	38-40
Article 15	41
Article 17	42/43
Article 18	44-45
Article (X)	46
C. Comments on the UNIDROIT draft	47-48

INTRODUCTION

1. This report is an addendum to the analytical compilation of comments by Governments and international organizations on the draft Convention on the Formation of Contracts for the International Sale of Goods as adopted by the Working Group on the International Sale of Goods (hereafter referred to as the draft Convention) and on the draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods prepared by the International Institute for the Unification of Private Law (hereafter referred to as the UNIDROIT draft). It contains an analytical compilation of comments received between 20 April and 2 May 1978 from Madagascar, Norway, the United States of America and Yugoslavia.

ANALYTICAL COMPILATION OF COMMENTS

A. Comments on the draft Convention as a whole

1. General comments on the draft Convention

2. Norway finds the draft Convention on the whole to be a good basis for further work within UNCITRAL on the preparation of a new convention. Norway states that the amendments it would like to suggest are not of a fundamental character.

3. The United States views the draft Convention with general approval. It is believed that, for the most part, the text will render the draft Convention more widely acceptable than its predecessor.

4. Yugoslavia notes that the draft Convention has certain advantages over the Uniform Law on the Formation of Contracts for the International Sale of Goods. However, even this text has not met fully the needs of international trade. The draft Convention, for example, does not mention standard contracts or general conditions, even though the largest number of international trade contracts is concluded by making reference to, or by making use of, such contracts and general conditions. It would be important also to regulate the situation in which each party makes reference to its own forms or general conditions (the so-called "battle of the forms"). The draft Convention does not treat the question of export and import permits and other forms of permission which are of importance at the time of concluding such contracts. In many standard contracts and general conditions formulated by the United Nations Economic Commission for Europe this question is reg-

ulated, hence, in the opinion of Yugoslavia, adequate attention should be paid to this subject-matter by the draft Convention as well.

5. Yugoslavia also notes that there is no justification for the fact that the draft Convention does not include the provisions of article 11 of the Uniform Law on the Formation of Contracts for the International Sale of Goods on the effect of death and incapacity of a party to submit offers.¹ Yugoslavia states that it would be highly beneficial to international trade if such a convention were to regulate the question of initiating bankruptcy proceedings or other analogous proceedings for the conclusion of a contract.

6. Yugoslavia states that the draft Convention, for the most part, relates to the offer and acceptance (even though these questions are not regulated in detail). However, the draft Convention has failed to take into account a series of other questions which are also important for the formation of contracts, for example, the question of the subject-matter of the contract and the purpose or grounds of the contract. On the other hand, the draft Convention contains certain provisions for which it can rightly be said that they are irrelevant to the formation of contracts (article 18 on modification and rescission of contracts). Yugoslavia states that these provisions could give rise to confusion, particularly because the title of the draft Convention does not indicate that it relates to problems other than those concerning the formation of contracts.

2. Relationship to the draft Convention on the International Sale of Goods

7. Norway states that the scope of the draft Convention should be the same as the scope of the draft Convention on the International Sale of Goods (CISG). Whether the two draft Conventions should be amalgamated or not depends mainly on the question whether an over-all Convention would be as acceptable to States as CISG would be. One should refrain from efforts to amalgamate the two drafts if that would render CISG less acceptable or unnecessarily complicate and delay the work on the said Convention. The Norwegian Government is therefore not in favour of such amalgamation.

3. Relationship to UNIDROIT draft

8. Norway states that the problems covered by the UNIDROIT draft seem to be relatively rare events in respect of contracts for the international sale of goods. Further the draft deals with an area in which increased harmonization of national law would seem hard to achieve. It may also be a risk that the provisions might be understood as being exhaustive. This will increase the importance of the problem of qualifying a matter as a question of validity or of breach of contract. The draft as it stands would seem to be less mature for finalizing deliberations. It does not seem expedient to include additional provisions of the UNIDROIT draft into the draft Convention.

9. The United States notes that the draft Convention incorporates from the UNIDROIT draft the mate-

rial on interpretation, which is the most important matter dealt with in that draft.

10. Yugoslavia states that the UNIDROIT draft has not been harmonized with the new codifications (Convention on the Limitation Period in the International Sale of Goods, draft Convention on the International Sale of Goods). Yugoslavia notes that it is rather unusual that this was not done by the UNCITRAL Working Group on the International Sale of Goods. Instead, a text was forwarded whose many provisions have not been harmonized with the other texts with which the draft Convention should constitute a single whole. Proceeding from the foregoing observations and the circumstances that this draft was produced under the auspices of UNIDROIT as early as 1972, Yugoslav experts are of the opinion that it will need to undergo substantive changes in order that it may be adapted to a whole series of conventions which are being drafted by UNCITRAL on purchase-sale problems.

B. Comments on specific provisions of the draft Convention

Article 2

Unilateral variation or exclusion of Convention

11. Norway notes that, under paragraphs (1) and (2), the parties may agree to exclude the application of the draft Convention or derogate from or vary the effect of its provisions. The wording of the paragraphs suggests that the offeror may not unilaterally exclude the application of the draft Convention or derogate from its provisions. This differs from the system in article 2 of the 1964 Hague Uniform Law on the Formation of Contracts for the International Sale of Goods and seems to raise problems which need further consideration. It should here be noted that the question of application of alternative rules does not seem to be quite the same with regard to formation of contracts as with regard to the material content of contracts (see the different rules in this respect in the Norwegian Acts of Agreements and of Sales).

12. Yugoslavia notes that it emerges from paragraphs (1) and (2) of this article that it is possible to exclude the application of this Convention only through explicit agreements, while individual provisions may be tacitly excluded. In the view of Yugoslavia this concept has not been sufficiently clearly expressed.

Article 3

Paragraph (1)

13. Yugoslavia notes that as regards form it would suffice to stipulate simply that a contract "may be proved by any means". There is no need to make specific reference to "witnesses" as this is understood.

Paragraph (2)

14. See the comments of Norway on article (X) at paragraph 46 below.

Article 4

Article as a whole

¹ Article 11 provides: "The formation of the contract is not affected by the death of one of the parties or by his becoming incapable of contracting before acceptance unless the contrary results from the intention of the parties, usage or the nature of the transaction".

Scope of the article

15. Norway notes that the commentary states that "article 4 on interpretation, as is the case with all the provisions in this draft Convention, relates only to the formation process. This article does not provide rules for interpreting the contract of sale, once a contract of sale has been concluded".² Norway questions whether this limited application of the article has been expressed sufficiently clearly in the text.

Nature of test for determining intent

16. Norway notes that it seems that the main rule from a practical point of view is found in paragraph (2), whilst an exception from this rule is included in paragraph (1). It is therefore proposed to change the order of the paragraphs.

17. Yugoslavia states that the provisions relating to interpretation are good, necessary and useful in such a text. The draft Convention proceeds from a subjective criterion (paragraph (1)) to an objective criterion (paragraph (2)) and that the objective criterion is applied in a subsidiary manner. Yugoslavia points out that, in principle, this approach is good, although, perhaps, these two paragraphs should be made more uniform and formulated in a way to constitute a single norm. More specifically, it would be necessary to further examine the intent of parties, so that imprecise provisions are interpreted according to the "understanding that a reasonable person would have had in the same circumstances". This is even more important in view of the fact that an objective criterion should help in formulating uniform rules on interpretation. Such a criterion would also serve the interests of economically weaker contracting parties who, more often than not, are not familiar with all the finesse involved in the process of concluding contracts in international trade. Therefore, although it would be advisable to proceed from the intent of parties as the basic principle, it would be useful to draw the objective criterion closer to it as the two criteria should not be separate.

18. Yugoslavia also notes that in paragraph (1) a question arises of how to interpret the intent "where the other party knew or ought to have known what that intent was". Will the criterion of a "reasonable person" apply in this case, or will it be interpreted in such a way as to take into account the mutual relations of the negotiating parties?

Paragraph (1)

19. Norway suggests that consideration be given to replacing the expression "ought to have known" by "could not have been unaware of".³

Paragraphs (1) and (2)

20. The United States points out that it would simplify the draft if the long phrase, "communications, statements and declarations by and conduct of a party", were replaced by "a party's language and conduct" in both (1) and (2). They would then read:

² A/CN.9/144, para. 1, of the commentary on article 4 (reproduced in the present volume, part two, I, D.).

³ The expression "ought to have known" also appears in articles 1(4) (a) and 6.

"(1) A party's language and conduct are to be interpreted according to his intent, where the other party knew or ought to have known what that intent was.

"(2) If the preceding paragraph is not applicable, a party's language and conduct are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances."

Article 5

Article as a whole

21. The United States favours the deletion of this article. The United States observes that the provision has no counterpart in the draft Convention on the International Sale of Goods and the terms "fair dealing" and "good faith" do not have a sufficiently precise meaning in international trade to warrant their use in such a statute.

22. Yugoslavia notes that this article is well formulated. However, because of its importance Yugoslavia states that it should be placed among the preceding articles.

Consequences of failure to comply with article 5

23. Norway notes that the article as drafted seems to contain only a declaration of principle to which no specific consequences have been attached. It might be asked whether such a provision should not be redrafted and placed in a possible future convention on the validity of contracts.

Article 7

Article as a whole

24. Yugoslavia notes that the heading of the article is inadequate.

Paragraph (1)

25. Yugoslavia notes that linguistically the provision could be more clearly formulated. For example, Yugoslavia states that it cannot be said that "an offer, declaration of acceptance . . . was delivered to his place of business". Also it is not clear what is meant by the term "indication of intention". Is it a declaration of intent, irrespective of whether made explicitly or implicitly?

Paragraph (2)

26. See the comments of Norway on article (X) at paragraph 46 below.

Article 8

Paragraphs (1) and (2)

27. Yugoslavia notes that in this article the definition of offer is given in the sense of a proposal addressed to one or more specific persons. However, a question could be posed about public offers addressed to an unspecified number of persons.

Paragraph (3)

28. Norway states that according to paragraph (3) a

proposal may in some cases be deemed not to be sufficiently definite if it makes no provision for determining the price. Consideration should be given to modifying this condition when the contract has been performed by delivery of the goods.

Article 10

Paragraph (1)

29. The United States notes that it would be desirable to add language to deal with acceptance by conduct where nothing is "dispatched". The relation of this paragraph to article 12 should be clarified.

30. Yugoslavia states that the principle of "irrevocability" (and not "revocability") is more suitable for the security of international trade, and this should constitute one of the fundamental objectives which the draft Convention should aim at achieving. The right of revocability creates insecurity on the part of the offeree. He is obliged to make, within a specified time, the necessary preparations, negotiate with subcontractors and buyers, and to carry out other studies so that he may make a decision on acceptance or refusal of the offer. For all these reasons, Yugoslavia suggests that this question be re-examined and that paragraph (1) should contain a formulation of the principle of irrevocability, and the following paragraph contain exceptions to this principle.

Paragraph (2) (b)

31. The United States proposes that paragraph (2) (b) should be deleted. Time-limits in offers may have two distinct purposes. One—that of lapse—is to indicate a time after which it is too late to accept ("This offer expires if not accepted in 10 days."). Another—that of irrevocability—is to indicate a time during which the offeror cannot revoke his offer ("This offer is irrevocable for 10 days."). This clause confuses the two by assuming that any time-limit has the second effect of irrevocability, even if the parties may have made it clear that they intended only the first effect of lapse. This is a particularly objectionable rule for countries, such as the United States, where there is a well-recognized difference between provisions for lapse and those for irrevocability, and both are given effect according to their terms. An American businessman would be startled to find that language clearly indicating only the purpose of lapse was to be given the effect of irrevocability as well. Even more so this is unfortunate if both parties come from such countries that the understanding of both would be frustrated by paragraph (2) (b).

Paragraph (2) (c)

32. Norway questions whether paragraph (2) (c) is sufficiently precise. Norway prefers a more elaborated rule on irrevocability of offers.

33. Yugoslavia states that the term "the offer being held open" is not clear. Should it be retained, a definition would be required. In practice, moreover, difficulties could emerge (especially in legal systems in which this is not known) with respect to determining when, and how, the offeree "has acted in reliance on the offer". Consequently, Yugoslavia suggests that a

more precise formulation be given or that paragraph (2) (c) be deleted.

Article 12

Acceptance by conduct

34. Yugoslavia notes that the formulation "a declaration or other conduct by the offeree" is not the most suitable since the term "other conduct" could be interpreted as not constituting a declaration of intent by action (a tacit declaration of intent). The meaning could be made more precise by adding the word "explicit" declaration . . .

Acceptance by silence

35. Yugoslavia makes the following observations in relation to the second sentence of article 12 which provides that silence shall not in itself amount to acceptance. Yugoslavia notes that if the expression "shall not in itself" is intended to apply only to exceptions, this phrase should be better formulated and more precisely stated. On the other hand, if the parties maintain continuing business relations, silence, in itself, could constitute an acceptance in so far as the offeree does not declare that he does not accept the offer.

Paragraph (3)

36. The United States points out that this paragraph does not appear to be consistent with article 10 (1). (See the comments of the United States on article 10 (1) at para. 29 above.)

Paragraph (4)

37. See the comments of Norway on article (X) at paragraph 46 below.

Article 13

Paragraph (1)

38. The United States points out that this paragraph would be easier to read if the words "a reply to an offer" were replaced by "a purported acceptance". The United States also points out that the present version of paragraph (1) is inaccurate in that it suggests that a request for clarification that is sent in reply to an offer is a rejection.

Paragraph (2)

39. The United States points out that this paragraph would be easier to read if the words "a reply to an offer which purports to be an acceptance but" were replaced by "a purported acceptance".

40. Yugoslavia states that in this article the basic problem is to establish the circumstances in which additional or different terms do not "materially alter the terms of the offer". It would be highly useful if the concept of substantive change could be defined, a task extremely difficult to accomplish. Perhaps the same effect could be achieved if instead of the aforementioned words it could be said that a reply to an offer containing additional or different terms could constitute an acceptance "if the circumstances indicate that

the parties, in spite of this, are intent on concluding a contract”.

Article 15

Paragraph (1)

41. See the comments of Norway on article (X) at paragraph 46 below.

Article 17

42/43. Yugoslavia is of the opinion that this article should be deleted.

Article 18

Article as a whole

44. Yugoslavia is of the opinion that this article should be deleted because it is irrelevant to the formation of contracts. These provisions could give rise to confusion, particularly because the title to the draft Convention does not indicate that it relates to problems other than those concerning the formation of contracts (see also para. 6 above).

45. See the comments of Norway on article (X) at paragraph 46 below.

Article (X)

46. Norway states that article (X) is supplemented by a separate paragraph in articles 3 (2), 7 (2), 12 (4) and 18 (3). This system seems to be unnecessarily complicated. These separate paragraphs do not add anything which cannot be achieved by the formulation of article (X). Further, the system of the draft Convention with separate paragraphs in the affected articles does not seem to be quite consistent. Thus there is no separate reservation for writing in connexion with the information given orally after article 15 (1).

C. Comments on the UNIDROIT draft

47. Madagascar notes that since, on the one hand, the provisions concerning defects in the contract, particularly those relating to mistake and consent, are of a general and conventional nature and, on the other, they seem to be in keeping with legal practice in this field, it has no comments to make on them.

48. The Malagasy Government does, however, express some reservations with respect to article 4, paragraph 2, of the draft law, which permits the use of oral evidence for the purpose of applying article 3, concerning substantive procedures for the establishment of the contract; this method by itself is very unreliable, especially now that modern technology, particularly telegraphic communication, provides the parties with much more reliable procedures for international sales. It is hard to see, once it is agreed, as it must be, that in many cases contracts for the international sale of goods can be concluded by modern means such as telegraphic communication, how oral evidence can be accepted in this connexion. If there is no other way of establishing the facts—although this will very seldom be the case—then oral evidence will no doubt have to be used, but the question is whether it is really necessary to spell it out, thus opening the way to practices that are

far too unreliable, particularly if it is borne in mind that, by definition, any contract for the international sale of goods involves a number of important details (nature and quality of goods, terms of payment, place and date of delivery, etc.) on which, in case of dispute, it is likely to prove difficult to rule in favour of one party or the other. Accordingly, although it appears likely that this type of evidence will in practice be very seldom used, it would seem wiser not to refer to it at all in the draft law.

III. COMMENTS BY FRANCE (A/CN.9/146/ADD.2)*

1. This addendum contains the observations of France which were received by the Secretariat on 9 May 1978.

I. General observations

2. There seems to be no reason for maintaining two separate instruments governing respectively the formation of contracts of sale and the effects of such contracts, since the sphere of application as laid down in article 1 is exactly the same.

3. Accordingly, the French Government is of the view that the draft Convention on the Formation of Contracts should be integrated into the draft Convention on the International Sale of Goods (CISG) adopted by UNCITRAL at its tenth session.

4. The French delegation looks forward with interest to the document on this question which the Secretariat will be submitting at the request of the Working Group.

5. It is regrettable that no provisions relating to the validity of contracts have been included in the draft Convention, since this would have been the only point on which the new draft Conventions went beyond the two Hague Conventions of 1964.

6. Articles 4 and 5 are innovations not found in earlier instruments. The French Government is favourably disposed towards them. The rules relating to good faith and interpretation should apply to both the content and the performance of a contract. Accordingly, they should also be included in CISG.

7. The article headings should be deleted. They add nothing to the text and are sometimes ambiguous (arts. 1, 2, 7 and (X)) or incorrect (art. 16: “*révocation*” instead of “*retrait*”; art. 17: “*date*” instead of “*moment*”).** Moreover, there are no article headings in the draft CISG adopted at Vienna in 1977. The chapter titles provide sufficient guidance to the reader.

II. Specific observations

Title of the draft Convention

8. The title should be amended to read: “*Projet de convention sur la formation du contrat de vente internationale de marchandise*”.**

Article 8

Paragraph (2)

9. It would be desirable to reverse the rule, so that

* 9 May 1978.

** These observations do not appear to apply to the English text.

an offer to the public at large would bind the offeror in the same way as an offer made to a specific person. This would provide a clear rule and would avoid the difficulties which will arise in interpreting the phrase "unless the contrary is clearly indicated by the person making the proposal".

Paragraph (3)

10. There is a contradiction between the first and the second sentences. The first sentence lays down the principle that, in order for a contract to be formed, the price must be fixed or capable of being determined. The second sentence implies the opposite. The French Government is firmly opposed to any solution which would allow a contract to be considered concluded when the price is neither fixed nor capable of being determined. It therefore requests the deletion of the second sentence. Article 37 of CISG is all that is needed in order to determine the price when it is uncertain. The rule laid down in that article is valid as regards payment of the price, but it should not be extended, as is proposed, to apply to the formation of contracts.

Article 18

11. This article does not relate to the formation of contracts but to their modification and rescission. It should therefore be transferred to CISG.

12. The second sentence of paragraph (2) is unclear. It will give rise to errors in interpretation. It should therefore be deleted, especially since the principle of good faith, as stated in article 5, suffices to ensure the desired result.

IV. COMMENTS BY THE GERMAN DEMOCRATIC REPUBLIC (A/CN.9/146/ADD.3)*

1. This addendum contains the observations of the German Democratic Republic which were received by the Secretariat on 10 May 1978.

2. The German Democratic Republic considers it desirable to examine at the eleventh session of UNCITRAL the following matters in connexion with the discussion on the draft Convention on the Formation of Contracts for the International Sale of Goods.

3. In their current state the draft Convention on the International Sale of Goods (CISG) and the present draft Convention on the Formation of Contracts for the International Sale of Goods do not yet cover the problems of the validity of contracts for the international sale of goods. In order to arrive at a regulation which will be as complete as possible, provisions on the various aspects of the validity of declarations (offer, acceptance) and of contracts should be included in the present draft Convention. The German Democratic Republic has in mind here rescission on account of error, incorrect transmission and fraud, but also violation of legal prohibitions, approval of contracts, voidness of individual terms of contract and contracts subject to conditions precedent and subsequent.

4. As a basis for an exchange of views the German Democratic Republic takes leave to submit the following amendments which could be included in the draft Convention at various points:

A

Violation of legal prohibitions and impossibility of performance

A declaration is void if it violates a statutory prohibition or has as its object an impossible performance.

B

Grounds for rescission

(1) The declarant has the right to rescind his declaration if, despite the observance of customary commercial care, he was in error as to the contents of the declaration on making it.

(2) The declarant also has the right to rescind his declaration if, despite the observance of customary commercial care, he was in ignorance of the facts, including the essential characteristics of persons or things, and, with knowledge of the facts, would not have made such a declaration.

(3) The declarant also has the right to rescind his declaration if it was incorrectly transmitted.

(4) The declarant has moreover the right to rescind his declaration if he has been induced by fraud or threats, by or on behalf of the addressee of the declaration, to make a declaration.

C

Exercise of rescission

(1) The rescission is effective only if the party entitled to rescind declares it immediately after he has gained knowledge of the grounds of rescission or, in the case of a threat, immediately after its removal. Rescission is excluded if the party entitled to rescind, after discovery of the error, confirms his original declaration.

(2) The opposing party has the right to object to the rescission within a period of one month. If the opposing party fails to object within this period, the rescission is deemed to have been effected. If the opposing party objects, the party entitled to rescind may only enforce his right of rescission within three months of receipt of the objection by the competent court or arbitral tribunal.

(3) The right of rescission in accordance with (1) expires not later than two years after submission of the declaration.

D

Legal consequences of rescission

(1) A successfully rescinded declaration is void from the outset.

(2) In the case of paragraph B (4) the rescinding party is entitled to demand compensation from the opposing party.

(3) In all other cases of rescission the opposing party has the right to demand reimbursement of expenditure from the rescinding party unless he knew, or should have known, the grounds for rescission.

* 10 May 1978.

E

Coming into effect of a contract

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

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

F

Conditions precedent and subsequent

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

G

Approval by a third party or by the party represented

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

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

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

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

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

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

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

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

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

2. ICC has taken a favourable position both to the

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

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

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

Sphere of application

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

Place of business

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

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

* 23 May 1978.

Autonomy of the parties

6. Article 2 (1) provides that only "agreement" between the parties may exclude the application of the convention. However, a party wanting to negotiate a contract under its domestic law rules, e.g. by stating in a set of General Conditions appended to an offer that any contract is to be governed by that law, should be allowed to do so.

7. Further, prior practice between the parties or usage, generally, may exclude or substitute the application of particular rules in the convention without previous "agreement" thereon being necessary. This should be adequately reflected in article 2 (2).

Form

8. The provisions in the present draft deleting any requirements of form for the formation of a contract are in line with the provisions in the draft Sales Convention. The Commission refers to paragraphs 13 and 14 in the said ICC statement, but finds the present contents allowing a State to make a declaration/reservation on this point acceptable as a compromise.

Interpretation

9. Any distinction between interpretation of offers and acceptances on the one side and interpretation of contracts on the other is untenable or most futile and must be avoided. Neither the draft Sales Convention nor ULF (1964) contains any rules on interpretation of contracts, offers or acceptances, except that the relevance of usages is stressed. The Commission refers in that respect to what is said in the said ICC statement on usages and interpretation of trade terms (paras. 8-11).

10. To let one party's "intent" prevail over the regular ordinary meaning only because the other party *ought* to have understood that the first party expressed himself improperly, is not acceptable. The provisions on interpretation in article 4 could very well be deleted but if retained, a more "objective" standard of interpretation must be set up, e.g. as follows:

- (i) Communications, statements and declarations by and acts of a party shall be interpreted according to the meaning usually given to them in the trade concerned, or where no such particular meaning is given to them in the trade concerned, according to their ordinary meaning. However, if another but common (alternatively: "mutual" or "joint") intent of the parties can be established, such common intent shall prevail.
- (ii) A party may not rely on such usual or ordinary meaning as said in paragraph (1), if he knew or could not have been unaware of (alternatively: or ought to have known) that the other party understood such communication, statement, declaration or act differently.

Fair dealing and good faith

11. The Commission does not object to the inclusion of such provision in the convention. However, in some countries, Courts seem to be prepared to give such phrases a rather wide and wholly unpredictable interpretation and application. One might therefore also consider the deletion of this provision, particularly as it does not appear in the draft Sales Convention.

Usage

12. The Commission refers here to what was said in the said ICC statement (paras. 8-11) on usages and the remarks above to article 2 (2).

Offer

13. The effect of article 8 (3) now seems to be that an offer *is* sufficiently definite to make a contract upon acceptance if it only indicates the kind of goods, quantity and price. According to the Secretariat's commentary, however, it is always a matter of interpretation in the particular case whether the offeror intended to be bound upon acceptance. This may also be in accordance with general understanding in commercial relations where parties frequently expect more details of the bargain to be defined than the said ones before the contract can be considered as concluded. The present text should therefore be adjusted so as to correspond more closely on this point to the contents of the commentary.

Withdrawal and revocation of offer

14. In general, the compromise reached here between the legal systems in which an offer stands, at least for a reasonable time, and those in which an offer always can be revoked until it has been accepted, seems workable. However, one should reconsider whether the contents could not be presented in a more easily intelligible way. The distinction between withdrawal of offer and revocation of offer is puzzling and a consolidated article on when an offer lapses may be useful. Further, the rule that an offer cannot be withdrawn after it has "reached" the addressee seems too narrow if applied to letters or telex communications. The deadline should be the moment when the communication came to the knowledge of the addressee or when the addressee in some way acted thereupon.

Acceptance

15. The Commission wants to stress the importance of the rule that offers may be accepted by "other conduct" than oral or written declarations, e.g. by dispatch of the goods. Although silence in itself shall not amount to acceptance, it may do so in a given particular situation. The wording of article 12 (3) may also be too narrow and the more generous formulation in article 6 (2) of ULF preferable.

Additions or modifications to the offer

16. Here an important exception from the rule that silence does not amount to acceptance is introduced. Additional or different terms which do "not materially" alter the terms of the offer become part of the contract unless objected to. Such rule is acceptable only if the interpretation of the words "not materially" is kept within some, rather narrow limits. A clarification in that direction would be useful.

Late acceptance

17. It might be reconsidered whether or not the rule in article 15 (2) that late acceptance may nevertheless be effective unless objected to, should be given a wider application (narrowing thereby the application of the rule in para. 1).

Modification and rescission of contract

18. In sets of general conditions or in particular contracts, one meets rather frequently provisions saying that terms and conditions set out may not be modified unless in writing. Indeed, when a contract is made in writing, it is a matter of order and good business routine to have any changes and modifications therein recorded in writing. Such provisions are usually understood or applied as recommendations. That a failure to observe them should result in making a modification orally agreed upon null and void would, however, be a rather harsh sanction. It may lead to considerable inequities which cannot entirely be removed by the help of the rule of estoppel in the last sentence of article 18 (2). Such a rule would also not be in accordance with the

overruling policy in the convention, article 3, opposing requirements of written form in the formation of a contract. The Commission suggests therefore that the present provision which has no counterpart in ULF (1964) be deleted. Even if such rule is deleted, a contractual provision of this kind would not be entirely without effects. It would usually establish a presumption against the parties maintaining that the oral agreement modifying the main contract has been concluded.

C. Comments on the UNIDROIT draft

19. The UNIDROIT draft rules relating to the validity of contracts which the Working Group has not included in its draft do not give rise to any particular comments.