I. INTERNATIONAL SALE OF GOODS

A. Report of the Working Group on the International Sale of Goods on the work of its eighth session (New York, 4–14 January 1977) (A/CN.9/128)*

CONTENTS

INTRODUCTION

1. The Working Group on the International Sale of Goods was established by the United Nations Commission on International Trade Law at its second session held in 1969. The Commission at its 44th meeting, on 26 March 1969, requested the Working Group to ascertain which modifications of the Hague Convention of 1964 relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods might render it capable of wider acceptance by countries of different legal, social and economic systems and to elaborate a new text reflecting such modifications.[1] At its third session the Commission decided that the Working Group should commence its work on formation of contracts when it had completed its work on the revision of the Uniform Law on the International Sale of Goods.[2]

2. The Working Group is currently composed of the following States members of the Commission: Austria, Brazil, Czechoslovakia, France, Ghana, Hungary, India, Japan, Kenya, Mexico, Philippines, Sierra Leone, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland and United States of America.

3. The Working Group held its eighth session at the Headquarters of the United Nations in New York from 4 to 14 January 1977. All members of the Working Group were represented.

4. The session was also attended by observers from the following members of the Commission: Argentina, Australia, Bulgaria, Chile, Cyprus, Gabon, Germany, Federal Republic of, and Poland. Observers from Canada, Finland, and the German Democratic Republic also attended the session.[3] In addition, the session was attended by observers from the following international organizations: East African Community, Hague Conference on Private International Law, the International Institute for the Unification of Private Law (UNIDROIT) and the Inter-American Juridical Committee.

5. The Working Group elected the following officers:
Chairman .....Mr. Jorge Barrera-Graf (Mexico)
Rapporteur .....Mr. Gyula Eörsi (Hungary)

6. The following documents were placed before the Working Group:

(*a*) Provisional agenda and annotations (A/CN.9/WG.2/L.3);

(*b*) Report of the Secretary-General: formation and validity of contracts for the international sale of goods (A/CN.9/WG.2/WP.26 and Add.1).[4] The Secretariat prepared for the consideration of the Working Group a draft of a convention on the formation of contracts for the international sale of goods (A/CN.9/WG.2/WP.26, annex I).[5] The Secretariat also prepared a critical analysis of the UNIDROIT draft law on the validity of contracts of international sale of goods (A/CN.9/WG.2/WP.26/Add.1);[6]

(*c*) Convention relating to a uniform law on the formation of contracts for the international sale of goods, with annexes (extract from the *Register of Texts and Conventions and other Instruments concerning International Trade Law, Vol. I* (United Nations publication, Sales No. E. 71.V.3));

(*d*) Analysis of replies and comments by Governments on the Hague Convention of 1964 on the Formation of Contracts for the International Sale of Goods (A/CN.9/31, paras. 144 to 156; UNCITRAL Yearbook, vol. I: 1968-1970, part three, I);

(*e*) Draft of a law for the unification of certain rules relating to validity of contracts of international sale of goods, followed by an explanatory report (UNIDROIT, ETUDE XVI/B, Document 22, U.D.P. 1972, French and English only).

7. The Working Group adopted the following agenda:

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* 3 February 1977.

[1] Report of the Commission on the work of its second session (1969), A/7618 (Yearbook..., 1968–1970, part two, II, A).

[2] Report of the Commission on the work of its third session (1970), A/8017 (Yearbook..., 1968–1970, part two, III, A).

[3] Finland and the German Democratic Republic were elected to the Commission by the General Assembly at its thirty-first session. Their terms commence on the first day of the Commission's tenth session.

[4] Reproduced as annex II to the present report. Annex I contains the text of the draft convention on the formation of contracts for the international sale of goods, as approved or deferred for further consideration by the Working Group on the International Sale of Goods at its eighth session. References to those annexes hereinafter replace references to documents A/CN.9/WG.2/WP.26 and Add.1.

[5] Annex II to the present report, appendix I.

[6] *Ibid.*, appendix II.

(1) Opening of the session
(2) Election of officers
(3) Adoption of the agenda
(4) Formation and validity of contracts for the international sale of goods
(5) Other business
(6) Date of the next session
(7) Adoption of the report of the session.

8. In the discussion of the adoption of agenda item 4, the Working Group noted the view of the Commission at its ninth session that "the Working Group should restrict its work to the preparation of rules on the formation of contracts for the international sale of goods so as to complete its task in the shortest possible time, but that the Working Group had discretion as to whether to include some rules in respect of the validity of such contracts".[7]

9. Accordingly, the Working Group decided to consider firstly the 1964 Hague Uniform Law on the Formation of Contracts for the International Sale of Goods[8] together with the proposed alternative provisions contained in the report of the Secretary-General (annex II, appendix I). However, during its consideration of this item any representative or observer could refer to such questions of validity which appeared to be related to the draft provisions on formation.

10. Secondly, the Working Group would consider the general question of validity of contracts and, in particular, the UNIDROIT draft of a law for the unification of certain rules relating to validity of contracts of international sale of goods and the critical analysis of these provisions prepared by the Secretariat (annex II, appendix II).

I. Formation of contracts for the international sale of goods

Article 1

11. The text of article 1 in Annex I of the 1964 Convention for use by those States which have not adopted the Uniform Law of the International Sale of Goods is as follows:

"1. The present Law shall apply to the formation of contracts of sale of goods entered into by parties whose places of business are in the territories of different States, in each of the following cases:

"(*a*) Where the offer or the reply relates to goods which are in the course of carriage or will be carried from the territory of one State to the territory of another;

"(*b*) Where the acts constituting the offer and the acceptance are effected in the territories of different States;

"(*c*) Where delivery of the goods is to be made in the territory of a State other than that within whose territory the acts constituting the offer and the acceptance are effected.

"2. Where a party does not have a place of business, reference shall be made to his habitual residence.

"3. The application of the present Law shall not depend on the nationality of the parties.

"4. Offer and acceptance shall be considered to be effected in the territory of the same State only if the letters, telegrams or other documentary communications which contain them are sent and received in the territory of that State.

"5. For the purpose of determining whether the parties have their places of business or habitual residences in 'different States', any two or more States shall not be considered to be 'different States' if a valid declaration to that effect made under Article II of the Convention dated the 1st day of July 1964 relating to a Uniform Law on the Formation of Contracts for the International Sale of Goods is in force in respect of them.

"6. The present Law shall not apply to the formation of contracts of sale:

"(*a*) Of stocks, shares, investment securities, negotiable instruments or money;

"(*b*) Of any ship, vessel or aircraft, which is or will be subject to registration;

"(*c*) Of electricity;

"(*d*) By authority of law or on execution or distress.

"7. Contracts for the supply of goods to be manufactured or produced shall be considered to be sales within the meaning of the present Law, unless the party who orders the goods undertakes to supply an essential and substantial part of the materials necessary for such manufacture or production.

"8. The present Law shall apply regardless of the commercial or civil character of the parties or of the contracts to be concluded.

"9. Rules of private international law shall be excluded for the purpose of the application of the present Law, subject to any provision to the contrary in the said Law."

12. The text of article I in Annex II of the 1964 Convention for use by those States which have adopted the Uniform Law on the International Sale of Goods is as follows:

"The present Law shall apply to the formation of contracts of sale of goods which, if they were concluded, would be governed by the Uniform Law on the International Sale of Goods."

Discussion and decision

13. The Working Group was of the view that it was desirable to prepare an article on the scope of application of the draft Convention based upon the provisions in the draft Convention on the International Sale of Goods (CISG) even though the provisions on formation and validity may eventually be incorporated into that draft Convention.

14. The Working Group accordingly requested the Secretariat to prepare draft provisions on the scope of application of the Convention using the approach em-

[7] Report of the Commission on its ninth session (1976), A/31/17, para. 27 (Yearbook..., 1976, part one, II, A).

[8] The Uniform Law is hereafter referred to as ULF. The English and French language versions of ULF are the official texts as adopted by the 1964 Hague Conference. The Russian and Spanish language versions are unofficial translations reproduced from *Register of Texts of Conventions and other Instruments concerning International Trade Law*, vol. I (United Nations publication, Sales No. 71.V.3), chap. I, sect. 1.

ployed in the ULF and the appropriate provisions of the CISG. The Secretariat prepared two draft provisions. Alternative No. 1 was for use by those States which adopt the CISG. Alternative No. 2 was for use by those States which do not adopt the CISG. The text of these provisions is as follows:

[*Alternative No. 1*]

"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."

[*Alternative No. 2*]

"(1) This Convention applies to the formation of contracts of sale of goods entered into by parties whose places of business are in different States:

"(*a*) When the States are Contracting States; or

"(*b*) When the rules of private international law lead to the application of the law of a Contracting State.

"(2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the offer, any reply to the offer, or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.

"(3) This Convention does not apply to the formation of contracts of sale:

"(*a*) Of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, did not know and had no reason to know that the goods were bought for any such use;

"(*b*) By auction;

"(*c*) On execution or otherwise by authority of law;

"(*d*) Of stocks, shares, investment securities, negotiable instruments or money;

"(*e*) Of ships, vessels or aircraft;

"(*f*) Of electricity.

"(4) This Convention does not apply to the formation of contracts in which the predominant part of the obligations of the seller consists in the supply of labour or other services.

"(5) The formation of contracts for the supply of goods to be manufactured or produced is to be considered as the formation of contracts of sale of goods unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

"(6) For the purposes of this Convention:

"(*a*) If a party has more than one place of business, the place of business is that which has the closest relationship to the proposed contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract;

"(*b*) If a party does not have a place of business, reference is to be made to his habitual residence;

"(*c*) Neither the nationality of the parties nor the civil or commercial character of the parties or of the proposed contract is to be taken into consideration."

15. The Working Group decided that these draft provisions should be placed in square brackets to indicate that they would have to be reconsidered in the light of any changes which the Commission might make to the scope of application of the draft CISG.

16. A suggestion was made that article 1, paragraphs (2) and (6) (*a*) of alternative No. 2, be limited to events prior to the conclusion of the contract. This suggestion was objected to on the grounds that such a limitation was not contained in the draft CISG and that there was no reason to have one rule in respect of the scope of application of the CISG and another in respect of the scope of application of the present Convention.

17. It was noted that the draft of alternative No. 1 could lead to the situation that if the parties to a transaction were from States both of which had adopted CISG but only one of which had adopted the present Convention, the courts of the State which had adopted the present Convention would be required to apply it to the transaction whereas the courts of the other States would not.

Article 2

18. The text of article 2 of ULF is as follows:

"1. The provisions of the following articles shall apply except to the extent that it appears from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usage, that other rules apply.

"2. However, a term of the offer stipulating that silence shall amount to acceptance is invalid."

19. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"The provisions of the following articles apply except to the extent that the preliminary negotiations, the offer, the reply, any practices that the parties have established between themselves or usage lead to the application of more stringent legal rules or more stringent agreed principles to determine whether a contract has been concluded."

Discussion and decision

20. The Working Group decided that article 2 should clearly state that the parties could exclude the uniform law as a whole, so that the applicable national law would govern. As to the extent to which particular rules could be excluded or modified by the parties, it was decided that the general principle should be that of autonomy of the will of the parties. However, it was recognized that in the subsequent discussion of the substantive provisions the Working Group might decide that the parties could not derogate from or vary certain of those provisions, especially if it was later decided to incorporate provisions on validity into the text.

21. It was decided that article 2 (2) of UFL should be retained, although there was some sentiment for including it in article 6.

22. Several representatives and an observer stated that the concept that an article could only be modified or excluded by more stringent legal rules or more stringent agreed principles, as suggested in the alternative text proposed by the Secretariat, could cause consider-

able difficulty since it was not always easy to determine whether a legal rule or agreed principle was "more stringent" than the rules contained in ULF or the alternative text proposed by the Secretariat.

23. A Drafting Party consisting of the representatives of Brazil, Czechoslovakia and the United States and the observer for UNIDROIT, was set up to draft a new text.

24. The text proposed by the Drafting Group was as follows:

"(1) The parties may exclude the application of this Convention.

"(2) Unless the Convention provides otherwise, the parties may derogate from or vary the effect of any of its provisions as may appear from the preliminary negotiations, the offer, the reply, the practices which the parties have established between themselves or usages widely known and regularly observed in international trade."

25. It was decided to add the words "agree to" before the word "exclude" in paragraph (1) and before "derogate" in paragraph (2). These words were placed in square brackets because some representatives believed that it was difficult to speak of the agreement of the parties prior to the conclusion of the contract.

26. The view was expressed that the most likely manner in which the parties would act to exclude the application of this Convention was by the choice of a specific national law to govern the contract. It was also suggested that the parties should not be able to exclude the application of this Convention unless they stated the law which would be applicable. One representative was opposed to paragraph (1) because, in his view, the parties should not be permitted to exclude the application of the Convention.

27. In respect of article 2 (2) of the proposal, the Working Group deleted the words following the word "usages" since "usages" were defined in article 13.

28. Several representatives suggested that the expression "the practices the parties have established between themselves or usages" should be deleted as it was unlikely that such practices or usages exist.

29. The decision to retain article 2 (2) of ULF was reaffirmed and it was placed as paragraph (3) of this article pending a general reordering of the text.

Article 3

30. The text of article 3 of ULF is as follows:

"An offer or an acceptance need not be evidenced by writing and shall not be subject to any other requirement as to form. In particular, they may be proved by means of witnesses."

31. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"Neither the formation or validity of a contract nor the right of a party to prove its formation or any of its provisions depends upon the existence of a writing or any other requirement as to form. The formation of the contract, or any of its provisions, may be proved by means of witnesses or other appropriate means."

Discussion and decision

32. There was support for the view that consideration of matters concerning form of contracts should be postponed until the Commission finalized article 11 of the draft CISG which had been left in square brackets because the Working Group had been unable to reach agreement on such questions of form.

33. It was noted that the use of the expression "need not be evidenced by writing" in the English language version of article 3 of ULF suggested that the article regulated only matters of evidence and of the proper form of the offer and the acceptance but that it did not overcome a national rule of law that a contract for the international sale of goods must be in writing either to be validly formed or to be enforceable before the courts of that country. It was further noted, however, that the French language versions of article 3 of ULF and article 11 of the draft CISG used the phrase "aucune forme n'est prescrite pour . . . " which suggested that the article went to questions of validity and enforceability. It was suggested that the fact that the different language versions of the text were not identical be brought to the attention of the Commission at its tenth session for its consideration during the discussion of article 11 of the draft CISG.

34. It was also noted that it might be possible to reach a compromise in relation to the problem of form of contracts by retaining the substance of article 3 of ULF with a proviso that it did not overcome contrary provisions in the municipal laws of the place of business of either party.

35. In view of the fact that the Commission would consider article 11 of the draft CISG at its tenth session in May, the Working Group decided to place both versions of article 3 in square brackets and to record in the report the compromise solution suggested above, which relates to all articles that deal with the question of the form of any declarations or expressions of intention of the parties.

Article 3A

36. The text of article 3A as proposed by the Secretariat (annex II, appendix I) is as follows:

"(1) An agreement by the parties made in good faith to modify or rescind the contract is effective. However, a written contract which excludes any modification or rescission unless in writing cannot be otherwise modified or rescinded.

"(2) Action by one party on which the other party reasonably relies to his detriment may constitute a waiver of a provision in a contract which requires any modification or rescission to be in writing. A party who has waived a provision relating to an unperformed portion of the contract may retract the waiver. However, a waiver cannot be retracted if the retraction would result in unreasonable inconvenience or unreasonable expense to the other party because of his reliance on the waiver."

The provision in general

37. The view was expressed that article 3A, since it did not strictly relate to the formation of contracts, did not belong in the draft Convention on formation. It was also suggested that it would be appropriate for the Working Group to transmit the proposal to the Commission for its possible inclusion in the draft Convention on the In-

ternational Sale of Goods. The Working Group, after deliberation, was of the view that the issues raised by its provisions were of such importance that the article should be retained in the draft Convention on formation.

First sentence of article 3A paragraph (1)

38. It was noted that this provision performed a useful function, particularly in common law jurisdictions which retained the doctrine of consideration. The introduction of this provision would enable the parties to modify or rescind a contract even though consideration was lacking, e.g., where the obligations of only one of the parties was affected.

39. The view was expressed, however, that the requirement that the modification be "in good faith" would not be interpreted the same in all countries. There was some support for the view that the words "in good faith" could be replaced by other expressions such as "freely" or "in conformity with fair dealing". There was also support for the view that the first sentence be recast in terms making inapplicable any rule of municipal law requiring consideration for modification or rescission of contracts. This would make it clear that questions of "good faith" were not involved. Another suggestion was to delete the provision and replace it with an article which made the provisions on formation applicable to modification and rescission of contracts. Yet another view was to delete the words "in good faith" and deal with the problem of improper pressures in a separate provision on questions of validity.

Second sentence of article 3A, paragraph (1) and article 3A, paragraph (2)

40. There was considerable support for the retention of the second sentence of article 3A, paragraph (1). However, the reasons for this support varied.

41. On the one hand, some support was dependent upon also retaining article 3A (2). The combined effect of these provisions would enable a written contract which excluded any modification or rescission unless in writing to be modified or rescinded without a writing if the conditions in article 3A (2) were met.

42. On the other hand, there was some support for the retention of the second sentence of article 3A (1) because it gave supremacy to the written terms of a contract. A representative sharing this opinion proposed the deletion of article 3A (2). He reserved his position should that article be retained since it raised the same type of problems as were posed by article 3.

43. In relation to article 3A (2), it was suggested that the general approach should be consistent with that taken in relation to article 3 and accordingly article 3A (2) if retained, should be placed in square brackets. In addition, a number of representatives considered article 3A (2) complex and unclear and suggested that, if it were retained, it should be simplified.

Action by the Working Group

44. The Working Group established a drafting party, consisting of the representatives of Austria, Czechoslovakia, the United Kingdom of Great Britain and Northern Ireland and the observer for UNIDROIT to draft provisions based on these considerations.

45. The Drafting Party proposed the following text:

"(1) The contract may be modified or rescinded merely by agreement of the parties [made in conformity with fair dealing].

"(2) A written contract which contains a provision requiring any modification or rescission to be in writing may not be otherwise modified or rescinded. However, a party may be precluded by his action from asserting such a provision to the extent that the other party has relied to his detriment on that action."

Discussion and decision

46. Although some representatives favoured the retention of the words in square brackets in paragraph (1) until the Working Group decided whether the draft Convention would contain a separate provision on good faith and fair dealing, the Working Group decided to delete them.

47. The Working Group placed the second sentence of paragraph (2) in square brackets to indicate that, while a number of representatives opposed the provision, other representatives considered that it should be reconsidered at a later stage since it dealt with a practical problem in international trade.

Article 4

48. The text of article 4 of ULF in annex I of the 1964 Convention for use by the States which have not adopted the Uniform Law on the International Sale of Goods is as follows:

"1. The communication which one person addresses to one or more specific persons with the object of concluding a contract of sale shall not constitute an offer unless it is sufficiently definite to permit the conclusion of the contract by acceptance and indicates the intention of the offeror to be bound.

"2. This communication may be interpreted by reference to and supplemented by the preliminary negotiations, any practices which the parties have established between themselves, usage and any applicable legal rules for contracts of sale."

49. The text of article 4 of ULF in annex II of the 1964 Convention for use by those States which have adopted the Uniform Law on the International Sale of Goods is as follows:

"1. The communication which one person addresses to one or more specific persons with the object of concluding a contract of sale shall not constitute an offer unless it is sufficiently definite to permit the conclusion of the contract by acceptance and indicates the intention of the offeror to be bound.

"2. This communication may be interpreted by reference to and supplemented by the preliminary negotiations, any practices which the parties have established between themselves, usage and the provisions of the Uniform Law on the International Sale of Goods."

50. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"(1) A communication directed to one or more specific persons [or to the public] with the object of concluding a contract of sale constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound.

"(2) This communication may be interpreted by

reference to and supplemented by the preliminary negotiations, any practices which the parties have established between themselves, usage and any applicable legal rules for contracts of sale.

"(3) An offer is sufficiently definite if it expressly or impliedly indicates at least the kind and quantity of the goods and that a price is to be paid.

"(4) Subject to the contrary intention of the parties, an offer is sufficiently definite even though it does not state the price or expressly or impliedly make provision for the determination of the price of the goods. In such cases, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.

"(5) An offer is sufficiently definite if it measures the quantity by the amount of goods available to the seller or by the requirements of the buyer. In such cases, the amount of goods available to the seller or the requirements of the buyer means the actual amount available or the actual amount required in good faith. However, the buyer is not entitled to demand nor compelled to accept a quantity unreasonably disproportionate to any stated estimate, or in the absence of a stated estimate, a quantity unreasonably disproportionate to any normal or otherwise comparable amount previously available or required."

Discussion

51. The Working Group decided to conduct its discussions on the basis of the alternative text.

Article 4 paragraph (1)

52. The discussion focused on two questions: (1) whether it was common for "offers to the public" for international sales of goods to be sufficiently definite and to indicate the requisite intention on the part of the offeror to conclude a contract of sale so as to qualify as offers in the legal sense and (2) whether "offers to the public" which met the test of definiteness and intent should be considered to be offers in the legal sense or whether an offer in a legal sense must be made to one or more specific persons.

53. The general view of the Working Group was that few "offers to the public" met the test of definiteness or indicated an intent to conclude a contract of sale. However, the Working Group was informed that a recent UNIDROIT survey found that public offers were becoming more important in international trade.

54. One view expressed in the Working Group was that the reference to public offers should be retained in article 4 (1). Another view was that the references to public offers should be deleted. Some representatives expressed the opinion that offers to "one or more specific persons" could approach the situation generally described as a public offer if the offer was made to a large number of specific persons. The suggestion was also made to delete any reference to the number of possible addressees of the offer.

Article 4 paragraph (2)

55. After discussion the Working Group decided to delete article 4 (2) and to combine it with other provisions on interpretation in the ULF as well as with articles 3, 4 and 5 of the draft uniform law on validity of contracts in a new general provision on interpretation.

Article 4 paragraphs (3) and (4)

56. The Working Group considered these two paragraphs together.

57. Under one view a communication was too indefinite to be an offer if it did not itself fix the price or provide for the means of determining the price. Under this view article 36 of the draft CISG, from which the second and third sentences of article 4 (4) were taken, was for use by those countries under whose law a contract could be concluded without fixing the price or providing a means of determining the price. It could not be used as a justification for the introduction of such a test into a text of uniform law on the formation of contracts.

58. Under another view article 4 (3) and (4) gave a means by which the price could always be determined. Therefore, a communication which would otherwise be an offer should not be held to be too indefinite to be an offer because it failed to fix the price or give the means by which the price could be determined.

59. One representative proposed a compromise solution which, after several amendments, was expressed as follows:

"(3) An offer is sufficiently definite if it expressly or impliedly indicates at least the kind and quantity of the goods and states the price or expressly or impliedly makes provision for the determination of the price or indicates the intention to conclude the contract even without fixing the price or making provision for determination of the price in the contract.

"(4) If the proposal indicates the intention to conclude the contract even without fixing the price or making provision for the determination of the price in the contract, it is a proposal for sale of goods at the price generally charged by the seller at the time of the conclusion of the contract or if no such price is ascertainable, the price generally prevailing at the aforesaid time for such goods under comparable circumstances."

60. The Working Group accepted the principle of this proposal and referred it to the Drafting Group for it to consider a number of drafting points made during the discussion.

61. However, three representatives expressed reservations to this decision on the grounds that it transformed certain invitations to deal into offers by implying a price which the "offeror" had not himself indicated. One of these representatives also expressed a reservation as to the decision that the implied price was the price generally prevailing at the time of the conclusion of the contract.

Article 4 paragraph (5)

62. Most representatives favoured deletion of this provision. It was pointed out that the second and third sentences of article 4 (5) dealt with matters of performance rather than with the formation of contracts. Some representatives were of the view that the provision left the determination of the quantity of goods too indefinite for the communication to be an offer. One representative noted that it only considered certain matters that were not specific in the offer and omitted to deal with a number of other matters, such as delivery dates and

quality of the goods, which might also be decided upon after the making of the offer.

63. Under another view the provision offered a practical solution for a common form of contract. It was suggested that, if article 4 (5) was deleted, some provision should be made in article 4 (3) to indicate the possibility for the parties to provide for the means of determining the quantity of goods to be delivered.

64. The Work Group decided to delete article 4 (5) but requested the Drafting Group to take into account the suggestion made above.

Decision of the Working Group as to article 4

65. It was decided that the parties were not to be permitted to derogate from or vary the provisions of this article.

66. The Working Group created a Drafting Group consisting of the representatives of Austria, France, the United Kingdom and the USSR and requested it to present a redraft of the entire article in the light of the decisions of the Working Group and the discussions which had been held.

67. The Drafting Group proposed the following text:

"(1) A proposal for concluding a contract constitutes an offer if it is sufficiently definite and indicates the intention of the offeror to be bound in case of acceptance.

"(2) An offer is sufficiently definite if expressly or impliedly it indicates the kind of the goods and fixes or makes provision for determining the quantity and the price. Nevertheless, if the offer indicates the intention to conclude the contract even without making provision for the determination of the price, it is considered as a proposal that the price be that generally charged by the seller at the time of the conclusion of the contract or, if no such price is ascertainable, the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances."

Discussion and decision

68. The Working Group decided to add the words "addressed to one or more specific persons" after the word "contract" in paragraph (1) in order to exclude specifically public offers from the ambit of the Convention. However, since there was opposition to a specific exclusion of public offers, these words were placed in square brackets for reconsideration at the next session of the Working Group.

69. The Working Group also decided to place the second sentence of paragraph (2) in square brackets to indicate the opposition of some representatives to the inclusion of a provision which would enable a proposal to be considered as an offer even though it does not indicate a price nor make provision for its determination.

Article 5

70. The text of article 5 of ULF is as follows:

"1. The offer shall not bind the offeror until it has been communicated to the offeree; it shall lapse if its withdrawal is communicated to the offeree before or at the same time as the offer.

"2. After an offer has been communicated to the offeree it can be revoked unless the revocation is not made in good faith or in conformity with fair dealing or unless the offer states a fixed time for acceptance or otherwise indicates that it is firm or irrevocable.

"3. An indication that the offer is firm or irrevocable may be express or implied from the circumstances, the preliminary negotiations, any practices which the parties have established between themselves or usage.

"4. A revocation of an offer shall only have effect if it has been communicated to the offeree before he has despatched his acceptance or has done any act treated as acceptance under paragraph 2 of article 6."

71. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"(1) The offer can be accepted only after it has been communicated to the offeree. It cannot be accepted if its withdrawal is communicated to the offeree before or at the same time as the offer.

"(2) After an offer has been communicated to the offeree it can be revoked if the revocation is communicated to the offeree before he has despatched his acceptance or has done any act treated as acceptance under article 6 (2). However, an offer cannot be revoked:

"(*a*) During any time fixed in the offer for acceptance; or

"(*b*) For a reasonable time if the offer otherwise indicates that it is firm or irrevocable; or

"(*c*) For a reasonable time if it was reasonable for the offeree to rely upon the offer being held open and the offeree has altered his position to his detriment in reliance on the offer.

"(3) An indication that the offer is firm or irrevocable may be express or may be implied from the circumstances, the preliminary negotiations, any practices which the parties have established between themselves or usage."

The provisions in general

72. The Working Group agreed to use the alternative text as the basis for discussion although there was support for the view that, in relation to paragraph (1), the approach of ULF was preferable.

Article 5 paragraph (1)

73. Those representatives who expressed the view that the approach taken in the drafting of article 5 (1) of ULF was preferable to that of the alternative text poined out that the ULF text clearly dealt with the effect of an offer, the subject-matter of article 5, whereas the alternative text appeared to deal with the time at which an acceptance could take place.

74. On the other hand it was pointed out that the alternative draft described the practical effect of an offer after its communication to the offeree. It also avoided the ambiguity which arose in article 5 (1) of ULF from the provision that "the offer shall not bind the offeror until it has been communicated". The use of the word "bind" suggested that the offer was irrevocable, which would conflict with the general principle of revocability of offers contained in article 5 (2) of ULF.

75. The Working Group decided to redraft article 5 (1) to conform to ULF but in a way that avoided such ambiguities.

76. In order to make it clear that the offeror could withdraw his offer if the withdrawal was communicated to the offeree before or at the same time as the offer even if the offer was irrevocable, the Working Group decided to add to the end of the second sentence of article 5 (1) the words "even if it is irrevocable". However, because some representatives did not believe the words were necessary, they were placed in square brackets. Another representative pointed out that the words in square brackets were necessary to avoid confusion with article 5 (2).

Article 5 paragraph (2)

77. After discussion it was decided that the basic compromise of the ULF should be retained; offers were in general revocable but they became irrevocable in a number of specific situations. It was thought that any fundamental change in this compromise might render a replacement text less acceptable.

78. The view was expressed that article 5 (2) (*a*) should be redrafted to distinguish between those offers which were intended to be irrevocable for a period of time and those offers which merely indicated the period of time before they lapsed. On the other hand the view was expressed that one of the main exceptions to the principle of revocability was precisely those occasions in which the offer fixed a time for acceptance. The Working Group decided to leave open this question until its next session by placing the word "acceptance" in square brackets immediately followed by the word "irrevocability" in square brackets.

79. There was general support for deleting from the beginning of subparagraphs (*a*), (*b*) and (*c*) any reference to the period of time during which an offer was irrevocable on the grounds that the offer normally remained irrevocable until it lapsed. It was agreed that there should not be two provisions on the period of time during which the offer could be accepted, one in article 5 (2) and the other in article 8.

80. The Working Group accepted subparagraph (*c*) on the understanding that this was a useful example of the general requirement that parties act in good faith. A number of representatives stated that they agreed to the retention of this subparagraph on the understanding that the draft Convention would contain a general provision dealing with the requirement to act in good faith.

81. In the discussion in respect of article 6 (2), the Working Group decided that the words "shipped the goods or paid the price" should be added to the first sentence of article 5 (2) following the words "before he has despatched his acceptance" but that they should be placed in square brackets for reconsideration at its next session. If these words were retained an offer otherwise revocable would become irrevocable once the offeree had shipped the goods or paid the price. In conjunction with this decision the second sentence of article 5 (2) became article 5 (3). A more complete discussion of this action is found in paragraphs 91 to 98 and 116 to 119.

82. One representative reserved his position in relation to article 5 (2) (*b*). Another representative stated that article 5 (2) (*b*) was acceptable provided the report noted that the provision would have the effect in some legal systems of transforming an offer which merely stated that it would expire after a certain period into an irrevocable offer.

83. A representative reserved his position in respect of article 5 (2) (*c*) on the basis that such a provision was vague and contained no safeguards to protect an innocent offeror.

Article 5 paragraph (3)

84. The Working Group deleted paragraph (3) of the alternative text on the ground that the question of interpretation should be dealt with in a separate provision.

Decision of the Working Group

85. The text of article 5 as adopted by the Working Group is as follows:

"(1) The offer becomes effective when it has been communicated to the offeree. It can be withdrawn if the withdrawal is communicated to the offeree before or at the same time as the offer [even if it is irrevocable].

"(2) The offer can be revoked if the revocation is communicated to the offeree before he has despatched his acceptance [, shipped the goods or paid the price].

"(3) However, an offer cannot be revoked:

"(*a*) If the offer expressly or impliedly indicates that it is firm or irrevocable; or

"(*b*) If the offer states a fixed period of time for [acceptance] [irrevocability]; or

"(*c*) If it was reasonable for the offeree to rely upon the offer being held open and the offeree has altered his position to his detriment in reliance on the offer."

Article 6

86. The text of article 6 of ULF is as follows:

"1. Acceptance of an offer consists of a declaration communicated by any means whatsoever to the offeror.

"2. Acceptance may also consist of the despatch of the goods or of the price of any other act which may be considered to be equivalent to the declaration referred to in paragraph 1 of this Article either by virtue of the offer or as a result of practices which the parties have established between themselves or usage."

87. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"(1) An offer is accepted by a declaration to that effect communicated by any means whatsoever to the offeror.

"(2) The offer is also accepted if the offeree:

"(*a*) Without delay ships either conforming or non-conforming goods unless the offeree notifies the offeror that the shipment of non-conforming goods is offered only for his accommodation; or

"(*b*) Pays the price in accordance with the terms of the offer; or

"(*c*) Commences any other act which indicates that the offer has been accepted; or

"(*d*) Remains silent beyond the point of time when, because of the circumstances of the case, the practices the parties have established between themselves or usage, the offeree should have notified the offeror that he did not intend to accept.

"(3) Where the offer is accepted by the shipment of the goods, payment of the price or the commencement of performance, an offeror who is not notified of the acceptance within a reasonable time may recover any damages caused thereby.

"(4) (*a*) A contract is concluded at the moment the offer is accepted.

"(*b*) A contract of sale may be found to be concluded even though the moment that it was concluded is undetermined."

The provisions in general

88. The Working Group agreed to proceed on the basis of the alternative text although a number of representatives expressed a preference for article 6 of ULF.

Article 6 paragraph (1)

89. The view was expressed that the rule of article 6 (1) coupled with the provision in article 12 on "communication", which results in the offer being accepted on the receipt of the acceptance, should be reversed so that the offer was accepted on despatch. It was decided, however, to retain the receipt theory as it had been adopted in ULF, although article 6 (1) itself was deleted for the reasons set out in paragraphs 91 to 98 and paragraphs 116 to 119.

90. It was pointed out that the words "by any means whatsoever" were very broad and could cause difficulty if the offeror had prescribed a particular mode of acceptance. It was also noted that in any case this question was dealt with in article 12 (1).

Article 6 paragraphs (2) (a), (b), (c) *and (3)*

91. It was noted that article 6 (2) dealt with the practical problem of cases where the offeree acted in response to an offer without first declaring his intention to accept. It was observed that even in the absence of this provision, such acts in response to an offer could constitute acceptance through the operation of usages and practices established by the parties.

92. However, there was considerable opposition to the notion that an offer could be accepted even though at the moment of acceptance no notice had been given to the offeror. Article 6 (3), which would give the offeror a right to damages for any losses caused to him by the offeree's failure to notify him of the acceptance by shipment or other act described in article 6, paragraph (2) (*a*) to (*c*), was considered an inadequate solution since it would place the burden of litigation on an innocent offeror. Accordingly, it was considered that an acceptance should not be considered to be effective until the offeror had received an indication of the offeree's assent to the offer.

93. On the other hand the view was expressed that an offeror should not be able to revoke his offer once the goods were shipped or the price had been paid. Such a result was achieved by a rule that the offer was accepted by the shipment of the goods or payment of the price, as provided in article 6 (2).

94. In relation to article 6 (2) (*a*), under one view shipment of non-conforming goods should not constitute acceptance. However, under another view this was an appropriate result if the goods were despatched with the intention to conform to the offer.

95. It was agreed that the words "without delay" should be deleted so as to eliminate a conflict with the provisions of article 8 on the time during which an offer can be accepted.

96. There was opposition to article 6 (2) (*c*) on the basis that the provision was vague and could apply where such a result would be unreasonable.

97. In the light of this discussion the Working Group decided to delete article 6, paragraphs (2) (*a*), (*b*), (*c*) and (3) and to add to the first sentence of article 5 (2) the words "shipped the goods or paid the price". These words were placed in square brackets for reconsideration by the Working Group at its next session. Under this new text the offer would become irrevocable once the goods were shipped or the price was paid but the acceptance of the offer would depend on notification to the offeror.

98. In order to redraft the provisions on acceptance to conform to this new arrangement, the Working Group created a Drafting Group consisting of the representatives of Hungary, the Philippines and the United States to present a new text. As a result of their proposal, which is discussed in more detail in paragraphs 116 to 119 in relation to article 8, article 6 (1), (2) (*a*), (*b*), (*c*) and (3) were deleted.

Article 6 paragraph (2) (d)

99. There was general agreement to delete article 6 (2) (*d*) on the basis that a contract should be concluded only on notification to the offeror, as discussed above. However, a representative and an observer stated that the same result as in article 6 (2) (*d*) would result through the operation of usages or established practices.

Article 6 paragraph (4)

100. The Working Group agreed that, since a number of provisions in the text and in the draft Convention on the International Sale of Goods have rules which are based on the time the contract was concluded, it was desirable to have a provision which specified that time. It was also agreed that, in order to conform to the new text of article 8, the time of the conclusion of the contract should be the moment at which the acceptance became effective.

101. The Working Group considered and rejected a proposal that the provision also expressly determine the place at which the contract was concluded. It was noted by some that such a provision was unnecessary since the time that the contract was concluded would also determine the place at which the contract was concluded. Others observed that it was undesirable to link automatically the time of conclusion of the contract with the place at which the contract was concluded since there may be little real connexion between the two, particularly in the case of oral contracts or contracts concluded at a place other than the place of business of either party, such as at a trade fair. The consequence of fixing the place of conclusion of the contract may have, it was thought, unfortunate results in regard to conflicts of law and judicial jurisdiction. It was also pointed out that such a provision was unneeded since neither the draft CISG nor this draft text on formation of contracts contained any provisions dependent upon the place at which the contract was concluded.

102. The Working Group deleted article 6 (4) (*b*) of the alternative text since it was considered that such a provision was unnecessary.

103. The text of article 6 as adopted by the Working Group is as follows:

"A contract of sale is concluded at the moment that an acceptance of an offer is effective in accordance with the provisions of this Convention."

The Working Group noted that this text was no longer in the proper sequence and that at a later time it should be moved to a different location.

Article 7

104. The text of article 7 of ULF is as follows:

"1. An acceptance containing additions, limitations or other modifications shall be a rejection of the offer and shall constitute a counter-offer.

"2. However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer shall constitute an acceptance unless the offeror promptly objects to the discrepancy; if he does not so object, the terms of the contract shall be the terms of the offer with the modifications contained in the acceptance."

105. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"(1) A reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.

"(2) (*a*) However, a reply to an offer which purports to be an acceptance but which contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance unless the offeror objects to the discrepancy without delay. If he does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.

"(*b*) If the offer and a reply which purports to be an acceptance are on printed forms and the non-printed terms of the reply do not materially alter the terms of the offer, the reply constitutes an acceptance of the offer even though the printed terms of the reply materially alter the printed terms of the offer unless the offeror objects to any discrepancy without delay. If he does not so object the terms of the contract are the non-printed terms of the offer with the modifications in the non-printed terms contained in the acceptance plus the printed terms on which both forms agree.

"(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.]"

Discussion and decision

106. There was general agreement to proceed on the basis of the alternative text.

Article 7 paragraph (1)

107. The Working Group decided to retain this provision which stated the generally accepted rule that a purported acceptance which adds to, limits or otherwise modifies an offer is a rejection of that offer and constitutes a counter-offer.

Article 7 paragraph (2)

108. It was pointed out that paragraph (2) (*a*) contained a practical rule which permitted the formation of a contract even though there were minor discrepancies between the offer and the acceptance.

109. However, several representatives expressed reservations in respect of this provision because it contradicted the basic principle expressed in paragraph (1). It was pointed out that while this rule may be appropriate for national law it was unsuited to international trade where opinions on what would constitute a material alteration would differ widely. Accordingly, the Working Group decided to place article 7 (2) (*a*) in square brackets for further consideration at its next session.

110. As to the provisions set forth in article 7 (2) (*b*), the view was expressed that these provisions dealt with a practical problem and provided an acceptable solution thereto. However, the Working Group, after deliberation, concluded that, if an acceptance contained any material alterations to an offer, it should constitute a rejection of that offer, whether those material alterations were in the printed or in the non-printed terms of the acceptance. Accordingly, the Working Group agreed to delete this provision.

Article 7 paragraph (3)

111. It was pointed out that paragraph (3) was a useful provision as it dealt with the widespread practice of sending a confirmation notice after the conclusion of a contract by telephone, telex or the like. In such confirmation forms it was common to refer to general conditions of sale which contained provisions which had not been discussed by the parties. It was observed that such general conditions were also found in invoices.

112. On the other hand, there was opposition to this proposal for the same reasons as were expressed in relation to paragraph (2) (*b*). The Working Group accordingly decided to place this provision in square brackets and to reconsider it at a later stage.

113. Therefore, the text of article 7 as approved by the Working Group is that contained in paragraphs (1), (2) (*a*) and (3) of the alternative text with paragraph (2) (*a*) and (3) in square brackets.

Article 8

114. The text of article 8 of ULF is as follows:

"1. A declaration of acceptance of an offer shall have effect only if it is communicated to the offeror within the time he has fixed or, if no such time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror, and usage. In the case of an oral offer, the acceptance shall be immediate, if the circumstances do not show that the offeree shall have time for reflection.

"2. If a time for acceptance is fixed by an offeror in a letter or in a telegram, it shall be presumed to begin to run from the day the letter was dated or the

hour of the day the telegram was handed in for despatch.

"3. If an acceptance consists of an act referred to in paragraph 2 of Article 6, the act shall have effect only if it is done within the period laid down in paragraph 1 of the present Article."

115. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"(1) Subject to article 9, an offer is accepted only if the declaration of acceptance is communicated to the offeror or any act referred to in article 6(2) is performed within the time the offeror has fixed or, if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. In the case of an oral offer, the acceptance must be immediate unless the circumstances show that the offeree is to have time for reflection.

"(2) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the hour of the day the telegram is handed in for despatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror in a telephone conversation, telex communication or other means of instantaneous communication, begins to run from the hour of the day that the offer is communicated to the offeree.

"(3) If the last day of such period is an official holiday or a non-business day at the residence or place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period."

Article 8 paragraph (1)

116. As a result of the decisions in respect of articles 5 and 6, the Drafting Group consisting of the representatives of Hungary, the Philippines and the United States recommended that article 8(1) be redrafted into three new paragraphs as follows:

"(1) A declaration or other conduct by the offeree indicating assent to an offer is an acceptance.

"(1 *bis*) Acceptance of an offer is not effective unless notice of acceptance is communicated to the offeror within the time the offeror has fixed or if no time is fixed, within a reasonable time, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror. In the case of an oral offer, the acceptance must be immediate unless the circumstances show that the offeree is to have time for reflection.

"(1 *ter*) If an offer is irrevocable because of an act referred to in paragraph 2 of article 5, the acceptance is not effective unless it is given immediately after that act and within the period laid down in paragraph 1 *bis* of the present article."

117. An objection was raised to this proposal that it artificially separated the definition of an acceptance in Article 8(1) from the time the acceptance was effective in article 8(1 *bis*) and 8(1 *ter*). It was suggested that only a declaration should constitute an acceptance. It was also suggested that article 8(1) and 8(1 *ter*) were in contradiction with one another because article 8(1) referred to conduct in general whereas article 8(1 *ter*) referred only to shipment of the goods and payment of the price. Furthermore, it was suggested, the words "or other conduct" created unnecessary complications and should either be deleted or modified. As a result, the Working Group decided to place the words "or other conduct" in article 8(1) and all of article 8(1 *ter*) in square brackets for further consideration at its next session.

118. In article 8(1 *bis*) the words "notice of acceptance" were replaced by "indication of assent" to make it clear that the offeror could be notified of the acceptance by a third party, such as a bank through whom the payment had been made. The words "due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror" were placed in square brackets because it was thought that they were not necessary to explain what is meant by a reasonable time. Other editorial changes were made prior to final adoption.

119. It was explained that article 8(1 *ter*) was included in the recommendation of the Drafting Group because it was thought that in case of a revocable offer which was made irrevocable by shipment of the goods or payment of the price, the offeror should be notified of this action promptly so that he would not be left for any appreciable period of time in the position that his offer was irrevocable although he did not know this fact. It was suggested that this problem did not arise in cases of payment, since notification to the offeror would be given by the bank through which payment was made.

Article 8 paragraph (2)

120. The Working Group decided to adopt the alternative text.

121. It was pointed out that it was useful to provide that time for acceptance commences to run from the date shown on the letter as this was easily provable and generally corresponded to the intention of the offeror. In addition, both parties are aware of the date shown on the letter whereas normally only the offeree would be aware of the date of a postmark on the letter containing the offer. However, several representatives reserved their position in respect of this paragraph on the basis that time for acceptance should commence to run from the date of receipt of the offer.

Article 8 paragraph (3)

122. The Working Group adopted the general approach of the alternative text and referred it to a Drafting Party consisting of the representatives of Czechoslovakia and the United States to redraft the paragraph to make it clear that only official holidays which would prevent an acceptance becoming effective should be included. Two representatives reserved their position in respect to the rule contained in this paragraph.

Decision

123. The text of article 8 as adopted by the Working Group is as follows:

"(1) A declaration [or other conduct] by the offeree indicating assent to an offer is an acceptance.

"(1 *bis*) Acceptance of an offer becomes effective at the moment the indication of assent is commu-

nicated to the offeror. It is not effective if the indication of assent is not communicated within the time the offeror has fixed or if no time is fixed, within a reasonable time [, due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror]. In the case of an oral offer, the acceptance must be immediate unless the circumstances show that the offeree is to have time for reflection.

"[1 *ter*) If an offer is irrevocable because of shipment of the goods or payment of the price as referred to in paragraph 2 of article 5, the acceptance is effective at the moment notice of that acceptance is communicated to the offeror. It is not effective unless the notice is given promptly after that act and within the period laid down in paragraph 1 *bis* of the present article.]

"(2) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the hour of the day the telegram is handed in for despatch or from the date shown on the letter or, if no such date is shown, from the date shown on the envelope. A period of time for acceptance fixed by an offeror in a telephone conversation, telex communication or other means of instantaneous communication, begins to run from the hour of the day that the offer is communicated to the offeree.

"(3) If the notice of acceptance cannot be delivered at the address of the offeror due to an official holiday or a non-business day falling on the last day of such period at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-business days occurring during the running of the period of time are included in calculating the period."

Discussion and decision

126. The Working Group decided to proceed on the basis of ULF although there was support for the alternative text which, it was stated, provided a unified solution to a practical problem. On the other hand, it was noted that the alternative text depended upon the concept of "good faith", the application of which in relation to a late acceptance was unclear and could be the source of difficulty. Furthermore, it was stated, if an acceptance was sent in such time that it would normally arrive late, the offeror should not be bound to a contract unless he expressed his assent.

127. There was general agreement for the retention of article 9 (1) which reflected the traditional rule that a late acceptance constituted a counter-offer. It was noted that article 9 (1) differed slightly from the traditional approach in that the offeror's assent was effective on the despatch of a notice.

128. There was some difference of opinion in relation to article 9 (2). Under one view it should be deleted because determining whether a communication should have arrived in due time was difficult. In addition, deletion of the paragraph would consistently place the risk of transmission on the acceptor.

129. However, under another view article 9 (2) should be retained because it provided equal protection to both parties. One representative was opposed to taking any decision on the question until the Working Group had determined the time at which the contract was concluded.

130. Under yet another view the second part of article 9 (2) should be deleted.

131. The Working Group decided to place article 9 (2) in square brackets for further consideration at its next session.

Article 9

124. The text of article 9 of ULF is as follows:

"1. If the acceptance is late, the offeror may nevertheless consider it to have arrived in due time on condition that he promptly so informs the acceptor orally or by despatch of a notice.

"2. If however the acceptance is communicated late, it shall be considered to have been communicated in due time, if the letter or document which contains the acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have been communicated in due time; this provision shall not however apply if the offeror has promptly informed the acceptor orally or by despatch of a notice that he considers his offer as having lapsed."

125. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"If a reply to an offer which purports to be an acceptance or any act referred to in article 6 (2) is communicated or performed late but the reply or the performance was made in good faith, the offer is deemed to be accepted in due time unless without delay after the offeror learns of the acceptance he informs the offeree that the offer had lapsed."

Article 10

132. The text of article 10 of ULF is as follows:

"An acceptance cannot be revoked except by a revocation which is communicated to the offeror before or at the same time as the acceptance."

133. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"An acceptance cannot be revoked except by a declaration which is communicated to the offeror before or at the same time the declaration of acceptance is communicated to the offeror or, in the case of an acceptance by an act referred to in article 6 (2), before or at the same time as the offeror is informed of the acceptance."

Discussion and decision

134. In view of the deletion of article 6 (2) the Working Group decided to adopt article 10 of ULF rather than the alternative text. However, the Working Group added the words "becomes effective" at the end of article 10 to bring the text into line with article 8 (2) as it was redrafted by the Working Group.

135. Two representatives expressed their reservations in respect of article 10. In their view, once a contract was concluded by an acceptance, it was not open to one of the parties to abrogate the contract unilaterally.

Article 11

136. The text of article 11 of ULF is as follows:

"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."

137. The alternative texts proposed by the Secretariat (annex II, appendix I) are as follows:

Proposed alternative text 1

"(1) (Same as article 11 of ULF.)

"(2) If bankruptcy or similar proceedings are opened in respect of either party after the making of the offer, a revocable offer cannot be accepted. However, an irrevocable offer can be accepted during the period the offer is irrevocable."

Proposed alternative text 2

"If either party dies or becomes physically or mentally incapable of contracting or if bankruptcy or similar proceedings are opened in respect of either party after the making of the offer, a revocable offer cannot be accepted. However, an irrevocable offer can be accepted during the period the offer is irrevocable."

Discussion and decision

138. The Working Group decided to proceed on the basis of article 11 of ULF because it was considered that it would be inappropriate to attempt to unify widely differing national bankruptcy rules in the context of the present draft Convention.

139. It was generally considered that, although article 11 was not overly important in the context of international trade, its retention was useful since it resolved a problem that was dealt with unsatisfactorily in a number of legal systems.

140. However, several representatives proposed the deletion of article 11 and another proposed that the provision read as follows:

"The offer becomes ineffective upon the death or incapacity of the offeror and before the offer is accepted. However, an irrevocable offer can be accepted during the period the offer is irrevocable."

The Working Group did not retain this proposal.

141. The Working Group agreed that the wording of article 11 be slightly amended to read ". . . or by his becoming physically or mentally incapable of contracting . . .". This made it clear that the provision applied only to physical persons and did not deal with bankruptcy or similar proceedings. Two representatives and an observer considered that a reference to death and mental incapacity would have been sufficient to make this point clear.

142. The Working Group also added the words "becomes effective" after "acceptance" in order to make the provision conform to article 8.

143. The text of article 11 as adopted by the Working Group is as follows:

"The formation of the contract is not affected by the death of one of the parties or by his becoming physically or mentally incapable of contracting before the acceptance becomes effective unless the contrary results from the intention of the parties, usage or the nature of the transaction."

Article 11A

144. The text of article 11A as proposed by the Secretariat (annex II, appendix I) is as follows:

Alternative 1

"(1) A revocable offer may be assigned by the offeree unless within a reasonable time after the offeror learns of the assignment he notifies either the offeree or the assignee that he objects to it.

"(2) An irrevocable offer may be assigned by the offeree to the extent that, if the contract was concluded, his rights and obligations under the contract could be assigned under the applicable law.

"(3) The contract concluded by acceptance of the offer by the assignee arises only between the offeror and the assignee. However, the offeree is responsible for any failure to perform by the assignee if within a reasonable time after the offeror learns of the assignment he informs the offeree of his intention to hold him so responsible."

Alternative 2

"(1) An offer may be assigned by the offeree unless within a reasonable time after the offeror learns of the assignment he notifies either the offeree or the assignee that he objects to it.

"(2) The contract concluded by acceptance of the offer by the assignee arises only between the offeror and the assignee. However, the offeree is responsible for any failure to perform by the assignee if within a reasonable time after the offeror learns of the assignment he informs the offeree of his intention to hold him so responsible."

Alternative 3

"(1) An offer may be assigned by either the offeror or the offeree unless within a reasonable time after the other party learns of the assignment that party notifies the assignor or the assignee that he objects to it.

"(2) The contract concluded by acceptance of the offer arises only between the offeror and the assignee of the offeree or between the offeree and the assignee of the offeror, as the case may be. However, the assignor is responsible for any failure to perform by the assignee if within a reasonable time after the other party learns of the assignment he informs the assignor of his intention to hold him so responsible."

Discussion and decision

145. The Working Group deleted this provision. The Working Group considered that offers should not be automatically assignable because the offeror should have control over who could accept his offer.

146. Some representatives pointed out that in their legal systems the reorganization of an offeree would not affect the identity of that offeree who could accordingly accept offers addressed to it under its prior name. Other representatives noted that even in the case of mere reorganization it was useful to require that the change be notified to the offeror who could then indicate whether he was prepared to deal with the reorganized entity.

Article 12

147. The text of article 12 of ULF is as follows:

"1. For the purposes of the present Law, the expression 'to be communicated' means to be delivered at the address of the person to whom the communication is directed.

"2. Communications provided for by the present Law shall be made by the means usual in the circumstances."

148. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"For the purposes of this Convention an offer, declaration of acceptance or any other notice is 'communicated' when it is told orally to the party concerned or when it is physically delivered to the addressee or when it is [physically, mechanically or electronically] delivered to his place of business, mailing address or habitual residence."

Discussion and decision

149. The Working Group decided to proceed on the basis of the Secretariat draft.

150. The Working Group accepted a proposal that the words in square brackets be deleted and be replaced by a general expression which would enable the provision to apply to any means of communication that might be developed in the future. The Working Group also accepted a proposal for the simplification of the text and for its location near the start of the draft Convention.

151. The text of article 12 as adopted by the Working Group is as follows:

"For the purposes of this Convention an offer, declaration of acceptance or any other indication of intention is 'communicated' to the addressee when it is made orally or delivered by any other means to him, his place of business, mailing address or habitual residence."

Article 13

152. The text of article 13 of ULF is as follows:

"1. Usage means any practice or method of dealing, which reasonable persons in the same situation as the parties usually consider to be applicable to the formation of their contract.

"2. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned."

153. The alternative text proposed by the Secretariat (annex II, appendix I) is as follows:

"Usage means any practice or method of dealing of which the parties knew or had reason to know and which in international trade is widely known to and regularly observed by parties to contracts of the type involved in the particular trade concerned."

Discussion and decision

154. The Working Group adopted the alternative text, which is based on article 8 in the draft CISG. One representative expressed a reservation in respect of the use of the expression "of which the parties knew or had reason to know".

Article 14

155. During the discussion on article 4 the Working Group decided to eliminate article 4 (2) on the interpretation of an offer and requested the Secretariat to prepare a draft text on interpretation based upon articles 4 (2) and 5 (2) of ULF and articles 3, 4 and 5 of the draft Law for the Unification of Certain Rules relating to Validity of Contracts of International Sale of Goods. The draft text prepared in accordance with those instructions is as follows:

"(1) [Communications by and acts of] the parties are to be interpreted according to their actual common intent where such an intent can be established.

"(2) If the actual common intent of the parties cannot be established, [communications by and acts of] the parties are to be interpreted according to the intent of one of the parties, where such an intent can be established and the other party knew or ought to have known what that intent was.

"(3) If neither of the preceding paragraphs is applicable, [communications by and acts of the parties] are to be interpreted according to the intent that reasonable persons would have had in the same circumstances.

"(4) The intent of the parties or the intent a reasonable person would have had in the same circumstances or the duration of any time-limit or the application of article 11 [may] [is to] be determined in the light of the circumstances of the case including the [preliminary] negotiations, any practices which the parties have established between themselves, any conduct of the parties subsequent to the conclusion of the contract, usages [of which the parties knew or had reason to know and which in international trade are widely known to, and regularly observed by parties to contracts of the type involved in the particular trade concerned] and any applicable legal rules for contracts of sale.

"(5) Such circumstances are to be considered, even though they have not been embodied in writing or in any special form. In particular, they may be proved by witnesses."

Discussion and decision

156. The Working Group agreed that a provision on interpretation was important and should be included in the draft text. However, in view of the lack of time to discuss fully all the important issues raised by this text, and because other important matters of interpretation had not been included in this text, the Working Group decided to place the provision in square brackets and to record the principal points of view expressed during the discussion.

157. Several representatives expressed reservations to the draft provisions because they appeared to govern interpretation of a contract once concluded as well as with questions of interpretation in the formation of contracts. Other representatives considered that it was artificial to limit the draft provisions to the formation of contracts and that, on the contrary, both this draft and CISG should contain rules on interpretation, which rules should be identical.

158. It was suggested that the practical effect of these provisions would be easier to understand if the

Secretariat were to prepare a commentary on this article that included practical examples for the next session of the Working Group.

Article 14 paragraph (1)

159. The use of the expression "actual common intent" was objected to as it might be taken to encompass the use of a subjective test in order to determine whether a contract had been formed. It was also suggested that this expression was not suitable for the interpretation of unilateral acts such as offer.

160. The Working Group decided to include in square brackets the expression "statements and declarations" after the word "communications" in paragraphs (1), (2) and (3) to indicate that "communications" also included informal statements of intention.

Article 14 paragraph (2)

161. Under one view the intention of one party should not be able to control the interpretation of a contract. However, under another view, if one party knew the intention of the other party, he should be bound by that intention unless he openly objected to it.

162. It was suggested that under this provision silence might constitute acceptance should one party have that intention and the other party knew of it. An objection was raised to this provision, if such an interpretation was correct.

163. The suggestion was made that the words "or ought to have known what that intent was" rendered the provision objective rather than subjective and that such questions would be better treated in paragraph (3).

Article 14 paragraph (3)

164. The use of the words "reasonable persons" was objected to and it was noted that they did not appear in CISG.

Article 14 paragraph (4)

165. It was suggested that the words in square brackets after "usages" be deleted as "usage" was defined in article 13. However, it was observed that the definition of usages should be fully defined in the provision on interpretation since it was in this provision that "usages" had their greatest operative effect.

166. The Working Group agreed to delete as unnecessary the expression "and any applicable legal rules for contracts of sale" in paragraph (4).

167. The use of the words "any conduct of the parties subsequent to the conclusion of the contract" was objected to on the grounds that acts after the conclusion of the contract should not be relevant to questions of interpretation as to whether a contract was concluded.

Article 14 paragraph (5)

168. The Working Group decided to delete paragraph (5) because it was felt not to be necessary.

II. Future Work

169. The Working Group, in view of the progress made at its present session, was agreed that it was likely to complete its mandate with respect to the matters of formation and validity of contracts, in the course of one further session. In order to enable the Commission to consider the draft Convention on Formation and Validity of Contracts at its eleventh session in 1978, together with comments from Governments and interested organizations on the draft Convention, the Working Group decided to recommend to the Commission that the Group should hold its ninth session in Geneva from 19–30 September 1977. However, in case the Working Group would not be able to complete its work at that session, the Working Group decided to request the Commission to schedule a further tenth session in New York in January 1978, even though it noted that it may be difficult for some representatives to attend so many meetings. Such an arrangement would make it possible for the Commission, should it so desire, to recommend to the General Assembly to convene in 1980 a conference of plenipotentiaries at which both the draft Convention on the International Sale of Goods and the draft Convention in respect of the Formation and Validity of Contracts would be considered.

170. One representative doubted whether the Working Group could complete its mandate with regard to matters of formation and validity of contracts in two further sessions if it gave a careful consideration to the full range of questions relating to validity of contracts. He further noted that such a result would have financial implications and may delay completion of work on the Convention on the International Sale of Goods contrary to the prevailing approach shown during the course of discussions in the Sixth Committee when it considered the report of the Commission on the work of its ninth session.[9]

171. The Working Group noted that the Commission at its ninth session had decided to take up at its tenth session the question whether the rules on formation and validity of contracts should be set forth in the Convention containing the rules on the International Sale of Goods or whether they should form the subject of a separate convention, and whether, if it were decided that there should be two separate conventions, they should be considered at the same conference of plenipotentiaries. It was observed that the discussion which the Commission intended to have on these matters would make clear the following issues: whether one conference should be convened to consider (i) only the draft Convention on the International Sale of Goods, or (ii) both the draft Convention on the International Sale of Goods and the draft Convention on the Formation of Contracts, or (iii) the draft Convention on the International Sale of Goods and separate draft Conventions on Formation of Contracts and Validity of Contracts; or whether two or more conferences of plenipotentiaries should be convened to consider these conventions separately. In this connexion the Working Group requested the Secretariat to prepare a statement of financial implications for each of these alternatives and to submit it to the tenth session of the Commission.

172. The Working Group also decided to recommend to the Commission that upon the completion of its mandate, the Secretary-General be requested (i) to circulate the draft Convention to Governments and interested international organizations for comments and to prepare a critical analysis of those comments to be submitted to the Commission at its eleventh session; (ii) to

[9] Sixth Committee report, A/31/390, para. 15 (reproduced in this volume, part one, I, B).

circulate the draft of a law for the unification of certain rules relating to validity of contracts of international sale of goods prepared by the International Institute for the Unification of Private Law (UNIDROIT) 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 prepared by the Working Group should be included.

173. The Working Group decided that at its next session it should determine which rules on validity of contracts of international sale of goods should be included in the draft Convention and to complete, if possible, its work in respect of the revision of the Uniform Law on the Formation of Contracts for the International Sale of Goods and its work on validity of such contracts.

174. In preparation of that session the Secretariat was requested to analyse the UNIDROIT text and to suggest, with draft texts as necessary, what matters covered by that text as well as what other matters of validity of contract should be included in the draft Convention. The Working Group invited any representatives or observers to submit their views to the Secretariat on the matter. The Secretariat was also requested to review the text of ULF as approved by the Working Group at this session and to suggest to the Working Group the modifications which might be made in the text in the various language versions to render the style of drafting consistent, to suggest a reorganization of the provisions in a more logical order and to prepare titles for the individual articles. The Working Group also requested the Secretariat to prepare a commentary on the text as it had been approved by the Working Group at this session similar to the commentary which had been prepared on the draft Convention on the International Sale of Goods.