I. INTERNATIONAL SALE OF GOODS

A. 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)*

CONTENTS

I. INTRODUCTION

1. The Working Group on the International Sale of Goods was established at the second session of the United Nations Commission on International Trade Law. At that session, the Commission requested the Working Group, *inter alia*, 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 the United States of America.

3. The Working Group held its ninth session at the United Nations Office in Geneva from 19 to 30 September 1977. All members of the Working Group were represented except Kenya and Sierra Leone.

4. The session was also attended by observers from the following members of the Commission: Argentina, Australia, Bulgaria, Finland, German Democratic Republic, and Germany, Federal Republic of.

5. Observers from Guatemala, Iran, Iraq, Malaysia, Netherlands, Oman and Turkey also attended the session. In addition the session was attended by observers from the following international organizations: Hague Conference on Private International Law, International Institute for the Unification of Private Law (UNIDROIT) and International Chamber of Commerce.

6. The Working Group elected the following officers:

Chairman ..... Mr. Jorge Barrera-Graf (Mexico)

Rapporteur ..... Mr. Gyula Eörsi (Hungary)

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

(*a*) Provisional agenda and annotations (A/CN.9/WG.2/L.4);

(*b*) Report of the Secretary-General: draft commentary on articles 1 to 13 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 (A/CN.9/WG.2/WP.27);**

(*c*) Report of the Secretary-General: analysis of unresolved matters in respect of the formation and validity of contracts for the international sale of goods (A/CN.9/WG.2/WP.28);**

(*d*) Note by the Secretary-General: observations of representatives on the draft of a uniform law for the unification of certain rules relating to validity of contracts of international sale of goods (A/CN.9/WG.2/WP.29);**

(*e*) Note by the Secretary-General: observations of the German Democratic Republic (A/CN.9/WG.2/WP.30).**

8. The Working Group adopted the following agenda:

(*a*) Opening of the session

(*b*) Election of officers

(*c*) Adoption of the agenda

(*d*) Formation and validity of contracts for the international sale of goods

(*e*) Date of the next session

(*f*) Adoption of the report of the session.

9. In the discussion of item (*d*) of the agenda the Working Group decided, firstly, to consider the rules relating to interpretation contained in article 14 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 at its eighth session,[3] secondly, to consider the possible inclusion in the draft Convention of certain rules relating

* 6 January 1978.

[1] UNCITRAL, report on the second session (1969), A/7618 (Yearbook . . . 1968-1970, part two, II, A).

[2] UNCITRAL, report on the third session (1970), A/8017 (Yearbook . . . 1968-1970, part two, III, A).

** Documents A/CN.9/WG.2/WP.27 to 30 are reproduced in the present volume, part two, I, B.

[3] A/CN.9/128, annex I (Yearbook . . . 1977, part two, I, B).

to validity of contracts and, thirdly, to complete its work on the preparation of rules relating to the formation of contracts for the international sale of goods.

10. The Working Group created a Drafting Group consisting of the representatives of France, Ghana, Mexico, Union of Soviet Socialist Republics and United Kingdom of Great Britain and Northern Ireland to consider drafting suggestions which had been made during the deliberations on the various articles, to assure consistency of drafting in the provisions of this Convention and with the draft Convention on the International Sale of Goods (hereinafter referred to as CISG), to assure consistency in the four language versions, and to propose a new arrangement of the articles. The Working Group invited other representatives and observers to attend meetings of the Drafting Group.

II. Deliberations and decisions

A. *Rules relating to interpretation*

11. The text of article 14 as adopted by the Working Group at its eighth session was as follows:

"*Article 14*

"(1) [Communications, statements and declarations 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, statements and declarations 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, statements and declarations 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]."

Article 14 in general

12. The Working Group considered whether the rules on interpretation contained in this draft Convention should be confined to interpreting the unilateral acts and statements of the parties, such as the offer and the acceptance, for the purpose of determining whether a contract has been concluded or whether the rules on interpretation should be extended to regulate the interpretation of contracts which have been concluded.

13. Under one view it was better to formulate general rules on interpretation, since it was artificial to distinguish between the interpretation of the communications which led to a contract and the interpretation of the contract which had been formed as a result of these communications. It was also considered that it would be undesirable to prescribe rules of interpretation in relation to formation and then leave the question of the interpretation of the contract to national law which may contain different rules. It was stated that interpretation in relation to formation and interpretation of the contract should be governed by the same rules because both require the establishment of the meaning of the same communications, statements, declarations and acts. In addition, it was noted that the draft Convention on Formation and CISG may eventually be combined into one instrument, in which case it would be inappropriate to limit the rules on interpretation to questions of formation.

14. However, there was considerable support for the contrary view that the rules of interpretation should be limited to determining whether a contract had been concluded. It was stated that the rules on interpretation of contracts were too complex to be set out adequately in the proposed Convention.

15. In addition, following the decision discussed in paragraphs 48 to 69 below not to include any of the provisions on validity of contracts from the draft of a Law for the Unification of Certain Rules relating to Validity of Contracts of International Sale of Goods which had been prepared by UNIDROIT, the entire text of the Convention would be limited to questions of formation of contract. Therefore, it was stated, it would be inappropriate to include provisions on the interpretation of contracts in this Convention.

16. The Working Group decided that the rules on interpretation should be limited to interpreting the unilateral acts and statements of the parties for the purpose of determining whether a contract had been concluded. At the same time it decided to append a foot-note to the text of the draft Convention noting that no similar rules on interpretation of the contract exist in the draft CISG.

Article 14 (1)

17. Under one view article 14 (1) was unnecessary because if there was an actual common intent of the parties, this intent would obviously be the interpretation of their statements and actions. Furthermore, if they had no actual common intent, it was hard to conceive of a court imposing a contract on the parties. In addition, it was noted that the rule in article 14 (2) would lead to the same result as that achieved by article 14 (1) for, if there was an actual common intent, each party would in fact know the intent of the other party. Accordingly, article 14 (1) was superfluous and could be deleted. It was also pointed out that the deletion of article 14 (1) would not prejudice a later decision to extend the rules of interpretation to interpretation of the contract since article 14 (2), which would become the primary rule of interpretation, was equally applicable to interpretation for the purposes of determining whether a contract had been concluded and to the interpretation of the contract.

18. The deletion of article 14 (1) was also favoured by some of those representatives who were of the view that the rules on interpretation should be limited to matters of formation since, in their view, the text in

article 14 (1) appeared to encompass questions of interpretation of the contract.

19. Support for the retention of article 14 (1) was founded on the view that it was useful to set out specifically the basic statement of principle that it contained. Furthermore, the rule might be useful in cases where a number of communications were involved in the formation process with the result that there may be actual common intent on some but not all the points contained in the communications. It was also pointed out that, although the application of article 14 (2) would usually result in the same conclusion as that achieved by article 14 (1), this would not always be the case, e.g. where each party knew of the other party's intent but where those intents differed.

20. The Working Group, after considering these points of view, decided to delete article 14 (1).

Combination of articles 14 (2), 14 (3) and 14 (4)

21. The Working Group considered two proposals to combine the provisions of the remaining three paragraphs. By one proposal articles 14 (2) and 14 (3) would have been combined. By the other proposal articles 14 (3) and 14 (4) would have been combined.

22. The proposal to combine articles 14 (2) and 14 (3) was intended to make the intent of a party also relevant where the other party did not know or could not be expected to know of that intent. The Working Group did not adopt this proposal as it was generally considered that article 14 (3) protected the other party where the party responsible for the communication, statement, declaration or act did not communicate his true intent. The later replacement of "intent" by "understanding" in article 14 (3) reinforced this decision not to merge the provisions. (See para. 28 below.)

23. The Working Group rejected a proposal to combine articles 14 (3) and 14 (4). This proposal would have eliminated as a means of interpreting the communications, statements and declarations by and acts of the parties any reference to the understanding a reasonable person would have had in the same circumstances. It was considered, however, that article 14 (3) served a useful function when it was not possible to determine the intent one party had or when the other party did not know of that intent under article 14 (2).

Article 14 (2)

Acts of the parties

24. During the course of deliberations on article 14 (1) it was suggested that "communications, statements and declarations" could be deleted from article 14 as they are covered by the word "acts". On the other hand a number of representatives questioned the use of the expression "acts of the parties" which appeared in the first three paragraphs of article 14. It was considered that the word "acts" might be misleading in some legal systems as it might be interpreted to refer only to legal acts, i.e. acts with legal consequences. The Drafting Group was requested to find a more suitable word such as "conduct" which would more closely conform to the word "*comportement*" in the French text.

Elimination of plural tense

25. The Working Group decided that article 14 (2) should refer to the "intent of a party" rather than to the "intent of the parties". This would avoid the possible problem of selecting which party's intent was governing.

Intent of the parties

26. As a consequence of its decision to delete article 14 (1) the Working Group deleted the expression "[i]f the actual common intent of the parties cannot be established".

27. The Working Group also deleted the expression "where such an intent can be established" as redundant since it was necessarily the case that, if an intent could not be established, it could not be taken into account.

Article 14 (3)

28. The Working Group decided to replace the word "intent" in the English text by the word "understanding". The present English text was ambiguous in that it appeared to introduce notions of what intentions a reasonable person would have had rather than what his understanding of the communications between the parties would have been. It was noted that the word "*sens*" in the French text, which was the text in which the provision was originally drafted, had the desired meaning.

29. The Working Group did not adopt a proposal to define the concept of a "reasonable person" as most representatives considered this a satisfactory standard. However, some representatives expressed the opinion that the notion of a "reasonable person" was vague and should be replaced. The suggestion that the reasonable person should be qualified as a reasonable person "in that trade" found no support.

Article 14 (4)

Matters in square brackets

30. The Working Group made the application of the tests in article 14 (4) obligatory by utilizing the expression "is to be determined" instead of "may be determined".

31. The Working Group deleted the word "preliminary" so that all negotiations would be relevant in determining the intent of the parties or the understanding that a reasonable person would have had in the same circumstances.

32. The Working Group also deleted the definition of "usages" contained in article 14 (4) as the concept of "usages" was already defined in article 13.

Duration of time-limits and application of article 11

33. The Working Group deleted the words "or the duration of any time-limit or the application of article 11". This decision was based upon the view that although the tests in article 14 (4) were appropriate to determine the intent of the parties or the understanding of a reasonable person in the same circumstances as the parties they were not appropriate to assist in the interpretation of provisions of the draft Convention.

34. One representative suggested that it would be desirable to include in the draft Convention a provision on interpretation of the Convention such as that contained in article 13 of CISG. The Working Group decided to examine this suggestion during its deliberations on the first 13 articles of the draft Convention.

Utilization of usages to determine intent or understanding

35. The Working Group considered a proposal that the word "usages" be deleted from article 14 (4) but that the draft Convention contain a provision that communications, statements and declarations by and acts of the parties be interpreted in the way that those expressions and acts would be interpreted in the trade concerned. This proposal was based on the view that usages were appropriate in determining the rights and duties of the parties to a contract but were less appropriate for the determination of their intent or the understanding of a reasonable person in the same circumstances as the parties. Furthermore, it was noted that usages might be used to introduce a term where the parties had been silent, which was not appropriate as a means of determining the actual intent of the parties.

36. The Working Group, after considerable discussion, decided not to adopt this proposal since CISG recognized that usages, as there defined, are a part of the contract and that they may be helpful in determining the intention of the parties or the understanding that reasonable persons in the same circumstances as the parties would have had.

Intent of the parties

37. Under one view the tests in article 14 (4) were not appropriate to determine the actual subjective intent of the parties. Accordingly, it was suggested that the provision be limited to the understanding that reasonable persons in the same situation as the parties would have had.

38. However, another view was that there could be uncertainty as to the actual subjective intent of the parties and that this uncertainty might be resolved in some cases by usages or by the practices established between or the conduct of the parties.

39. After deliberation, the Working Group decided to maintain the application of the tests in article 14 (4) to determine the intent of the parties.

Conduct subsequent to the conclusion of the contract

40. There was considerable support for the view that utilization of conduct subsequent to the conclusion of the contract should not be relevant in determining the intent of the parties or the understanding that a reasonable person would have had in the same circumstances for the purpose of determining whether a contract had been concluded. However, the reasons for this support varied. One approach was that utilization of subsequent conduct could result in a contract having one meaning at the time of its conclusion and another meaning subsequent to the time of its conclusion. It was also noted that it was inconsistent to refer to "conduct of the parties subsequent to the conclusion of the contract" for the purpose of determining whether there was a contract. The provision seemed to assume the existence of that which it was attempting to aid in determining.

41. However, there was also strong support for the view that subsequent conduct was relevant for questions of interpretation and that it would be unrealistic to exclude it.

Reservations in respect of article 14

42. A representative and an observer expressed a reservation in respect of article 14. The representative noted that the words "a party" in article 14 (3) should be in the plural because the interpretation of the statements and acts of one party must always be made in the light of the statements and acts of the other party.

Relationship to CISG

43. The Working Group decided to append a foot-note to the text of the draft Convention noting that there was no provision in CISG equivalent to the article on interpretation which had now been included in the draft Convention on Formation of Contracts for the International Sale of Goods.[4]

Additional proposal relating to article 14

44. After the Working Group had completed its discussion of article 14 (see above, paras. 11 to 44), an observer introduced a proposal that paragraphs (1) and (2) of article 14 read as follows:

"(1) 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.

"(2) 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."

45. The observer stated that interpretation of offers and acceptances could, by necessity, not be different from interpretation of the contract and that therefore any attempt to restrict the proposed rules to "formation" of the contract would be in vain. The observer argued that the basic approach to interpretation should be an objective one.

46. The Working Group noted this proposal but declined to reconsider its decisions in respect of article 14.

Decision

47. The Working Group adopted the following text of article 14 (which was later renumbered as article 4):

"(1) Communications, statements and declarations by and conduct of a party 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, communications, statements and declarations by and conduct of a party are to be interpreted according to the understanding that a reasonable person would have had in the same circumstances.

"(3) In determining the intent of a party or the understanding a reasonable person would have had in the same circumstances, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties."

[4] The foot-note to the article (foot-note *a*) is set out in the annex to the present report.

B. Rules relating to validity

48. The Working Group at its eighth session noted the view expressed at the ninth session of the Commission 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."[5]

49. The Working Group at its eighth session decided that at its ninth session it should determine which rules on validity of contracts of international sale of goods should be included in the draft Convention. In preparation of that session the Secretariat was requested to analyse the draft of a Law for the Unification of Certain Rules relating to Validity of Contracts of International Sale of Goods (hereafter referred to as LUV) prepared by UNIDROIT and to suggest what matters covered by that text as well as what other matters of validity of contracts should be included in the draft Convention.[6]

50. The Working Group examined the problem of validity in the context of the analysis contained in the report of the Secretary-General (A/CN.9/WG.2/WP.28) which examined LUV and in the light of the observations of the representative of the United Kingdom (A/CN.9/WG.2/WP.29) and of the German Democratic Republic (A/CN.9/WG.2/WP.30).

51. The report of the Secretary-General suggested that, other than articles 3, 4 and 5 of LUV, which related to interpretation and which had been incorporated into article 14 of this draft Convention, the Working Group should consider for inclusion in the draft Convention only articles 9 and 16.[7]

(1) *Proposals relating to the doctrine of mistake*

(a) *Possible inclusion of article 6 of LUV in draft Convention*

52. Article 6 of LUV is as follows:

"A party may only avoid a contract for mistake if the following conditions are fulfilled at the time of the conclusion of the contract:

"(*a*) The mistake is, in accordance with the above principles of interpretation, of such importance that the contract would not have been concluded on the same terms if the truth had been known; and

"(*b*) The mistake does not relate to a matter in regard to which, in all the relevant circumstances, the risk of mistake was expressly or impliedly assumed by the party claiming avoidance; and

"(*c*) The other party has made the same mistake, or has caused the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error."

Article 6 (a) *of LUV*

53. Under one view article 6 (*a*) should be included in the draft Convention because it provided a useful rule which was found in a number of legal systems. In the view of those supporting the provision it was designed to operate only in cases where the mistake was of "importance". It was suggested that an appropriate redrafting of the provision would make this limitation clearer. In addition, it was stated, possible abuse of the provision was prevented by article 14 (4) of LUV which provides, *inter alia*, that if "the mistake was at least in part the fault of the mistaken party, the other party may obtain damages from the party who has avoided the contract."

54. However, there was general opposition to the retention of this provision. It was considered to be unacceptably broad in its application since it appeared to provide that a party could avoid a contract for mistake even if the mistake would lead reasonable persons to make only minor modifications to the terms of the contract. It was also pointed out that even if the test were reformulated to include only important mistakes, it was very unlikely that a uniform body of interpretation would develop since concepts such as an "important mistake", or the like, depended upon value judgements which would vary widely. It was also pointed out that while a formulation such as that contained in article 6 (*a*) could operate satisfactorily in those legal systems which had a similar rule and consequently had the appropriate background in case law and doctrine to interpret the article, the formulation would not work as well in those legal systems which did not recognize such a rule. It could be expected that in those legal systems there would be widely varying interpretations of the provision.

55. After considerable deliberation the Working Group decided not to include a provision based on article 6 (*a*) of LUV in the draft Convention.

Article 6 (b) *of LUV*

56. There was some support for the inclusion of a provision based on article 6 (*b*) of LUV. This support was based on the view that the article provided a useful rule where there was a mistake but the circumstances indicated that the person claiming avoidance had assumed the risk of such a mistake. In addition, it was pointed out that as the article was framed negatively it would be possible to include it in the draft Convention even if the draft Convention did not include a complete provision on mistake.

57. However, most representatives considered that this provision should not be incorporated into the draft Convention for the same general reasons as led to the decision not to adopt a provision based on article 6 (*a*).

58. The Working Group accordingly decided not to adopt a provision based on article 6 (*b*) of LUV.

Article 6 (c) *of LUV*

59. There was no support for the adoption of a provision based on article 6 (*c*) of LUV.

(b) *Possible inclusion of article 8 of LUV in draft Convention*

60. Article 8 of LUV provides:

"A mistake shall not be taken into consideration when it relates to a fact arising after the contract has been concluded."

[5] Report of the Working Group on the International Sale of Goods on the work of its eighth session, A/CN.9/128, para. 8 (Yearbook . . . 1977, part two, I, A).

[6] *Ibid.*, paras. 173 and 174.

[7] Report of the Secretary-General: analysis of unresolved matters in respect of the formation and validity of contracts for the international sale of goods (A/CN.9/WG.2/WP.28, para. 44).

61. There was some support for this provision on the basis that it would rightly deny a party the right to avoid the contract for mistake where his mistake consisted of an evaluation as to future events.

62. However, most representatives were of the view that it would not be useful for the draft Convention to contain a provision based on this article once it was decided not to retain article 6 of LUV. It was thought not to be appropriate to negate in the draft Convention one aspect of what might constitute mistake if the basic concept of mistake was left to national law. It was also suggested that, in any case, the rule as presently contained in article 8 was too broad.

63. The Working Group accordingly decided not to include a provision based on article 8 of LUV in the draft Convention.

(c) *Possible inclusion of article 9 of LUV in draft Convention*

64. Article 9 of LUV provides:

"The buyer shall not be entitled to avoid the contract on the ground of mistake if the circumstances on which he relies afford him a remedy based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods."

65. This provision was generally considered inappropriate for inclusion in the draft Convention. The reasons for this view varied. One approach was that it was undesirable to limit the right that national law might give to avoid contracts on the basis of mistake merely because there was a remedy available based on non-conformity of the goods under the substantive law of sales. Compelling the buyer to rely on such remedy based on non-conformity might in some circumstances unjustifiably deprive the buyer of the right to avoid the contract. Another view was that the article was unnecessary because, if goods did not conform to the contract, it was clear that any remedy must be based on non-conformity whereas if there was a mistake in making the specification, any claim concerning the supply of inappropriate goods would be based on mistake. It was also pointed out that, since there was no assurance that a State which adhered to this Convention would also adhere to CISG, this article could not give assurance that a party would have the remedies available to him under that Convention, even though this seemed to be its main purpose.

66. In view of these considerations the Working Group decided not to include a provision based on article 9 of LUV in the draft Convention.

(d) *Possible inclusion of article 16 of LUV in the draft Convention*

67. Article 16 of LUV provides:

"1. The fact that the performance of the assumed obligation was impossible at the time of the conclusion of the contract shall not affect the validity of the contract, nor shall it permit its avoidance for mistake.

"2. The same rule shall apply in the case of a sale of goods that do not belong to the seller."

68. Some representatives expressed support for the adoption of article 16.

69. However, the Working Group decided not to include such a provision in the draft Convention because no other provisions on mistake had been adopted and there was no compelling reason to make an exception in this case.

(2) *Proposals relating to good faith and fair dealing*

70. During the eighth session of the Working Group the representative of Hungary submitted paragraphs I and II of the proposal set out below, the consideration of which was deferred by the Working Group to its ninth session.[8] The German Democratic Republic suggested that a third paragraph be added to the proposal of Hungary.[9] The composite text reads as follows:

"I

"In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith. [Conduct violating these principles is devoid of any legal protection.]

"II

"The exclusion of liability for damage caused intentionally or with gross negligence is void.

"III

"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."

The general concept of provisions on good faith and fair dealing.

71. The general concept that the draft Convention should contain provisions relating to good faith and fair dealing was supported by a majority of the representatives. It was pointed out that such principles are expressly stated in many national laws and codes and that it was thus appropriate that similar provisions be found in international conventions. It was also pointed out that provisions on good faith and fair dealing contained in national laws had in some legal systems become useful regulators of commercial conduct. It was suggested that, over time, the same process may occur on an international level, particularly if national jurisprudence and doctrine were used to assist in the interpretation of such provisions in the draft Convention.

72. Although the majority of the representatives were in favour of including a provision on good faith and fair dealing in the Convention, there was considerable opposition to the specific formulation of each paragraph of the proposed text.

Paragraph I

73. Paragraph I was supported on the basis that it incorporated a desirable standard of business conduct in the process of formation of contracts, a standard which was recognized and codified in many legal systems and there was no reason for not having a similar rule in international trade. Although there might be difficulty, in particular in the beginning, in obtaining a uniform interpretation of this provision in all legal systems, this would not be worse than the situation that

[8] A/CN.9/WG.2/WP.28, para. 60. The representative of Hungary explained that the second sentence of paragraph I was put in square brackets as informal consultations had indicated opposition to the sentence from some representatives who were prepared to support the first sentence.

[9] A/CN.9/WG.2/WP.29, annex, para. 3.

prevailed in national laws after such kinds of general clauses were enacted. The existence of a uniform text might encourage future uniformity of interpretation of such matters.

74. On the other hand it was noted that the general principle enunciated in the first sentence would not have much effect until it had been judicially interpreted and applied over a long period of time. In addition, the view was expressed that the sentence was too vague and imprecise. In particular, one representative noted that as it would be difficult to enumerate "the" principles of fair dealing it might be preferable to refer to "principles of fair dealing". It was also stated that countries which gave internal effect to treaties by enabling legislation might leave out the provision on the basis that the provision did not add anything to national law.

75. The second sentence failed to attract widespread support, largely because it was considered to provide vague and unclear standards which would be unlikely to receive a uniform interpretation.

76. One representative was opposed to the entire first paragraph because it contained vague rules whose meaning would depend upon value judgements which would vary greatly.

77. After considerable deliberation, the Working Group decided to adopt the first sentence of paragraph I. One representative expressed a reservation in respect of this decision. The Working Group deleted the second sentence of the paragraph.

Relationship to CISG

78. The Working Group decided to append a footnote to the text of the draft Convention noting that there was no provision in CISG equivalent to the first sentence of paragraph I which has now been included in this Convention.

Paragraph II

79. Under one view paragraph II should be retained because it provided a safeguard, albeit a minimum one, against unilaterally imposed exemption clauses by placing a limit well known to many national laws on the allowable extent of such clauses.

80. However, another view was that this complex question was best regulated by national law. Concepts such as gross negligence were susceptible of varying definitions with the result that the provision would lead to uncertainty in application. It was also pointed out that the International Convention for the Unification of Certain Rules relating to Bills of Lading (Brussels Convention of 1924) provided exemption from liability in some cases of intentional damage, e.g. when done in furtherance of saving life at sea.[10] These problems could lessen the chances of widespread ratification of the draft Convention if it included a provision based on paragraph II.

81. It was also pointed out that while paragraph II might be appropriate for consumer transactions it was less appropriate for transactions between merchants where exclusions of liability for the seller were frequently compensated by a lower price for the buyer.

82. There was considerable support for an amended provision which would permit total exemption clauses when the complete exemption from liability was reflected in a lower price. However, another view was that this proposal still ran counter to the principle of autonomy of the will of the parties contained in article 4 of CISG. Some representatives did not consider that article 4 caused difficulty since CISG specifically excluded itself from questions of formation.[11]

83. After considerable discussion no consensus could be reached on the desirability of including in the draft Convention a provision based on paragraph II. Accordingly, the paragraph was not retained.

Paragraph III

84. In support of paragraph III it was stated that prior to the formation of the contract the parties had duties and responsibilities toward each other. The proposal recognized these duties and provided compensation for costs in the event of their violation. The fact that a contract had not yet come into existence was recognized by the fact that the sanction provided by the provision was limited to the recovery of costs and did not include other items of damages such as recovery for loss of profit. It was also suggested, however, that the paragraph should provide for recovery of all damages.

85. However, the generally prevailing view was that the paragraph was too vague and uncertain to be usefully included in the draft Convention. Furthermore, the inclusion might lessen the chances of widespread ratification of the Convention.

86. After deliberation, the Working Group decided not to retain paragraph III.

Decision

87. The Working Group adopted the following text (which was later numbered as article 5):

"In the course of the formation of the contract the parties must observe the principles of fair dealing and act in good faith."

C. Formation of contracts for the international sale of goods

Article 1

88. The text of article 1 as adopted by the Working Group at its eighth session was as follows:[12]

"[Article 1 (alternative 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.]

"[Article 1 (alternative 2)

"(1) This Convention applies to the formation of

[10] Paragraph (4) of article 4 of the Brussels Convention of 1924 is as follows: "Any deviation in saving or attempting to save life or property at sea or any reasonable deviation shall not be deemed to be an infringement or breach of this convention or of the contract of carriage, and the carrier shall not be liable for any loss on damage resulting therefrom". The Brussels Convention of 1924 appears in the *Register of Texts of Convention and other Instruments Concerning International Trade Law*, vol. 11 (United Nations publication, Sales No. E.73.V.3), chap. II, sect. I.

[11] Article 6.

[12] Those matters which were not resolved by the Working Group at its eighth session were placed in square brackets.

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.]"

Scope of application of the draft Convention

89. The Working Group considered the scope of application provisions in article 1 in the light of its decisions to include in the draft Convention rules on the interpretation of communications, statements and declarations by and acts of the parties and to include a provision on fair dealing and good faith in the formation of a contract.

Alternative 1

90. This alternative was discussed in the light of the following example. The buyer has his place of business in State A which has ratified both CISG and the Formation Convention and which has therefore chosen alternative 1 of article 1. The seller has his place of business in State B which is not party to CISG but which is party to the Formation Convention and has accordingly chosen alternative 2 of article 1. For the courts of State A it would appear that the Formation Convention does not apply since article 1 of CISG would exclude the transaction from the ambit of CISG because both States were not Contracting States[13] and the rules of private international law[14] would normally lead to the application of the law of the place of business of the seller, which State was not party to CISG. However, if the question arose before the courts of State B the transaction would be governed by the Formation Convention since article 1 (1) *(a)* of alternative 2 would be satisfied.

91. There was considerable support for the view that this result was inappropriate and that the Formation Convention should apply if the parties had their places of business in different Contracting States. This result could be achieved by deleting alternative 1 and relying solely upon alternative 2.

92. The deletion of alternative 1 was also supported by representatives who considered that a State which adhered only to the Formation Convention should be able to do so on the same basis as a State which adhered to both the Formation Convention and the Sales Convention.

93. Under another view, alternative 1 was merely a shorthand expression of alternative 2, which was identical in material respects to article 1 of CISG. Therefore, it was unlikely that a court would reach the conclusion suggested in the example. One representative favoured the retention of alternative 1 as it would make the Formation text inapplicable where a party had his place of business in a State which had declared that the application of CISG depends upon its express adoption by the parties and those parties had not decided to adopt it.[15]

94. After deliberation, the Working Group deleted alternative 1 of article 1.

Alternative 2

Article 1 (1) (b)

95. The Working Group considered a proposal for the deletion of article 1 (1) (*b*).

96. Under one view this provision, although appropriate in CISG, was not appropriate in a Convention on Formation of Contracts because the rules of private international law do not necessarily select one law to govern all elements in the formation process. However, another view was that, since article 1 (1) (*b*) was identical to article 1 (1) (*b*) of CISG which had been formulated after long and exhaustive discussion by the Working Group and which had been adopted by the Commission, it would be inappropriate for the Working Group to alter the provision at this stage. Any changes should be proposed during the diplomatic conference which would be convened to consider the draft Conventions.

[13] Article 1 (1) (*a*) of CISG is in the same terms as article 1 (1) (*a*) of alternative 2 of article 1 of this draft.

[14] Article 1 (1) (*b*) of CISG is in the same terms as article 1 (1) (*b*) of alternative 2 of article 1 of this draft.

[15] Cf. Convention relating to a Uniform Law on the International Sale of Goods, The Hague, 1 July 1964, article V.

97. The deletion of article 1 (1) (*b*) was also supported on the basis that its effect in a non-Contracting State was uncertain. It was not clear whether the courts of non-Contracting States would, if their rules of private international law lead to the application of the law of a Contracting State, apply only the domestic law of that State or apply the rules contained in the Convention which had been adhered to by that State. It was suggested that the result may depend upon the manner in which that Contracting State had incorporated the Convention into its domestic legal system. Accordingly, it was proposed that article 1 (1) (*b*) should either be deleted or that the report should indicate whether it was intended that the rules contained in the Convention should apply in the courts of a third State not party to the Convention.

98. It was stated that the same type of problem arose in the case of a party having his place of business in a Contracting State and a party having his place of business in a non-Contracting State.

99. On the other hand, it was pointed out that non-Contracting States could not be bound by provisions in a Convention to which they were not party. Accordingly, the fact that a provision in a Convention might lead to conflicting interpretations in non-Contracting States was no argument for deletion of that provision.

100. After deliberation, the Working Group decided to retain article 1 (1) (*b*).

Drafting changes

101. The Working Group also requested the Drafting Group to effect a number of drafting changes, in particular the replacement of the phrase "entered into by" in article 1 (1) by "between". The Drafting Group was also requested to ensure that any changes in the drafting of the scope of application provisions of CISG by the Commission at its tenth session would be reflected in the drafting of article 1.

Decision

102. The text of article 1 as adopted by the Working Group is as follows:

"(1) This Convention applies to the formation of contracts of sale of goods between 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) 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.

"(4) 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, neither knew nor ought to have known 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.

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

"(6) 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.

"(7) 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."

Article 2

103. The text of article 2 as adopted by the Working Group at its eighth session is as follows:

"(1) The parties may [agree to] exclude the application of this Convention.

"(2) Unless the Convention provides otherwise, the parties may [agree to] 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.

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

Paragraphs (1) and (2)

Necessity for agreement to exclude or vary Convention

104. The Working Group considered a proposal to retain the expression "agree to" which appeared in articles 2 (1) and 2 (2) and which had been placed in square brackets at the eighth session of the Working Group.

105. Under one view the will of one party should be sufficient to exclude the application of the Convention or to derogate from or vary the effect of any of its provisions. In support of this view it was stated that it was unlikely that the parties would reach agreement on the question of the applicability of the Convention prior to the conclusion of their contract since the usual way in which the Convention would be excluded would be by general conditions attached to an offer which specified, *inter alia*, the manner in which any future contract between the parties was to be concluded. The Conven-

tion should permit this practice which recognized the principle that the offeror can specify the manner in which the offeree must accept the offer.

106. However, there was strong support for the view that exclusion or variation of the provisions of this Convention should be permitted only by express or implied agreement between the parties. It was stated that it was difficult to understand how one party could unilaterally impose on the other party his decision to exclude the Convention or to derogate from or vary any of its provisions. A party could bind only himself but not the other party by a unilateral declaration. It was noted that it was quite common for parties to reach agreement on numerous points during the formation process and prior to the conclusion of the contract. Accordingly, the question of the exclusion of the Convention was properly left to agreement between the parties. This approach also had the benefit of encouraging the application of the Convention.

107. The Working Group decided to retain the words "agree to" in article 2 (1) and 2 (2), thereby making both provisions subject to agreement between the parties.

Article 2 (2)

108. The Working Group did not adopt a proposal that the words "as may appear from the preliminary negotiations, the offer, the reply, the practices which the parties had established between themselves or usages" be deleted from article 2 (2). The Working Group also did not adopt a proposal that article 2 (2) should not apply to contracts which were intended to be concluded in written form.

109. A representative requested that the report reflect the view of her delegation that article 2 (2) should not apply to contracts concluded in written form.

110. The Working Group deleted the word "preliminary" to make the provision conform to article 14 (4).

111. The Working Group recalled that at its eighth session it had decided that the parties were not to be permitted to derogate from or vary the provisions of article 4, but noted that the text that it had adopted at its eighth session did not reflect this decision.

Article 2 (3)

112. There was general agreement with the rule in article 2 (3) that the offeror could not unilaterally impose on the offeree a term of the offer that his silence would constitute acceptance of the offer. However, there was a difference of views as to whether silence on the part of the offeree could ever constitute acceptance of the offer.

113. Under one view the parties should have the possibility to agree that silence on the part of the offeree would constitute acceptance. It was stated that such situations might often arise where a buyer and a seller had continuing commercial relations.

114. Under another view an acceptance should always be made by declaration. Therefore, there would be no occasion in which silence could amount to acceptance. Yet another view was that silence which was not accompanied by some objective act should not constitute acceptance.

115. Another question raised was whether the offeror should be bound if he had said in his offer that the silence of the offeree would constitute acceptance and the offeree relied upon this statement by intending to accept but remaining silent.

116. The Working Group decided to adopt the principle in article 2 (3) that the offeror could not impose a term of the offer that silence would constitute acceptance but to make it clear in article 2 (3) and in article 8 (1) that the parties could agree that silence would constitute acceptance.

117. One representative objected to enabling the parties to create a contract by means of silent acceptance.

Decision

118. The text of article 2 as adopted by the Working Group is as follows:

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

"(2) Unless the Convention provides otherwise, the parties may agree to derogate from or vary the effect of any of its provisions as may appear from the negotiations, the offer or the reply, the practices which the parties have established between themselves or from usages.

"(3) Unless the parties have previously agreed otherwise, a term of the offer stipulating that silence shall amount to acceptance is not effective."

Article 3

119. The text of article 3 as adopted by the Working Group at its eighth session is as follows:

"[*Article 3 (alternative 1)*

"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.]

"[*Article 3 (alternative 2)*

"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.]"

120. The Commission at its tenth session adopted the following text of article 11 of CISG:

"*Article 11*

"(1) A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

"(2) Paragraph (1) of this article does not apply to a contract of sale where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention."

121. Article (X), to which article 11 of CISG refers, is as follows:

"Article (X)

"A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing, may at the time of signature, ratification or accession, make a declaration to the effect that article 11, paragraph (1) shall not apply to any sale involving a party having his place of business in a State which has made such a declaration."

Article 3 in general

122. The Working Group decided to proceed on the basis of article 11 and article (X) of CISG which had been adopted by the Commission at its tenth session.

Paragraph (1)

123. The Working Group considered a proposal that the opening words of the first sentence of article 11 (1) be amended to conform to alternative 1 of article 3 so that the provision would begin "[a]n offer or an acceptance need not be evidenced by writing. . .". The Working Group also considered an allied proposal that the words "or any other act" be added after the word "acceptance".

124. In support of the first proposal it was stated that this formulation was more precise than the general formulation contained in article 11 (1) of CISG in that it emphasized that neither the offer nor the acceptance need be in writing. In support of the second proposal it was stated that the use of this wording would ensure that article 3 would cover all matters relating to the formation of the contract.

125. However, another view was that it was more appropriate to retain the formulation used in article 11 (1) of CISG because both that article and article 3 of this Convention dealt with matters of formation. It would thus be confusing to be faced by two versions of essentially the same provision.

126. The Working Group decided to adopt article (11) 1 of CISG as article 3 (1) of this draft Convention.

127. A representative reserved his position with respect to the adoption of the second sentence of article 11 (1) of CISG in this Convention because he considered that contracts should not be able to be proved by means of witnesses.

Proposed additional sentence to paragraph (1)

128. The Working Group considered a proposal that article 3 (1) should contain an additional sentence providing an exception to article 2 (2) to the effect that a party could unilaterally exclude article 3 and provide that his contract with the offeree must be in writing to be binding on him.

129. This proposal was supported on the basis that a party should be able to require that his contract be in writing.

130. The proposal was opposed on the basis that it ran counter to the principle that the Working Group had adopted in respect of article 2 (2), i.e. that any derogation from or variation of the provisions of the Convention required agreement of the parties. It was also suggested that under article 7 (1) a purported oral acceptance of an offer which required a written acceptance would not constitute an acceptance and that, therefore, no contract would be concluded.

131. The Working Group did not adopt the proposal to enable unilateral derogation from article 3. Two representatives reserved their position with respect to this decision.

Paragraph (2)

132. The Working Group considered a proposal that a sentence be added to paragraph (2) which would provide that the parties could neither refuse to apply this paragraph nor modify it by virtue of article 2, paragraph (2), of this Convention.

133. Under one view this provision was necessary because article 2 (2), which permits variation of or derogation from the provisions of the Convention, could give rise to the argument that the parties could render ineffective a declaration of a Contracting State under article (X) by agreeing to exclude or derogate from the effect of paragraph (2) of this article by virtue of article 2 (2).

134. Under another view it was inappropriate to depart from the text of CISG and that, therefore, the proper procedure would be for the Working Group to draw the attention of the Commission to the problem.

135. The Working Group decided to retain the proposal. One representative requested that the report reflect his opinion that in cases where article 3 (2) and article (X) applied, the question of whether the formation of the contract required writing would depend upon the applicable law which was not necessarily that of the State which had made the declaration. Accordingly, it was still possible for the contract to be concluded without a writing.

Decision

136. The text of article 3 as adopted by the Working Group is as follows:

"(1) A contract of sale need not be concluded in or evidenced by writing and is not subject to any other requirements as to form. It may be proved by any means, including witnesses.

"(2) Paragraph (1) of this article does not apply to a contract of sale where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

Article (X)

137. The Working Group decided that article (X) of CISG should be adopted as the basis for a similar provision in this Convention. It noted, during its consideration of article (X) in connexion with article 3 (2), that provision for similar declarations might be necessary in respect of other articles of this Convention.[16] The text of article (X) is as follows:

"A Contracting State whose legislation requires a contract of sale to be concluded in or evidenced by writing may at the time of signature, ratification or accession make a declaration to the effect that the provisions of this Convention, in so far as they allow the conclusion, modification or rescission of the con-

[16] Provision for similar declarations was also made in respect of other articles in the draft Convention: see paras. 152, 250 and 293 below.

tract, offer, acceptance or any other indication of intention to be made otherwise than in writing shall not apply if one of the parties has his place of business in the declarant State."

Article 3 A

138. The text of article 3 A as adopted by the Working Group at its eighth session is as follows:

"(1) The contract may be modified or rescinded merely by agreement of the parties.

"(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.]"

Article 3 A (1)

139. The Working Group noted that the use of the word "merely" was intended to indicate that the common law doctrine of consideration was inapplicable to the modification or rescission of a contract.

140. The Working Group did not adopt a proposal that article 3 A (1) specifically include reference to the substitution of a new contract for the original contract because this addition was generally considered to be unnecessary. The paragraph was adopted without change.

Article 3 A (2)

Modification or rescission of written contracts

141. The Working Group considered a proposal that article 3 A (2) read as follows:

"(2) A written contract may not be otherwise modified or rescinded."

142. This proposal was supported on the basis that it would minimize disputes and help create certainty of contract. It was also stated that such a provision was necessary for large organizations which needed to be able to insist on written modifications or rescissions to written contracts for purposes of control.

143. However, under another view this restriction could cause serious injustice in cases where the action of one party had led the other party to rely on an expectation either that a subsequent written agreement to modify or rescind the contract would be forthcoming or that the first party would not insist on a writing. Therefore, it was important that the second sentence of article 3 A (2) be retained.

144. After considerable discussion the Working Group rejected the proposal.

Deletion of article 3 A (2)

145. The Working Group considered a proposal that article 3 A (2) be deleted.

146. It was stated by some representatives that the rule in the first sentence of article 3 A (2) was wrong in that if the parties had in fact agreed to modify or rescind the contract, that agreement should be effective even if it was not in writing. This result would be reached under article 3 A (1) if article 3 A (2) was deleted. The deletion of article 3 A (2) was also favoured by some representatives as an alternative to the proposal discussed in paragraphs 141 to 144 above.

147. On the other hand it was stated that article 3 A (2) represented a balance between the needs of some parties to ensure that modifications and rescissions of their contracts were in writing so as to preserve an adequate paper record of their transactions and the needs of fairness to the other party.

148. The Working Group decided not to adopt the proposal to delete article 3 A (2).

Deletion of phrase "to his detriment"

149. The Working Group considered a proposal to delete the expression "to his detriment."

150. The view was expressed that the words "to his detriment" were vague, and unnecessary. However, the expression was supported on the basis that it provided a useful criterion which would assist a court in determining whether the rule stated in the first sentence of article 3 A (2) should be applied.

151. After deliberation, the Working Group deleted the expression "to his detriment."

Proposed article 3 A (3)

152. The Working Group adopted a proposal to add a new paragraph (3) to article 3 A, similar to article 3 (2), which would provide that a Contracting State could make a declaration under article (X) in respect of paragraphs (1) and (2) of article 3 A, in so far as these two paragraphs allow a modification or rescission of a contract otherwise than in writing. The Working Group also decided to make a corresponding amendment to article (X).[17]

Decision

153. The Working Group adopted the following text of article 3 A (which was later renumbered as article 18):

"(1) The contract may be modified or rescinded by the mere agreement of the parties.

"(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 conduct from asserting such a provision to the extent that the other party has relied on that conduct.

"(3) This article does not apply to the modification or rescission of a contract in so far as it is allowed otherwise than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

Article 4

154. The text of article 4 as adopted by the Working Group at its eighth session is as follows:

"(1) A proposal for concluding a contract [addressed to one or more specific persons] constitutes

[17] The text of article (X) is found in para. 137.

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 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.]"

Article 4 (1)

Public offers

155. The Working Group considered whether the draft Convention should deal with public offers.

156. One view was that the draft Convention should make provision for public offers which were becoming more important in international trade. However, it was also stated that while public offers may be increasing in certain types of international transactions they were still uncommon in the international sale of goods so that their regulation could be left to national law. It was also stated that in view of the limited amount of time available to the Working Group it would be more appropriate to consider the question of public offers in connexion with the Commission's new long-term programme of work. The rules needed to regulate public offers were complex and could perhaps be dealt with in a separate Convention.

157. The Working Group, after considerable discussion which revealed that most representatives favoured the inclusion of rules on public offers, considered a proposal that the phrase in square brackets in article 4 (1) be maintained and that the following paragraph based on article 2 (3) of the draft Uniform Law on the Formation of Contracts in General elaborated by UNIDROIT be added as a new article 4 (2):

"(2) Offers not addressed to one or more specific persons are to be considered, unless the contrary is clearly indicated by the person making the statement, merely as invitations to make offers."

158. This proposal to deal separately with public offers was generally supported. It was noted that setting out the rule on public offers in a separate provision would make it easier, if desired, to modify such other provisions as were thought to be affected by public offers. However, some representatives considered that it would be sufficient to delete the phrase "[addressed to one or more specific persons]" contained in article 4 (1).

159. The Working Group decided to adopt the proposal to retain the expression "addressed to one or more specific persons" in article 4 (1) and to accept in principle the proposed text which was to appear as a new article 4 (2).

160. The Working Group considered a proposal to introduce a rule on acceptance of public offers. This proposal did not gain widespread support. The question of withdrawal and revocation of public offers is discussed in paragraph 180 below.

Indication of intention to be bound

161. The Working Group considered a suggestion to replace the requirement that the offer must indicate the intention of the offeror to be bound by a provision stating that this intention could be deduced from the circumstances surrounding the transaction. This suggestion was based on recent developments in the use of automatic data processing (ADP) systems where the communications by themselves may not indicate an intention on the part of the offeror to be bound but which would do so if all the circumstances of the transaction were examined.

162. The Working Group did not adopt this proposal since it was considered that the result which it was designed to achieve had already been achieved by the rules on interpretation contained in article 14.

Article 4 (2)

First sentence of article 4 (2)

163. The Working Group considered a proposal for the deletion of the first sentence of article 4 (2) and a proposal that the rule that it expresses be phrased in the negative.

164. Support for the deletion of the first sentence was based on the view that it was very difficult, if not impossible, to gain agreement on a definition of "sufficiently definite" for the purposes of determining whether a proposal for concluding a contract constitutes an offer. Accordingly, it was preferable to leave the matter to national law rather than attempt to reach an unsatisfactory compromise definition in the text. This was stated to have the added advantage of adopting the approach of the 1964 Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF) which had already been ratified by a number of States.

165. The proposal to express the rule in the first sentence of article 4 (2) in the negative, i.e., to state that an offer is not sufficiently definite unless expressly or impliedly it indicates the kind of goods and fixes or makes provision for determining the quantity and the price, would make it possible to hold that in a given transaction a contract could not be concluded without agreement on additional elements while at the same time recognizing that no contract of sale could be concluded without agreement on at least these three elements.

166. However, there was considerable support for the view that the first sentence of article 4 (2) provided a useful uniform definition of what was "sufficiently definite" to enable a proposal for concluding a contract to be considered an offer. It was also stated that the advantages of this approach would be destroyed by a negative formulation of the definition. It was added that it was always open to the offeror or the offeree to require agreement on further elements of the transaction before the contract would be concluded.

167. After considerable discussion the Working Group decided to retain the first sentence of Article 4 (2). The Working Group rejected the proposal to ex-

press the first sentence of article 4 (2) in the negative because it was considered that the criteria set out in the sentence should be sufficient in themselves to make a proposal sufficiently definite to constitute an offer. Adoption of the negative formulation would have led to a contrary result. For similar reasons the Working Group rejected a proposal to amend the first sentence so that the proposal would have been sufficiently definite if it "at least" indicates the kind of goods and fixes or makes provision for determining the quantity and the price.

168. A representative and an observer requested that the report reflect their view that article 4 of ULF was preferable to the text adopted by the Working Group and that the requirements set out in article 4 (2) were only minimum requirements.

Deletion of second sentence of article 4 (2)

169. The Working Group considered a proposal to delete the second sentence of article 4 (2).

170. This proposal was supported on the basis that article 37 of CISG upon which the provision was based had been agreed to by the Commission on the assumption that it applied only to contracts which had been validly concluded according to the applicable law. However, the inclusion of the provision in this Convention would make valid the conclusion of contracts which did not state a price or make provision for its determination even though many legal systems refuse to recognize such contracts. The deletion of article 4 (2) was also supported on the basis that it selected the seller's price in cases where the offer did not state a price or make provision for its determination.

171. The retention of the second sentence of article 4 (2) was supported on the basis that it contained a useful rule and that it was essential to keep the provisions in this draft parallel to those contained in CISG.

172. The Working Group, after deliberation, decided to retain the second sentence of article 4 (2).

173. Two representatives expressed reservations to this decision. The Working Group agreed to include these reservations as a foot-note to the text of the article.

Decision

174. The Working Group adopted the following text of article 4 (which was later renumbered as article 8):

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

"(2) A proposal other than one addressed to one or more specific persons is to be considered merely as an invitation to make offers, unless the contrary is clearly indicated by the person making the proposal.

"(3) A proposal is sufficiently definite if it indicates the kind of goods and fixes or makes provision for determining the quantity and the price. Nevertheless, if a proposal indicates the intention to conclude the contract even without making provision for the determination of the price, it is considered as proposing 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."

Article 5

175. The text of article 5 as adopted by the Working Group at its eighth session 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 dispatched 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 5 (1)

176. The Working Group adopted the phrase "even if it is irrevocable" which it had placed within square brackets at its eighth session. This phrase was considered to contain a practical rule which made it clear that all offers could be withdrawn if the withdrawal was communicated to the offeree before or at the same time as the offer.

177. The Working Group requested the Drafting Group to consider whether article 5 (1) could be reformulated to explain the distinction between withdrawal of an offer and revocation of an offer. There was general agreement that "withdrawal" referred to the period of time before the offer became effective and that "revocation" referred to the period of time after the offer became effective. However, doubts were expressed whether the distinction was clear because the offer could be withdrawn if it had been communicated to the offeree at the same time as the withdrawal, which meant that both communications were effective but that the withdrawal took precedence over the offer and revoked it.

Communication of offers

178. The Working Group noted that by the definition of the word "communicated" in article 12,[18] an offer and the withdrawal of an offer become effective under article 5 (1) and a revocation of an offer becomes effective under article 5 (2) at the moment the offer, withdrawal or revocation is delivered to the addressee whereas article 10 of CISG adopted the general principle that communications were effective on dispatch.

179. One representative and two observers stated that offers and acceptances and their revocation should

[18] The Working Group when considering article 12 replaced the words "communicated to" with "reaches". See para. 292 below.

be effective only when the particular communication comes to the knowledge of the addressee.

Withdrawal and revocation of public offers[19]

180. The Working Group noted two proposals relating to public offers. The first proposal made the withdrawal and revocation of a public offer effective when the offeror has taken reasonable steps to bring the withdrawal or revocation to the attention of those to whom the offer was addressed. The second proposal provided that a public offer becomes effective when it is notified in a manner by which the public can recognize it and that it may be revoked by a notice made in the same manner as that in which it was made. The Working Group did not have sufficient time to consider these proposals and accordingly requested the Secretariat to bring the matter to the attention of the Commission at its eleventh session in 1978.

Article 5 (2)

181. The Working Group considered a proposal to delete the expression "shipped the goods or paid the price" which had been placed in square brackets at its eighth session.

182. This proposal was supported on the basis that the only form of acceptance which the draft Convention should recognize was an acceptance by declaration. It was added that while shipment of the goods or payment of the price were not acts of acceptance according to article 8 their effect was very similar under article 5 (2) in that the offer could no longer be revoked by the offeror. Furthermore, it was stated, in these cases the offer would frequently be irrevocable by the operation of article 5 (3) (*c*) since the offeree would have acted in reliance on the offer and it would have been reasonable for him to do so.

183. The rule that the offer cannot be revoked if the offeree has shipped the goods or paid the price was supported on the basis that it was a useful rule which created no more uncertainty than the rule that an offer could not be revoked if the offeree had dispatched his acceptance, which is already found in article 5 (2). It was also pointed out that ULF had the same rule in a different formulation in that the contract would be accepted by shipment of the goods or payment of the price, after which the offer could no longer be revoked.

184. After considerable deliberation the Working Group deleted the phrase "shipped the goods or paid the price" from article 5 (2).

185. A representative expressed a reservation in respect of this decision, stating that to permit revocation of an offer after dispatch of the goods or payment of the price was contrary to the principles of good faith in international trade.

186. The Working Group noted that the deletion of the phrase "shipped the goods or paid the price" would necessitate reconsideration of article 8 (1 *ter*).

187. A representative pointed out that since article 5 (2) uses the term "dispatched his acceptance", it followed that the article was inapplicable to cases when the acceptance is effective upon the doing of an act (see paras. 241 to 250 below).

[19] The question of acceptance of public offers is discussed in paras. 155 to 160 above.

Article 5 (3)

Subparagraph (a)

188. The Working Group adopted article 5 (3) (*a*) and requested the Drafting Group to consider whether it was necessary to use the expression "expressly or impliedly" in view of the rules on interpretation contained in the draft Convention.

Subparagraph (b)

189. The Working Group considered three proposals in respect of article 5 (3) (*b*). The first was to adopt the word "acceptance", the second was to adopt the word "irrevocability" and the third was to delete the provision.

190. The proposal to adopt the word "acceptance" was supported on the basis that it recognized a widely accepted rule in civil law systems and also created a rule that was appropriate for international sales of goods.

191. However, it was pointed out that the rule was unknown in common law countries. In those countries merchants were accustomed to making offers in which they set a maximum period of time for acceptance but did not intend thereby to make their offers irrevocable for that period. The adoption of the word "acceptance" in article 5 (3) (*b*) would create a trap for merchants from those countries. Therefore, it was suggested that the word "irrevocability" be adopted.

192. In opposition to the adoption of the word "irrevocability" it was pointed out that an offer which "stated a fixed period of time for irrevocability" would already be irrevocable under article 5 (3) (*a*).

193. The proposal to delete subparagraph (*b*) was rejected when it became evident that there would be different interpretations in different legal systems as to whether an offer which stated that the offeree had, for example, two weeks in which to accept would be considered to have indicated whether it was firm or irrevocable under article 5 (3) (*a*).

194. The Working Group decided to adopt the proposal that an offer cannot be revoked "if the offer states a fixed period of time for acceptance".

195. Three representatives requested that, since the rule that an offer cannot be revoked if it states a fixed period of time for "acceptance" would cause considerable difficulties in some legal systems, the word "acceptance" be placed in square brackets. The Working Group declined to place the word "acceptance" in square brackets since reservations had been expressed against other provisions without those provisions being placed in square brackets. Accordingly there was no reason to use square brackets in relation to this provision.

196. Two representatives expressed reservations in respect of article 5 (3) (*b*).

Subparagraph (c)

197. The Working Group considered a proposal to delete article 5 (3) (*c*).

198. The deletion of article 5 (3) (*c*) was supported on the basis that only the offeror should be able to make his offer irrevocable. The deletion of the provision was also supported on the basis that the article contained a

vague test which appeared unnecessary since it would not be reasonable for the offeree to alter his position to his detriment on the basis that the offer was still open unless the conditions in article 5 (3) (*a*) or 5 (3) (*b*) were satisfied.

199. However, there was considerable support for the retention of article 5 (3) (*c*) as it protected the offeree when he properly relied upon the offer being held open. The provision was merely a particular application of the rule requiring good faith and fair dealing in the formation process which the Working Group had already included in the draft Convention. In addition, the rule contained in article 5 (3) (*c*) was considered to have a certain degree of independent operation from articles 5 (3)(*a*) and 5 (3)(*b*). It would cover cases where the offer did not state either that it was firm or irrevocable or that there was a fixed time for acceptance but where the offeree had to engage in extensive investigation to determine whether he should accept the offer. In such cases it was proper that the offer be irrevocable for the period of time necessary for the offeree to make his determination.

200. The Working Group decided to retain article 5 (3) (*c*).

201. The Working Group deleted the expression "to his detriment" because this expression had been deleted from paragraph (2) of article 3 A (which was later renumbered as article 18).

Decision

202. The Working Group adopted the following text of article 5 (article 5 (1) was later renumbered as article 9; articles 5 (2) and 5 (3) were later renumbered as articles 10 (1) and 10 (2) respectively):

"(1) The offer becomes effective when it reaches the offeree. It is withdrawn if the withdrawal reaches the offeree before or at the same time as the offer even if it is irrevocable.

"(2) The offer is revoked if the revocation reaches the offeree before he has dispatched his acceptance.

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

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

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

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

Article 6

203. The text of article 6 as adopted by the Working Group at its eighth session 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."

204. The Working Group adopted the text of article 6.

205. A representative suggested that the future commentary to article 6 should take into account the fact that a rule for determining the time at which a contract was concluded was, in the view of some representatives who had agreed to the provision, also determinative of the place where the contract had been concluded.

Proposed article 6 (2) and 6 (3)

206. The Working Group considered a proposal that the following paragraphs be added to article 6:

"(2) 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.

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

Proposed article 6 (2)

207. This proposal was supported on the ground that the article would make it clear that should a party require agreement on more than the kind, quantity and price of the goods, which article 4 specifies are necessary for a proposal to be "sufficiently definite to constitute an offer", a contract would not be concluded until agreement on all the items which either party has stated were necessary. This rule would also be of assistance in cases where a contract was formed as the result of a negotiating process rather than from a separately identifiable offer and acceptance. Proposed article 6 (2) was also supported on the basis that it would provide a safeguard for offerors if article 7 (2) was retained by the Working Group since that article permitted the conclusion of a contract even though the purported acceptance did not precisely match the offer.

208. Proposed article 6 (2) was opposed as being unnecessary since the offeror was always able to state in his offer those points upon which agreement must be reached. Likewise, the offeree can always require agreement on those points that he considers essential prior to accepting the offer. In addition, it was unrealistic to have a general rule which required agreement on all matters prior to the conclusion of a contract. Minor discrepancies between the offer and the acceptance should be subject to the flexible rules of article 7 (2) rather than preventing the conclusion of the contract.

209. The Working Group decided not to adopt proposed article 6 (2).

Proposed article 6 (3)

210. This proposal was supported on the basis that it provided a useful rule of construction. However, the proposal was generally opposed because it was considered to contain a vague and uncertain test whose application would cause considerable difficulty.

211. The Working Group decided not to adopt proposed article 6 (3).

Decision

212. The Working Group adopted the following text of article 6 (which was later renumbered as article 17):

"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."

Article 7

213. The text of article 7 as adopted by the Working Group at its eighth session 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) 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.]

"[(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 (1)

214. Under one view article 7 (1) was inadequate in that it did not explicitly distinguish between a communication which rejected the original offer and substituted itself as a counter-offer and a communication which treated the offer as open but sought further information or inquired whether some terms could be changed. It was considered that such a general inquiry did not of itself terminate the offer and that the draft Convention should expressly recognize this result. It was also suggested that this result might be achieved by framing article 7 (1) in terms of a purported acceptance so that a general inquiry would be excluded and would thus not constitute a counter-offer.

215. However, there was stronger support for the retention of the present text of article 7 (1). There was general agreement that a mere request for further information, or for clarification of the offer, would not constitute a counter-offer. However, it was thought that this result would be achieved as easily by application of the present text as by any new text which might be adopted in its place.

216. The Working Group accordingly decided to retain the present text of article 7 (1).

Termination of an offer by rejection

217. During the eighth session of the Working Group it was suggested that the Secretariat consider whether any additional subjects within the general scope of the draft Convention might profitably be added to the current text. The Secretariat suggested that termination of an offer by rejection was one such subject (A/CN.9/WG.2/WP.28, paras. 62-71).

218. The Working Group was of the opinion that the draft Convention should contain a provision dealing with the termination of offers by rejection.

219. There was strong support for inclusion in the draft Convention of a rule which would provide that a rejection of an offer would in all cases terminate the offeree's power to accept the offer. It was stated that any time limits for acceptance fixed by an offeror meant that the offeree had that particular time period in which to decide whether to accept or reject the offer. Once a choice to reject the offer had been made, the offeree's power to accept the offer was at an end.

220. There was some support for the view that irrevocable offers should be treated differently and that an offeree should be able to make a counter-proposal without destroying his power to accept the original offer provided that the terms of his counter-proposal indicated that the original offer had not been rejected and was still being considered.

221. The Working Group also considered a proposal which sought to distinguish between a rejection which would always terminate an offer and a request for changes in the terms of an offer which would terminate a revocable offer but would not terminate an irrevocable offer if the offeree had reserved his right to accept the original offer. This proposition obtained little support because it was considered too complex to be readily understandable by merchants and because it seemed preferable to have a clear rule that rejection of an offer always terminated the offer.

222. Several representatives considered that the draft Convention should not contain any rules on termination of an offer by rejection and that this question be left to the interpretation of the courts in the light of practices established between the parties and usages.

223. The Working Group decided to adopt a new provision to the effect that rejection of an offer, whether revocable or irrevocable, will terminate the offeree's power to accept the offer. The text of the new article is set out in paragraph 230 below.

Article 7 (2)

224. The Working Group considered a proposal that article 7 (2) be deleted.

225. This proposal was supported on the basis that it would be very difficult to arrive at a uniform interpretation of what constituted a non-material alteration to an offer. It was also stated that the principle that the parties have to agree on every point in order to conclude a contract must prevail. Furthermore, a provision which may be considered minor to one party may be extremely important to the other party. The proposal to delete article 7 (2) was also supported on the basis that it impliedly recognized acceptance by silence. It was also noted that the offeror was compelled to object to the new terms "without delay" if he was not to be bound by them. However, this period of time would appear to be measured from the time when the purported acceptance reaches the offeror which, according to the definition of "reaches" in article 12, included delivery to the place of business of the offeror, therefore, the failure to object without delay might simply have been due to a lack of knowledge.

226. The retention of article 7 (2) was supported on the basis that it provided a useful practical rule for a practical problem and that it was favoured by business circles. In most cases in which a reply purports to be an acceptance but it contains additional or different terms which do not materially alter the terms of the offer, both parties believe and act as though a contract had been concluded. If the offeror does not object without delay to those new terms, he should not later be able to avoid his contractual obligations by claiming that there was a minor discrepancy between his offer and the reply.

227. The Working Group decided to retain the existing text of article 7 (2).

Article 7 (3)

228. The Working Group decided to delete this paragraph as it was generally considered that any modifications to the contract after its conclusion should require agreement of the parties in accordance with the provisions of article 3 A (which was later renumbered as article 18).

Decision

229. The Working Group adopted the following text of article 7 (which was later renumbered as article 13):

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

230. Following its decision in paragraph 223 above, the Working Group adopted the following text (article 7 A) dealing with termination of an offer by rejection (this provision was later renumbered as article 11):

"An offer, even if it is irrevocable, is terminated when a rejection reaches the offeror."

Article 8

231. The text of article 8 as adopted by the Working Group at its eighth session 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 communicated 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 dispatch 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."

Article 8 (1)

232. The Working Group decided to retain the words "or other conduct", which were in square brackets, so that not only a declaration but also other conduct by the offeree indicating assent to the offer would be an acceptance. It was agreed that article 8 (1) was subject to the rules in article 8 (1 *bis*).

233. A representative expressed a reservation in respect of this decision on the basis that all acceptances should be in written form.

234. During the discussion in respect of article 2 (3) on acceptance by silence (paras. 112 to 117 above), the Working Group agreed that there were some situations in which silence should not amount to acceptance. Therefore, the Working Group decided to add a new sentence to article 8 (1) providing that silence in itself does not amount to acceptance.

235. An observer expressed a reservation in respect of the inclusion in article 8 (1) of a sentence providing that silence in itself does not amount to acceptance because in some cases the fact of remaining silent may be a clear indication of acceptance.

Article 8 (1 bis)

Expression in square brackets

236. The Working Group considered a proposal to delete the expression within square brackets.

237. This proposal was supported on the basis that the notion of "a reasonable time" did not require further amplification in the text. This was said to be particularly true when part of this amplification was in terms of the "circumstances of the transaction", which was said to be a very vague and unsatisfactory test.

238. There was also opposition to the words "including the rapidity of the means of communication employed by the offeror" because this standard was considered difficult to apply.

239. Under another view the expression in square brackets was a useful illustration of the type of factors to be taken into account in determining whether the indication of assent had been communicated within a reasonable time.

240. The Working Group decided to retain the expression "due account being taken of the circumstances of the transaction, including the rapidity of the means of communication employed by the offeror".

Article 8 (1 ter)

241. The Working Group was generally agreed that the deletion of the phrase "shipped the goods or paid the price" from article 5 (2) required at least some modifications to article 8 (1 *ter*). However there was difference of opinion on whether the provision should be modified or deleted.

242. The Working Group considered a proposal that article 8 (1 *ter*) be based on article 6 (2) of ULF, which provides that acceptance may consist of the dispatch of the goods or of the price or any other act which may be considered equivalent to an acceptance by declaration either by virtue of the offer or as a result of the practices which the parties have established between themselves or of usage.

243. This proposal was supported on the basis that it would introduce a limited but practical exception to the main rule that an acceptance is a declaration or other conduct by the offeree which indicates assent to the offer and that this assent becomes effective at the moment that the indication of assent reaches the offeror. It was considered that, if, by virtue of the offer, the practices which the parties have established between themselves or of usage, the parties had agreed to waive the requirement that the acceptance reach the offeror, the draft Convention should not reimpose such a requirement.

244. It was suggested that this proposal was too narrow in that it required dispatch of the price, whereas other acts such as the opening of a letter of credit should be sufficient.

245. Under another view, shipment of the goods or payment of the price or other acts which indicated assent to the offer should constitute acceptance only if the offeror had knowledge of those acts. It was noted that in a number of legal systems it was against the basic principles of the law of contract for a party to be bound without his knowledge. It was stated that this proposal would have particularly undesirable results in international trade where an offeror could be bound to a contract without his knowledge for a considerable period of time.

246. The proposal was also opposed on the basis that all acceptances should be in written form communicated to the offeror and that if an exception to written form was made there still must be notice to the offeror before the contract could be concluded. It was also suggested that the proposal was superfluous since the parties could always derogate from or vary the effect of the provisions of the Convention by virtue of article 2 (2).

247. After considerable discussion the Working Group adopted the principle that article 8 contain a provision based on article 6 (2) of ULF. The Working Group was agreed that this provision should clearly state that the exception operated only where, by virtue of the offer or the practices established between the parties or of usage, the dispatch of the goods or of the price or the performance of any other act would indicate assent to the offer even though no notice had been given to the offeror. Furthermore, it was agreed, that the act constituting acceptance subject to this paragraph should in conformity with article 8 (3) of ULF be effective only if it was performed within the time-limits set out in paragraphs 2 and 3 of article 8 (1 *bis*).

248. The Working Group established a Special Working Party composed of the representatives of France, Hungary and the United Kingdom to prepare a draft text which implemented these decisions.

249. A representative indicated his opposition to the decision of the Group in respect of article 8 (1 *ter*) on the basis that no acceptance could become effective without notice being communicated to the offeror.

250. The Working Group adopted a proposal to add a new paragraph to article 8, similar to article 3 (2), which would provide that a Contracting State could make a declaration under article (X) in respect of article 8 in so far as the acceptance is allowed otherwise than in writing. The Working Group also decided to make a corresponding amendment to article (X).[20]

Article 8 (2)

251. The Working Group approved article 8 (2).

Article 8 (3)

252. The Working Group approved article 8 (3).

Decision

253. The Working Group adopted the following text of article 8 (articles 8 (1), 8 (2), 8 (3) and 8 (6) were later renumbered as articles 12 (1), 12 (2), 12 (3) and 12 (4) respectively; articles 8 (4) and 8 (5) were later renumbered as articles 14 (1) and 14 (2) respectively):

"(1) A declaration or other conduct by the offeree indicating assent to an offer is an acceptance. Silence shall not in itself amount to acceptance.

"(2) Subject to paragraph 3 of this article, acceptance of an offer becomes effective at the moment the indication of assent reaches the offeror. It is not effective if the indication of assent does not reach the offeror within the time he 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. An oral offer must be accepted immediately unless the circumstances indicate otherwise.

"(3) However, if, by virtue of the offer or as a result of practices which the parties have established between themselves or of usage, the offeree may indicate assent by performing an act, such as one relating to the dispatch of the goods or payment of the price, without notice to the offeror, the acceptance is effective at the moment the act is performed provided that the act is performed within the period of time laid down by the second and third sentences of paragraph 2 of this article.

"(4) A period of time for acceptance fixed by an offeror in a telegram or a letter begins to run from the moment the telegram is handed in for dispatch 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 by telephone, telex or other means of instantaneous communication, begins to run from the moment that the offer reaches the offeree.

"(5) 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 the period for acceptance at the place of business of the offeror, the period is extended until the first business day which follows. Official holidays or non-

[20] The text of article (X) is found in para. 137.

business days occurring during the running of the period of time are included in calculating the period.

"(6) This article does not apply to the acceptance of an offer in so far as the acceptance is allowed otherwise than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

Article 9

254. The text of article 9 as adopted by the Working Group at its eighth session 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 dispatch 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 dispatch of a notice that he considers his offer as having lapsed."

Article 9 (1)

255. The Working Group rejected a proposal to delete the words "orally or" which would have confined the operation of paragraph (1) to written communications.

256. The Working Group adopted the text of article 9 (1).

257. One observer was of the opinion that the requirement of giving information to the offeree-acceptor should apply only where a fixed time limit had been set for the acceptance of the offer or it otherwise was clear to the offeror that the acceptance did not arrive in time. Another observer stated that in his view it would be preferable to have a rule that, where an acceptance was dispatched within time but reached the offeror late, it should be effective unless the offeror promptly informed the offeree that his offer had lapsed prior to the time that the acceptance had reached him.

Article 9 (2)

258. The Working Group considered a proposal for the deletion of article 9 (2).

259. This proposal was supported on the basis that the rule contained in article 9 (2) was very complex and could lead to difficulties in application because its operation depended on the offeror being able to assess what period of time constituted a normal period for the transmission of the acceptance.

260. However, the prevailing view was that article 9 (2) contained a useful rule, particularly for those legal systems which operated under the theory that an acceptance was effective on dispatch. This provision would help compensate for the fact that the draft Convention generally made acceptance effective when it reached the offeror.

261. It was agreed by the Working Group that if the offeror wished to inform the offeree that he considered his offer as having lapsed prior to the receipt of the late acceptance, he must do so without delay after the acceptance reached him.

262. The Working Group rejected a proposal to delete the words "orally or" which would have confined the operation of paragraph (2) to written communications.

263. The Working Group adopted the text of article 9 (2).

Decision

264. The Working Group adopted the following text of article 9 (which was later renumbered as article 15):

"(1) A late acceptance is nevertheless effective as an acceptance if without delay the offeror so informs the offeree orally or dispatches a notice to that effect.

"(2) If the letter or document containing a late acceptance shows that it has been sent in such circumstances that if its transmission had been normal it would have reached the offeror in due time, the late acceptance is effective as an acceptance unless, without delay, the offeror informs the offeree orally that he considers his offer as having lapsed or dispatches a notice to that effect."

Article 10

265. The text of article 10 as adopted by the Working Group at its eighth session 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 becomes effective."

266. The Working Group adopted article 10. The Drafting Group was requested to ascertain whether the article could be reformulated so that it would be clear that an acceptance would not become effective if the revocation reached the offeror before or at the same time as the acceptance.

Decision

267. The Working Group adopted the following text of article 10 (which was later renumbered as article 16):

"An acceptance is withdrawn if the withdrawal reaches the offeror before or at the same time as the acceptance would have become effective."

Proposed articles 10 bis *to 10* quinquies

268. The Working Group considered a proposal that four new articles based on the following provisions be inserted between articles 10 and 11 of the draft Convention:

"*Article 10* bis

"(1) If a contract of sale has been concluded under a suspensive condition, it will become effective at the moment the condition occurs.

"(2) If a contract has been concluded under a resolutive condition, it will become ineffective at the moment the condition occurs.

"*Article 10* ter

"(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.

"*Article 10* quater

"(1) In case a contract of sale is subject to authorization by a State organ, it will become effective only at the moment this authorization has been given.

"(2) In case a contract of sale contravenes a legal prohibition or is aimed at an impossible service, it will be void.

"*Article 10* quinquies

"(1) In the cases referred to under article 10 *ter* and article 10 *quater* the other party shall be immediately informed of the granting of the approval or authorization.

"(2) If the information is not given within two months after conclusion of the contract the contract shall be regarded as not concluded."

Article 10 bis

269. In support of this provision it was stated that rules relating to conditions precedent and to conditions subsequent would complete the rules on formation of contracts and would deal with two very common situations in international trade and would also cover contingent sales.

270. However, under another view these rules opened up very complex questions of legal theory which could not be adequately dealt with in a few simple provisions. In addition the text did not regulate the consequences of the rule contained in article 10 *bis* (2) and that it would be very difficult to reach consensus on what those consequences should be.

271. The Working Group decided not to adopt proposed article 10 *bis*.

Article 10 ter

272. The Working Group decided not to adopt paragraph (1) of article 10 *ter* for the same reasons which led it to reject article 10 *bis* since the provision appeared to be only a particular example of the principle contained in paragraph (1) of article 10 *bis*.

273. The Working Group decided not to adopt paragraph (2) of article 10 *ter* because it was considered that the question of agency could not be considered in one short article.

Article 10 quater

274. There was no support for article 10 *quater*.

Article 10 quinquies

275. The rejection of proposed article 10 *ter* and 10 *quater* also necessitated the deletion of article 10 *quinquies*.

Proposed articles 10 A and 10 B

276. The Working Group considered a proposal to insert the following articles after article 10 of the draft Convention:

"*Article 10 A*

"General conditions of sale referred to in the offer which are attached to it or known to the offeree or widely known in the international trade are considered to be a part of the contract if the offeree agrees they are to be applied. The terms of the contract prevail if they differ from the general conditions of sale.

"*Article 10 B*

"If the parties agree to complete specific terms of the contract later, the contract is considered to be concluded after the parties have achieved a subsequent agreement on the remaining part of the contract unless they indicate to be bound by the agreed terms even if no subsequent agreement is reached."

277. These provisions were supported on the basis that they dealt with matters of major practical importance in international trade which ought to be regulated in this draft Convention.

278. The Working Group decided not to adopt article 10 A because the draft Convention already contained rules for determining the contents of a contract. The Working Group decided not to adopt article 10 B because there was difference of opinion as to whether the rule contained in the provision was appropriate. In addition, it was stated in respect of both articles that the problems raised were too complex to be satisfactorily dealt with in the context of this draft Convention.

Article 11

279. The text of article 11 as adopted by the Working Group at its eighth session 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."

280. The Working Group considered a proposal to delete this article.

281. This proposal gained widespread support. Yet it was noted that article 11 did not relate to all events which might occur between the making of an offer and its acceptance which would prevent the acceptance from being effective. In particular, it was noted that the provision gave no rule for the eventuality that one or other of the parties would become bankrupt or that, if it was a legal person, it would cease to exist. It was stated that questions of death or physical incapacity of the parties were of minor importance in comparison with problems of bankruptcy and corporate personality and that as the draft Convention did not regulate these major matters relating to contractual capacity it should consequently delete article 11 which dealt only with aspects of contractual capacity of secondary importance in international trade.

282. A representative indicated that he favoured the retention of article 11 as it provided a useful uniform solution for the limited circumstances to which it applied.

Decision

283. The Working Group deleted article 11.

Article 12

284. The text of article 12 as adopted by the Working Group at its eighth session 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."

Habitual residence

285. The Working Group considered a proposal that reference to "habitual residence" be deleted from article 12.

286. The deletion of express reference to "habitual residence" was supported on the basis that article 1 (6) (*b*) already provides that if a party does not have a place of business reference is to be made to his habitual residence.

287. Under another view it was useful to retain the reference to "habitual residence" in article 12 since if it was deleted it would not be immediately obvious upon reading article 12 that article 1 (6) (*b*) permitted delivery to the habitual residence of the addressee if he did not have a place of business.

288. The Working Group decided to maintain the expression "habitual residence" in article 12.

Places to which communications may be sent

289. The decision to retain the term "habitual residence" raised the question whether article 12 enabled the sender of a communication to choose whether the communication is to be sent to the place of business of the addressee or to his mailing address or habitual residence. The Working Group was generally agreed that the sender must, subject to contrary agreement between the parties according to article 2 (2), send the communication to the place of business or mailing address of the addressee and that only if there was no place of business or mailing address could the communication be sent to the habitual residence of the addressee.

Oral communications

290. It was understood that oral communications could be made to the addressee at any place and only to him or to his authorized agents.

291. The Working Group noted that in the case of parties which were corporations or organizations the question of which individuals were authorized to receive oral communications for the purposes of this Convention would be determined by the applicable law.

292. The Working Group accepted a proposal of the Drafting Group to replace the words "communicated to" with "reaches" throughout the Convention.

Declaration of non-application of article 12

293. A representative expressed a reservation in respect of the inclusion of oral communications within article 12. On the proposal of this representative, the Working Group agreed to include a paragraph in article 12 based on article 11 (2) of CISG to enable States to declare that article 12 does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X).[21]

Decision

294. The Working Group adopted the following text of article 12 (which was later renumbered as article 7):

"(1) For the purposes of this Convention an offer, declaration of acceptance or any other indication of intention 'reaches' the addressee when it is made orally to him or delivered by any other means to him, his place of business or mailing address or, if he does not have a place of business or mailing address, to his habitual residence.

"(2) Paragraph (1) of this article does not apply to an offer, declaration of acceptance or any other indication of intention if any of them is made in any other form than in writing where any party has his place of business in a Contracting State which has made a declaration under article (X) of this Convention. The parties may not derogate from or vary the effect of this paragraph."

Article 13

295. The text of article 13 as adopted by the Working Group at its eighth session 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."

296. Article 7 of CISG is as follows:

"(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

"(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract a usage of which the parties knew or ought to have known 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."

297. The Working Group considered a proposal to shorten article 13 by deleting reference to the knowledge of the parties since these matters were already dealt with in the article on interpretation. This proposal was withdrawn for lack of support because the notion of usages contained in CISG was the result of long discussions both in the Working Group and at the Commission and accordingly it was generally agreed that it would be inappropriate to make any alterations at this stage.

298. An observer was of the opinion that the phrase "had reason to know" in article 13 of this draft was preferable to the phrase "ought to have known" which appears in article 7 (2) of CISG. In his view, the phrase "had reason to know" indicated the use of more objective standards than "ought to have known". However, the Working Group agreed that the definition of usages

[21] The text of article (X) is found in para. 137.

in article 13 should conform as much as possible to the text of article 7 of CISG.

299. One representative stated that article 13 should be redrafted to make it conform more closely to the text of article 7 of CISG by deleting the words "practice or" from the definition of a usage.

Decision

300. The Working Group adopted the following text of article 13 (which was later renumbered as article 6):

"For the purposes of this Convention usage means any practice or method of dealing of which the parties knew or ought to have known 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."

Reorganization of provisions of the draft Convention

301. The Working Group adopted the recommendations of the Secretariat as to the reorganization and titles of the provisions of the draft Convention.[22]

D. Future Work

302. The Working Group noted that it had completed the mandate given to it by the Commission in respect of formation and validity of contracts of international sale of goods.[23] Therefore, the Working Group would not need to hold a further session which had been scheduled for New York in January 1978 in case it could not have completed its mandate at its present session.

303. The Working Group further noted that the Commission at its tenth session had deferred until its eleventh session the question whether the rules on formation and validity of contracts for the international sale of goods should be the subject-matter of a Convention separate from the Convention on the International Sale of Goods.[24] Although this Convention had, for convenience, been prepared as a separate Convention, the Working Group requested the Secretariat to prepare an analysis of the drafting problems which would be entailed in combining the rules on formation and validity of contracts with the Convention on the International Sale of Goods and to present the analysis to the Commission at its eleventh session.

304. The Working Group noted that, in accordance with the practices established by the Commission, the draft Convention on the Formation of Contracts for the International Sale of Goods would be circulated to Governments and interested international organizations for comments and that these comments together with an analysis to be prepared by the Secretary-General would be submitted to the Commission at its eleventh session. The Working Group requested the Secretary-General to prepare a commentary on the draft Convention and to circulate that commentary to Governments and interested international organizations to facilitate their consideration of the draft Convention.

305. The Working Group recalled the view expressed at its eighth session[25] that the Secretary-General should 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 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.

ANNEX*

Text of the draft Convention on the formation of contracts for the International Sale of Goods

PART I. SUBSTANTIVE PROVISIONS

CHAPTER I. SPHERE OF APPLICATION

Article 1. Scope

(1) This Convention applies to the formation of contracts of sale of goods between 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) 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.

(4) 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, neither knew nor ought to have known 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.

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

(6) 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.

(7) 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;

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[22] These recommendations are set out in the report of the Secretary-General: analysis of unresolved matters in respect of the formation and validity of contracts for the international sale of goods (A/CN.9/WG.2/WP.28, para. 72). In addition the Secretariat recommended that the two new provisions, i.e. articles 7 A and 15 be renumbered as articles 11 and 5 and be entitled "Termination of offer by rejection" and "Fair dealing and good faith."

[23] The mandate given to the Working Group by the Commission is set out in para. 1 of the present report.

[24] UNCITRAL, report on the tenth session (1977), A/32/17, para. 33 (Yearbook . . . 1977, part one, II, A).

* Originally issued as A/CN.9/142/Add.1 on 18 November 1977.

[25] A/CN.9/128, para. 172.