II. THE TENTH SESSION (1977)


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Introduction


2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the General Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

Chapter I. Organization of the Session

A. Opening

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its tenth session on 23 May 1977. The session was opened on behalf of the Secretary-General by Mr. Erik Suy, the Legal Counsel.


B. Membership and attendance

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII), the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 12 December 1973 and 15 December 1976, are the following States: Argentina, Australia, Austria, Barbados, Belgium, Brazil, Bulgaria, Burundi, Chile, Colombia, Cyprus, Czechoslovakia, Egypt, Finland, France, Gabon, German Democratic Republic, Germany, Federal Republic of, Ghana, Greece, Hungary, India, Indonesia, Japan, Kenya, Mexico, Nigeria, Philippines, Sierra Leone, Singapore, Syrian Arab Republic, Union of Soviet Socialist Republics, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania, United States of America and Zaire.

*Term of office expires on the day before the opening of the regular annual session of the Commission in 1980.

**Term of office expires on the day before the opening of the regular annual session of the Commission in 1983.

Pursuant to General Assembly resolution 2205 (XXI), the
5. With the exception of Burundi, Cyprus, Gabon, Kenya, Sierra Leone, the Syrian Arab Republic and the United Republic of Tanzania, all members of the Commission were represented at the session.

6. The session was also attended by observers from the following States Members of the United Nations: Costa Rica, Cuba, Denmark, Ireland, Malaysia, Mauritania, Mauritius, Norway, Poland, Romania, Spain, Sweden, Turkey, Uruguay and Yugoslavia; and from the following non-member States of the United Nations: Holy See and Switzerland.

7. The following United Nations organs, specialized agencies, intergovernmental organizations and international non-governmental organizations were represented by observers:
   (a) **United Nations organs**
   United Nations Industrial Development Organization.
   (b) **Specialized agencies**
   Inter-Governmental Maritime Consultative Organization; International Monetary Fund (IMF).
   (c) **Intergovernmental organizations**
   Asian-African Legal Consultative Committee; Bank for International Settlements; Caribbean Community; Commission of the European Communities; Council for Mutual Economic Assistance; Council of Europe; East African Community; Hague Conference on Private International Law; International Institute for the Unification of Private Law.
   (d) **International non-governmental organizations**

C. **Election of officers**

8. The Commission elected the following officers by acclamation:

   Chairman ............ Mr. N. Gueiros (Brazil)
   Vice-Chairman ........ Mr. O. Adeniji (Nigeria)
   Vice-Chairman ........ Mr. M. Byers (Australia)
   Vice-Chairman ........ Mr. S. Michida (Japan)
   Rapporteur ............ Mr. L. Kopač (Czechoslovakia)

D. **Agenda**

9. The agenda of the session as adopted by the Commission at its 182nd meeting, on 25 May 1977, was as follows:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda; tentative schedule of meetings
4. International sale of goods
5. International payments
6. International commercial arbitration
7. Liability for damage caused by products intended for or involved in international trade
8. Training and assistance in the field of international trade law
9. Future work
10. Other business
11. Date and place of the eleventh session
12. Adoption of the report of the Commission

E. **Establishment of two Committees of the Whole**

10. The Committee established two Committees of the Whole (Committee I and Committee II) and referred to them for consideration the following agenda items:

   **Committee I**


   **Committee II**

   Item 4. International sale of goods: general conditions of sale.
   Item 5. International payments:
   (a) Security interests in goods
   (b) Negotiable instruments.
   Item 7. Liability for damage caused by products intended for or involved in international trade.
   Item 8. Training and assistance in the field of international trade law.

   Item 10. Other business: consistency of legal provisions drafted by the Commission or its Working Groups.

11. Committee I met from 23 May to 17 June 1977 and held 32 meetings. Committee II met on 6, 7 and 9 June 1977 and held 5 meetings.


   Summary records of the meetings of Committee I are contained in A/CN.9(X)/C.1/SR.1 to 32.

   Summary records of the meetings of Committee II are contained in A/CN.9(X)/C.2/SR.1 to 5.
12. The Commission, at its 180th meeting, on 23 May 1977, unanimously elected Mr. G. Eörsi (Hungary) as Chairman of Committee I. At its 4th meeting, on 25 May 1977, Committee I unanimously elected Mr. J. Barrera-Graf (Mexico) as Rapporteur. At its 1st meeting, on 6 June 1977, Committee II unanimously elected Mr. R. Loewe (Austria) as Chairman and Mr. C. O. Magreola (Nigeria) as Rapporteur.

13. The Commission considered the reports of Committee I and Committee II at its 185th and 186th meetings on 17 June 1977. The Commission decided to include the reports of Committees I and II in the present report in the form of annexes (annex I and annex II, respectively).

F. Adoption of the report


CHAPTER II. INTERNATIONAL SALE OF GOODS

A. Uniform rules governing the international sale of goods

Introduction

15. The Commission, at its second session, established a Working Group on the International Sale of Goods and requested it to ascertain which modifications of the text of the Uniform Law on the International Sale of Goods (ULIS), annexed to the 1964 Hague Convention, might render that Convention capable of wider acceptance or whether it would be necessary to elaborate a new text for this purpose. The Working Group held seven sessions in carrying out its mandate in respect of the revision of ULIS and submitted to the ninth session of the Commission the text of a draft Convention on the International Sale of Goods. At that session, the Commission decided to consider the draft Convention at its tenth session, in the light of the comments received from Governments and interested international organizations.

16. At the present session the Commission had before it the following documents:


(b) Comments by Governments and international organizations on the draft Convention on the International Sale of Goods (A/CN.9/125 and Add. 1, 2 and 3).*

(c) Analysis of the comments by Governments and international organizations on the draft Convention on the International Sale of Goods (A/CN.9/126).*


Report of Committee of the Whole I

18. The Commission accepted the report of Committee I and the recommendations contained therein. The Commission noted that the Committee had not had sufficient time to consider the draft texts proposed by the Drafting Group.* It was noted that the Committee had considered in detail each individual article of the draft Convention, that the Drafting Group established by the Committee had based its work on the decisions taken and conclusions reached in the Committee, and that the Committee had adopted the texts of the articles of the draft Convention as revised by the Drafting Group without further consideration.

19. The Commission also noted that the report of Committee I sets forth reservations made by representatives in respect of certain provisions of the draft Convention and was of the view that, because of the fact that these reservations were made in a Committee of the Whole of the Commission, they should be considered as having been made in the Commission.

B. Conference of plenipotentiaries

20. The Commission considered in the context of future action relative to the draft Convention on the International Sale of Goods a proposal that consideration be given to issuing the set of rules on the international sale of goods, elaborated by the Commission, in the form not of a convention as had been planned, but as uniform rules for optional use by the parties to a sales transaction.

21. In support of this proposal, it was argued, firstly, that the suggested procedure would result in substantial cost savings to the United Nations and to States which, in view of the current financial situation of the Organization and of many States, was not an insignificant con-

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* Yearbook ...1976, part two, I.
sideration. In comparison to the considerable costs of holding a conference of plenipotentiaries such as was planned, the cost of issuing (i.e., printing and publishing) uniform rules were almost negligible, as had been demonstrated in the case of the UNICTRAL Arbitration Rules which had been issued in the form now being proposed for the rules on sales. Secondly, it was argued that the form of uniform rules such as was being proposed had the advantage over that of a convention in that it provided more flexibility and greater opportunity to change the rules, if need be, than would be the case for a convention. This, it was emphasized, was a significant consideration in the context of rules designed to regulate business practices which themselves were constantly changing.

22. Thirdly, and most significantly, the form of optional rules should be favoured because it would in fact lead to a more speedy implementation of the régime contemplated than would resort to the traditional method of concluding a convention. Uniform rules could be quickly promulgated and thereafter put into immediate use, as had happened in the case of the UNICTRAL Arbitration Rules which, within only a few months of their issue, had already been adopted by the business community in many parts of the world. On the other hand, it was well known how cumbersome and lengthy a procedure must be undergone between the drafting of a text of a convention and the coming into effect of that convention.

23. For all these reasons, it was suggested, the Commission should not at this stage take a final decision on the form in which the rules would be promulgated; it would be advisable first to seek the views of States and of both the Fifth and Sixth Committees of the General Assembly.

24. Some representatives, while not formally supporting the proposal to issue the rules on sales in the form of optional uniform rules, stated that they shared some of the concerns underlying the proposal. The traditional technique of legislating on the international level by the use of conventions was too cumbersome and ill-suited to the task of unification in the sphere of private law. What was required, it was said, was a new approach, better adapted to the needs of regulating private conduct and the Commission should give serious consideration to this question with a view to devising such a method for its future work.

25. Most representatives who spoke on the matter were against the proposal to issue the rules on sales in the form of optional rules and not as a convention. It was generally pointed out that work on the text had proceeded throughout on the basis that the Working Group was engaged in the elaboration of the draft of a future convention and now that that work had been completed and an agreed text presented to the Commission for consideration it was hardly the time to seek to reopen the question of the form in which the rules should be promulgated.

26. Among other reasons adduced against the proposal were the following. To adopt the form of optional uniform rules, thereby dispensing with the need for a conference of plenipotentiaries to consider the text, would deprive many States, especially developing States and those States not represented on the Commission, of the opportunity to scrutinize the draft text in connexion with such a conference and to influence at the conference the final content and form of that text. Furthermore, it was observed, developing countries had frequently voiced dissatisfaction with international trade practices in the evolution of which they had played no determining role. They would, therefore, prefer to see these trade practices revised by means, wherever possible, of binding multilateral treaties.

27. Furthermore, to promulgate the rules on sales in a form less binding than a convention would not foster the objective of harmonization and unification of international trade law which the Commission was committed to serve since, unlike a convention which applies where the parties have not exercised the right, if granted them, to derogate from its provisions, optional rules were subject to the individual wishes of businessmen. Moreover, optional rules were always open to abuse by the stronger trading party who could very quickly modify the rules to their own advantage and obtain acceptance of such terms by the weaker party in the manner of "contracts of adhesion".

28. With regard to the cost argument, it was noted that the Commission and its Working Group and also those Governments which had been represented at the Working Group's sessions had already invested well over seven years of work and expense in elaborating the draft Convention in question, all or some of which investment might have been unnecessary if the known objective were to produce uniform rules of an optional character. Similarly, with regard to the argument of relative speed of implementation, it was pointed out that nothing would preclude parties after approval of a text by the Conference of Plenipotentiaries from incorporating provisions therefrom into their sales contracts regardless of the question of ratification by States.

29. A number of representatives, speaking in favour of the form of a convention, observed that it would be anomalous for the Commission to issue the rules regulating the actual sales transaction in the form of optional rules when it had utilized the convention technique with regard to the secondary matter of limitation of action. Furthermore, the related matters of formation and validity of sales contracts, on which work was in progress within the Commission, did not lend themselves to the form of optional rules and would, therefore, have to be promulgated in the form of a convention, leading to even greater anomaly should the rules on sales be issued in the form now proposed to the Commission.

30. Some representatives also drew attention to the fact that for many legal systems the preferred manner for receiving international legal rules into national law was by means of treaties and conventions. For such States the promulgation of the rules on sales in the form of merely optional rules for parties would present certain difficulties of implementation.

31. Two ideas were put forward as to possible alternatives that would meet some of the concerns expressed on both sides of this issue. The first was for the rules on sales to be promulgated both as uniform rules for optional use by parties and as a convention. One advantage of this would be that the rules could be in use long before the convention had gone into effect. The other idea would have the Commission obtain the views and comments of Governments on its draft text and, taking those views and
32. The Commission decided, in view of the position taken by most representatives, not to adopt the proposal to issue as uniform rules for optional adoption by parties the rules on the international sale of goods, but to recommend to the General Assembly that they should be adopted in the form of a convention.

Formation and validity of contracts for the international sale of goods

33. The Commission decided that, if the Working Group on the International Sale of Goods should, at its ninth session in September 1977, finalize draft provisions on the formation and validity of contracts for the international sale of goods, it would consider these draft provisions at its eleventh session in June 1978. The Commission also decided that, in conjunction with its consideration of these draft provisions, it would consider the question whether the rules on formation and validity of contracts should be the subject-matter of a convention separate from the Convention on the International Sale of Goods and, if so, whether the two conventions should be submitted to one and the same conference of plenipotentiaries or to two separate conferences.

Decision of the Commission

34. At its 186th meeting, on 17 June 1977, the Commission adopted the following decision:

The United Nations Commission on International Trade Law

1. Approves the text of the draft Convention on the International Sale of Goods, as set out below in paragraph 35 of the report of the Commission;

2. Requests the Secretary-General:
   (a) To prepare, under his own authority, a commentary on the provisions of the draft Convention;
   (b) To circulate the draft Convention, together with the commentary thereon, to Governments and to interested international organizations for comments and proposals;
   (c) To prepare an analytical compilation of the comments and proposals received from Governments and interested international organizations and to submit this analytical compilation to a Conference of Plenipotentiaries which the General Assembly may wish to convene;

3. Recommends that the General Assembly, at an appropriate time, convene an international Conference of Plenipotentiaries to conclude, on the basis of the draft Convention approved by the Commission, a Convention on the International Sale of Goods;

4. Informs the General Assembly that the Commission may place before it, at its thirty-third session, draft provisions on the Formation and Validity of Contracts for the International Sale of Goods together with appropriate recommendations on the action to be taken in respect of those draft provisions, including the question whether such draft provisions should be considered at the Conference referred to in paragraph 3 of the present decision.


35. The draft Convention on the International Sale of Goods, as approved by the Commission, reads as follows:

DRAFT CONVENTION ON THE INTERNATIONAL SALE OF GOODS

Part I. Substantive Provisions

CHAPTER I. SPHERE OF APPLICATION

Article 1

(1) This Convention applies to 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 contract 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 contract is to be taken into consideration.

Article 2

This Convention does not apply to sales:
   (a) Of goods bought for personal, family or household use, unless the seller, at the time of 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.

Article 3

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

(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.

Article 4

The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.

Article 5

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 contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of 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.

The Commission considered this subject at its 186th meeting on 17 June 1977; a summary record of this meeting is contained in A/CN.9/SR.186.
Article 6
This Convention governs only the rights and obligations of the seller and the buyer arising from a contract of sale. In particular, except as otherwise expressly provided therein, this Convention is not concerned with:
(a) The formation of the contract;
(b) The validity of the contract or of any of its provisions or of any usage;
(c) The effect which the contract may have on the property in the goods sold.

Chapter II. General Provisions

Article 7
(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.

Article 8
A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such a result.

Article 9
A declaration of avoidance of the contract is effective only if made by notice to the other party.

Article 10
Unless otherwise expressly provided in this Convention, if any notice, request or other communication is given by a party in accordance with this Convention and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication.

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.

Article 12
If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgement for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention.

Article 13
In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity.

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.

Chapter III. Obligations of the Seller

Article 14
The seller must deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and this Convention.

Section I. Delivery of the goods and handing over of documents

Article 15
If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:
(a) If the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;
(b) If, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place;
(c) In other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract.

Article 16
(1) If the seller is bound to hand the goods over to a carrier and if the goods are not clearly marked with an address or are not otherwise identified to the contract, the seller must send the buyer a notice of the consignment which specifies the goods.
(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation.
(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must provide the buyer, at his request, with all available information necessary to enable him to effect such insurance.

Article 17
The seller must deliver the goods:
(a) If a date is fixed by or determinable from the contract, on that date; or
(b) If a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or
(c) In any other case, within a reasonable time after the conclusion of the contract.

Article 18
If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract.

Section II. Conformity of the goods and third party claims

Article 19
(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they:
(a) Are fit for the purposes for which goods of the same description would ordinarily be used;
(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the
contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;

(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) Are contained or packaged in the manner usual for such goods.

(2) The seller is not liable under subparagraphs (a) to (d) of paragraph (1) of this article for any non-conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity.

Article 20

(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and which is due to a breach of any of his obligations, including a breach of any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period.

Article 21

If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. The buyer retains any right to claim damages as provided for in this Convention.

Article 22

(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

(3) If the goods are redispached by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the buyer knew or ought to have known of the possibility of such redispach, examination may be deferred until after the goods have arrived at the new destination.

Article 23

(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless such time-limit is inconsistent with a contractual period of guarantee.

Article 24

The seller is not entitled to rely on the provisions of articles 22 and 23 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer.

Article 25

(1) The seller must deliver goods which are free from any right or claim of a third party, other than one based on industrial or intellectual property, unless the buyer agreed to take the goods subject to that right or claim.

(2) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right of claim.

Article 26

(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial or intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that that right or claim is based on industrial or intellectual property.

(a) Under the law of the State where the goods will be resold or otherwise used if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

(b) In any other case under the law of the State where the buyer has his place of business.

(2) The obligation of the seller under paragraph (1) of this article does not extend to cases where:

(a) At the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) The right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

(3) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim.

Section III. Remedies for breach of contract by the seller

Article 27

(1) If the seller fails to perform any of his obligations under the contract and this Convention, the buyer may:

(a) Exercise the rights provided in articles 28 to 34;

(b) Claim damages as provided in articles 56 to 59.

(2) The buyer is not deprived of any right he may have to claim damages by exercising his right to other remedies.

(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.

Article 28

(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with such requirement.

(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 23 or within a reasonable time thereafter.

Article 29

(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resert to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in the performance.

Article 30

(1) Unless the buyer has declared the contract avoided in accordance with article 31, the seller may, even after the date for delivery, remedy at his own expense any failure to perform
his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.

(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under paragraph (2) of this article, that the buyer make known his decision.

(4) A request or notice by the seller under paragraphs (2) and (3) of this article is not effective unless received by the buyer.

Article 31

(1) The buyer may declare the contract avoided:
(a) If the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract;
(b) If the seller has not delivered the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 29 or has declared that he will not deliver within the period so fixed.

(2) However, in cases where the seller has made delivery, the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time:
(a) In respect of late delivery, after he has become aware that delivery has been made; or
(b) In respect of any breach other than late delivery, after he knew or ought to have known of such breach, or after the expiration of any additional period of time fixed by the buyer in accordance with paragraph (1) of article 29, or after the seller has declared that he will not perform his obligations within such an additional period.

Article 32

If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value that the goods actually delivered would have had at the time of the conclusion of the contract bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 30 or if he is not allowed by the buyer to remedy that failure in accordance with that article, the buyer's declaration of reduction of the price is of no effect.

Article 33

(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, the provisions of articles 28 to 32 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract.

Article 34

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of any part of the excess quantity, he must pay for it at the contract rate.

Chapter IV. Obligations of the Buyer

Article 35

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention.

Section I. Payment of the price

Article 36

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any relevant laws and regulations to enable payment to be made.

Article 37*

If a contract has been validly concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances.

Article 38

If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight.

Article 39

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:
(a) At the seller's place of business; or
(b) If the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in the place of business of the seller subsequent to the conclusion of the contract.

Article 40

(1) The buyer must pay the price when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity.

Article 41

The buyer must pay the price on the date fixed by or determinable from the contract and this Convention without the need for any request or other formality on the part of the seller.

Section II. Taking delivery

Article 42

The buyer's obligation to take delivery consists:
(a) In doing all the acts which could reasonably be expected

* Ghana, the Philippines and the Union of Soviet Socialist Republics expressed formal reservations to this article.
of him in order to enable the seller to make delivery; and
(b) In taking over the goods.

Section III. Remedies for breach of contract by the buyer

Article 43

(1) If the buyer fails to perform any of his obligations under the contract and this Convention, the seller may:
(a) Exercise the rights provided in articles 44 to 47;
(b) Claim damages as provided in articles 56 to 59.
(2) The seller is not deprived of any right he may have to claim damages by exercising his right to other remedies.
(3) No period of grace may be granted to the buyer by a court or arbitral tribunal when the seller resorts to a remedy for breach of contract.

Article 44

The seller may require the buyer to pay the price, take delivery or perform his other obligations, unless the seller has resorted to a remedy which is inconsistent with such requirement.

Article 45

(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.
(2) Unless the seller has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in the performance.

Article 46

(1) The seller may declare the contract avoided:
(a) If the failure by the buyer to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or
(b) If the buyer has not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 45, performed his obligation to pay the price or taken delivery of the goods, or if he has declared that he will not do so within the period so fixed.
(2) However, in cases where the buyer has paid the price, the seller loses his right to declare the contract avoided if he has not done so:
(a) In respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or
(b) In respect of any breach other than late performance, within a reasonable time after he knew or ought to have known of such breach, or within a reasonable time after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 45 or the declaration by the buyer that he will not perform his obligations within such an additional period.

Article 47

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with any requirement of the buyer that may be known to him.
(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If the buyer fails to do so after receipt of such a communication, the specification made by the seller is binding.

Chapter V. Provisions common to the obligations of the seller and of the buyer

Section I. Anticipatory breach and instalment contracts

Article 48

(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the ability to perform or in the creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives good grounds to conclude that the other party will not perform a substantial part of his obligations.
(2) If the seller has already dispatched the goods before the grounds described in paragraph (1) of this article become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.
(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice to the other party thereof and must continue with performance if the other party provides adequate assurance of his performance.

Article 49

If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided.

Article 50

(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.
(2) If one party's failure to perform any of his obligations in respect of any instalment gives the other party good reason to conclude that a fundamental breach will occur with respect to future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.
(3) A buyer, avoiding the contract in respect of any delivery, may, at the same time, declare the contract avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Section II. Exemptions

Article 51

(1) A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided it or its consequences.
(2) If the party's failure is due to the failure by a third person whom he has engaged to perform the whole or a part of the contract, that party is exempt from liability only if he is exempt under paragraph (1) of this article and if the person whom he has engaged would be so exempt if the provisions of that paragraph were applied to him.
(3) The exemption provided by this article has effect only for the period during which the impediment exists.
(4) The party who fails to perform must give notice to the other party of the impediment and its effect on his ability to perform. If the notice is not received within a reasonable time after the party who fails to perform knew or ought to have known of the impediment, he is liable for damages resulting from such non-receipt.
Section III. Effects of avoidance

Article 52

(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. Avoidance does not affect any provisions of the contract for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract.

(2) If one party has performed the contract either wholly or in part, he may claim from the other party restitution of whatever he has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently.

Article 53

(1) The buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) Paragraph (1) of this article does not apply:
(a) If the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which he received them is not due to an act or omission of the buyer; or
(b) If the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 22; or
(c) If the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered the lack of conformity or ought to have discovered it.

Article 54

The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 53 retains all other remedies.

Article 55

(1) If the seller is bound to refund the price, he must also pay interest thereon from the date on which the price was paid.

(2) The buyer must account to the seller for all benefits which he has derived from the goods or part of them:
(a) If he must make restitution of the goods or part of them; or
(b) If it is impossible for him to make restitution of all or part of the goods or to make restitution of all or part of the goods substantially in the condition in which he received them, but he has nevertheless declared the contract avoided or required the seller to deliver substitute goods.

Section IV. Damages

Article 56

Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract.

Article 57

If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction and any further damages recoverable under the provisions of article 56.

Article 58

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 57, recover the difference between the price fixed by the contract and the current price at the time he first had the right to declare the contract avoided and any further damages recoverable under the provisions of article 56.

(2) For the purposes of paragraph (1) of this article, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

Article 59

The party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated.

Section V. Preservation of the goods

Article 60

If the buyer is in delay in taking delivery of the goods and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the buyer.

Article 61

(1) If the goods have been received by the buyer and he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the seller.

(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination.

Article 62

The party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.

Article 63

(1) The party who is bound to preserve the goods in accordance with articles 60 or 61 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation, provided that notice of the intention to sell has been given to the other party.

(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is bound to preserve the goods in accordance with articles 60 or 61 must take reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.
(3) The party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable expenses of preserving the goods and of selling them. He must account to the other party for the balance.

CHAPTER VI. PASSING OF RISK

Article 64

Loss or damage to the goods after the risk has passed to the buyer does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller.

Article 65

(1) If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. If the seller is required to hand the goods over to a carrier at a particular place other than the destination, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk.

(2) Nevertheless, if the goods are not clearly marked with an address or otherwise identified to the contract, the risk does not pass to the buyer until the seller sends the buyer a notice of the consignment which specifies the goods.

Article 66

The risk in respect of goods sold in transit is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents controlling their disposition. However, if at the time of the conclusion of the contract the seller knew or ought to have known that the goods had been lost or damaged and he has not disclosed such fact to the buyer, such loss or damage is at the risk of the seller.

Article 67

(1) In cases not covered by articles 65 and 66 the risk passes to the buyer when the goods are taken over by him or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

(2) If, however, the buyer is required to take over the goods at a place other than any place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

(3) If the contract relates to a sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have been clearly identified to the contract.

Article 68

If the seller has committed a fundamental breach of contract, the provisions of articles 65, 66 and 67 do not impair the remedies available to the buyer on account of such breach.

D. General conditions of sale and standard contracts

36. The Commission, at its 185th meeting on 17 June 1977,11 considered paragraphs 4 to 8 of the report of Committee of the Whole II (annex II to the present report) and, on the recommendation of the Committee, adopted the following decision:

The United Nations Commission on International Trade Law

Decides to postpone work on “general” general conditions and to review the matter when it considers, at its eleventh session, the proposals of the Secretary-General for its long-term programme of work.

CHAPTER III. INTERNATIONAL PAYMENTS

A. Security interests12

37. The Commission, at its 185th meeting, on 17 June 1977, considered paragraphs 9 to 16 of the report of Committee of the Whole II (annex II to the present report) and, on the recommendation of the Committee, adopted the following decision:

The United Nations Commission on International Trade Law

Requests the Secretary-General:

(a) To submit to the Commission at its twelfth session a further report on the feasibility of uniform rules on security interests and on their possible content, taking into account the comments and suggestions made in the Commission;

(b) To carry out further work on the subject in consultation with interested international organizations and banking and trade institutions, and in particular to ascertain the practical need and relevance of an international security interest for international trade.

B. Contract guarantees13

38. The Commission considered paragraphs 18 to 21 of the report of Committee of the Whole II (annex II to the present report) and, on the recommendation of the Committee, decided to review the item of contract guarantees at its eleventh session when the work of the International Chamber of Commerce on contract guarantees will have been concluded.

CHAPTER IV. INTERNATIONAL COMMERCIAL ARBITRATION

Recommendations of the Asian-African Legal Consultative Committee14

39. The Commission, at its 185th meeting on 17 June 1977, considered paragraphs 27 to 37 of the report of Committee of the Whole II (annex II to the present report) and, on the recommendations of the Committee, adopted the following decision:

The United Nations Commission on International Trade Law,

Having noted the recommendation of the Asian-African Legal Consultative Committee taken at its seventeenth session at Kuala Lumpur, on 5 July

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11 A summary record of this meeting is contained in A/CN.9/SR.185.

12 The Commission considered this subject at its 185th meeting on 17 June 1977; a summary record of this meeting is contained in A/CN.9/SR.185.

13 Ibid.

14 The Commission considered this subject at its 185th meeting on 17 June 1977; a summary record of this meeting is contained in A/CN.9/SR.185.
Recalling that the Commission, at its sixth session, recommended that the General Assembly should invite the States which have not ratified or acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 to consider the possibility of adhering thereto, and that the General Assembly, by resolution 3108 (XXVIII) of 12 December 1973, made a recommendation to that effect,

Recalling also that the General Assembly, by resolution 31/98 of 15 December 1976 on the Arbitration Rules of the United Nations Commission on International Trade Law, recommended the use of the UNCITRAL Arbitration Rules in the settlement of disputes arising in the context of international commercial relations, particularly by reference to such Arbitration Rules in commercial contracts,

1. Welcomes the recommendation of the Asian-African Legal Consultative Committee that the States of the Asian-African region which have not ratified or acceded to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards consider the possibility of ratification or accession to that Convention;

2. Expresses its appreciation to the Asian-African Legal Consultative Committee for recommending that the UNCITRAL Arbitration Rules should be used in the settlement of disputes arising in the context of international commercial relations;

3. Expresses the view that the matters brought to the attention of the Commission by the Asian-African Legal Consultative Committee deserve thorough study and consideration, taking into account all of their aspects and implications;

4. Requests the Secretary-General to prepare, in consultation with the Asian-African Consultative Legal Committee, studies on these matters, taking into account the discussions and views expressed in the Commission and seeking, where necessary, information from Governments and interested international organizations and arbitration centres, including the International Council for Commercial Arbitration, and to submit such studies if possible at the eleventh session of the Commission.

CHAPTER V. LIABILITY FOR DAMAGE CAUSED BY PRODUCTS INTENDED FOR OR INVOLVED IN INTERNATIONAL TRADE

40. The Commission considered paragraphs 38 to 46 of the report of Committee of the Whole II (annex II of the present report).15

41. Two representatives disagreed with the recommendation of the Committee that the Commission should not pursue work on the subject of products liability at this time and that the matter should be reviewed in the context of the Commission’s future programme of work at a future session if one or more Member States of the Commission should take an initiative to that effect. These representatives considered that work on this subject-matter should continue in view of its importance to developing countries which were important consumers of manufactured products.

42. However, according to another view it was preferable to reconsider the matter in the context of the Commission’s new long-term programme of work. It was pointed out that the recommendation of the Committee expressly provided for the matter to be reviewed if one or more Member States took an initiative to that effect.

43. One representative stated that the subject of products liability was more appropriately regulated on a national, rather than an international, basis. The valuable and informative report of the Secretary-General on “liability for damage caused by products involved in international trade” (A/CN.9/133)* could be used by any country which wished to draft national legislation dealing with the question of products liability.

Decision of the Commission

44. The Commission, at its 185th meeting on 17 June 1977, decided to adopt the recommendation of the Committee that it not pursue work on the subject of products liability at this time and that the matter be reviewed in the context of its future programme of work at a future session if one or more Member States of the Commission should take an initiative to that effect.

CHAPTER VI. TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW

Second UNCITRAL Symposium16

45. The Commission, at its 185th meeting on 17 June 1977, considered paragraphs 48 to 54 of the report of Committee of the Whole II (annex II to the present report) and, on the recommendation of the Committee, adopted the following decision:

The United Nations Commission on International Trade Law,

Recalling the great importance attached by the United Nations Commission on International Trade Law to its programme of training and assistance in the field of international trade law and the widespread and consistent interest expressed by Governments, especially those of developing countries, in the continuation of that programme,

Recognizing that the principal feature of such programme of training and assistance in the field of international trade law is the symposia on international trade law which the Commission has organized, and plans to organize, in connexion with its sessions,

Recalling further that the Commission has hitherto attempted to finance such symposia by soliciting voluntary contributions from Governments and other sources,

Noting that the Second UNCITRAL Symposium on International Trade Law which the Commission had planned to hold in connexion with its tenth session had to be cancelled for insufficiency of funds,

* Reproduced in this volume, part two, IV.

15 The Commission considered this subject at its 185th meeting on 17 June 1977; a summary record of this meeting is contained in A/CN.9/5SR.185.

16 Idem.
Being convinced of the need to find alternative means of financing the UNCITRAL symposia which would place this activity on a more secure financial footing,

1. Recommends to the General Assembly that it should consider the possibility of providing for the funding of the Commission's symposia on international trade law, in whole or in part, out of the regular budget of the United Nations;

2. Decides:
   (a) That, if sufficient funds are then available, the second UNCITRAL Symposium on International Trade Law shall be held in connexion with its twelfth session;
   (b) To consider, at its eleventh session, whether the themes of the Symposium selected at its ninth session, namely, "Transport and financing documents used in international trade" and "UNCITRAL Arbitration Rules", should be retained;

3. Invites the Secretary-General to continue his efforts to solicit funds from international organizations and foundations and from private sources to supplement such funds as may be provided under the regular budget of the United Nations.

CHAPTER VII. FUTURE WORK

A. Dates and places of sessions of the Commission and its Working Groups

46. The Commission approved the following scheduling of the sessions of its Working Groups:
   (a) Working Group on the International Sale of Goods: ninth session to be held at Geneva from 19 to 30 September 1977 and, if necessary, tenth session to be held at New York from 3 to 13 January 1978.
   (b) Working Group on International Negotiable Instruments: fifth session to be held at New York from 18 to 29 July 1977 and the sixth session to be held at Geneva from 3 to 13 January 1978.

47. The Commission decided to hold its eleventh session in New York from 5 to 23 June 1978 provided that the Working Group on the International Sale of Goods, at its ninth session in September 1977, completed its work on the preparation of draft provisions on the formation and validity of contracts for the international sale of goods. However, it was generally considered that if the Working Group did not complete its task at its ninth session then the duration of the Commission's eleventh session should be less than three weeks. The Commission requested the Secretary to reduce in that event the length of the session and to inform Member States thereof before 31 December 1977.

B. United Nations Conference of Plenipotentiaries on the Carriage of Goods by Sea

48. The representative of the Federal Republic of Germany informed the Commission that the Permanent Representative of his Government to the United Nations had, by a letter dated 1 June 1977, convened the Secretary-General an invitation by his Government to hold the United Nations Conference of Plenipotentiaries on the Carriage of Goods by Sea in Hamburg in March 1978. His Government sincerely hoped that the United Nations would be in a position to accept this invitation which reflected his Government's deep commitment to UNCITRAL's work in this field. His Government was confident that these efforts would culminate in the adoption at the Conference of a modern world-wide convention on the carriage of goods by sea.

49. In connexion with the fact that the Conference of Plenipotentiaries on the Carriage of Goods by Sea was to be held in March 1978, the question was raised whether the Secretariat would be able to circulate all documents in all languages in good time before the beginning of the Conference. In reply to this question, the Secretary of the Commission stated that he would be able to circulate all available comments and observations of Governments and interested international organizations, and an analysis thereof, by the end of 1977 or earlier if possible.

50. The Commission took note of the invitation by the Federal Republic of Germany.

51. The representative of the Philippines informed the Commission of the interest which his Government attached to the convening of a United Nations Conference on the Carriage of Goods by Sea in his country. However, his Government was not, at this time, in a position to issue a formal invitation.

C. Agenda for the eleventh session of the Commission

52. The Commission was agreed that at its eleventh session the following items should be considered: the draft provisions on the formation and validity of contracts for the international sale of goods if they should be completed by the Working Group on the International Sale of Goods in September 1977; the proposals of the Secretary-General for the long-term programme of work for the Commission; studies on aspects of commercial arbitration as set forth in the report of the Committee of the Whole II; and such other matters which the Secretary may wish to place before it.

D. Co-ordination of work

53. The Commission heard a statement on this matter by the Secretary-General of the International Institute for the Unification of Private Law (UNIDROIT), in which he recalled successive resolutions of the General Assembly, particularly resolution 31/99 of 15 December 1976, calling for continued collaboration between the Commission and other organizations which were active in the field of the Commission's interest.

54. Although there had in the past been collaboration between the Commission and UNIDROIT, it was not time to give more concrete form to such collaboration, particularly in view of the continued expansion of the scope of work of the Commission. This was neces-
sary if only to avoid duplication and wastage of efforts between organizations having similar long-term objectives. His organization particularly appreciated the role which the Commission, as the most widely representative body engaged in the work of unification of private law, could play in this field. He would, therefore, propose the setting up of a consultative group composed of the representatives of the secretariats of the Commission, UNIDROIT and possibly of the Hague Conference on Private International Law, whose function would be to promote and co-ordinate collaboration between these bodies.

55. All representatives who spoke on the matter paid tribute to the contribution by UNIDROIT to the cause of unification of private law and more particularly its contribution to the success of a number of the Commission’s projects. They also welcomed UNIDROIT’s proposal for more effective collaboration between the Commission’s secretariat and those of UNIDROIT and other appropriate organizations, and authorized the secretariat to enter into consultation with these bodies.

56. The Secretary of the Commission informed the Commission that the secretariat was approaching various interested bodies and organizations in various regions of the world for the purpose of consultations in respect of the future work programme of the Commission.

CHAPTER VIII. OTHER BUSINESS

A. General Assembly resolutions

57. The Commission took note of the following General Assembly resolutions:


(c) Resolution 31/100 of 15 December 1976 on a United Nations Conference on the Carriage of Goods by Sea;

(d) Resolution 31/194 of 22 December 1976 on the utilization of office accommodation and conference facilities at the Donaupark Center in Vienna.

B. Participation at United Nations Conference of Plenipotentiaries on the Carriage of Goods by Sea

58. The Commission took note of General Assembly resolution 31/100 on the United Nations Conference on the Carriage of Goods by Sea. The Commission noted that in paragraph 4 (g) the General Assembly requested the Secretary-General to invite the specialized agencies, the International Atomic Energy Agency, as well as interested organs of the United Nations and interested regional intergovernmental organizations, to be represented at the Conference by observers. The Commission was of the view that the phrase “interested regional intergovernmental organizations” in that para-

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21 The Commission considered these resolutions at its 184th meeting, on 15 June 1977; a summary record of this meeting is contained in A/C.9/SR.184.

22 See also paras. 22 to 23 of the report of Committee of the Whole II (annex II to the present report).

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C. Possible transfer of the International Trade Law Branch from New York to Vienna

59. With respect to General Assembly resolution 31/194, the Commission noted that the General Assembly, by that resolution, had authorized the Secretary-General to put into effect, among other things, the proposal contained in paragraph 41 of his report on the utilization of office accommodation and conference facilities at the Donaupark Centre in Vienna (A/C.9/35/31/34), which mentions the International Trade Law Branch as one of the units to be considered for possible transfer from New York to Vienna in 1979. In view of the fact that the International Trade Law Branch functions as the secretariat of the Commission, the Commission held an exchange of views concerning the effect of the proposed transfer on its work, and it was agreed that the report on the work of its tenth session should reflect the views expressed by delegations.

60. Opinions were divided on the question whether it was proper for the Commission to express its opinion on the General Assembly resolution at issue.

61. According to one view, since the Secretary-General had been authorized by the General Assembly to put his proposal to transfer the Commission’s secretariat to Vienna into effect, it was no longer open for the Commission, as an organ of the General Assembly, to seek to discuss the issue or to express views contrary to the policy decisions embodied in the pertinent resolution. This was particularly so since that resolution must be taken to embody the result of the deliberations of all Member States, including those represented by representatives to the current session of the Commission. Furthermore, at issue was an administrative and budgetary matter, and it was outside the legal competence of the Commission to interfere in such a matter.

62. According to another view, the Commission was not precluded from expressing its views on the question. The Commission’s primary competence with respect to matters relating to the unification and harmonization of trade law had been recognized in its mandate. Since it must be taken as given that both the General Assembly and the Secretary-General were interested in the continued success of the Commission’s work, it was not improper, but on the contrary justified, for the Commission, within its area of recognized competence, to bring to the attention of the General Assembly and the Secretary-General any factors which it felt might have an adverse effect on its ability to carry out its mandate effectively, even if such factors arose from a decision of the Secretary-General which had been approved by the General Assembly.

63. In the course of the discussions, two separate
issues were identified with regard to the planned relocation of the Commission's secretariat in Vienna: the effect of that relocation, firstly on the Commission's work, and, secondly, on the venue of the Commission's sessions.

64. As to the first issue, several representatives expressed concern that the proposed transfer might adversely affect the ability of the secretariat to function at the level of effectiveness and competence which the Commission had come to expect of it. In this connexion, it was observed that sound preparatory work in respect of the technically complex areas with which the Commission was dealing was fundamental to the success of any work in the unification of law and that the favourable reception which had so far been accorded to the work of the Commission reflected the thorough preparatory work carried out by the secretariat. Accordingly, it was considered essential that adequate research facilities be readily accessible and be available in the working languages of the Commission.

65. The representative of Austria, speaking in this context, informed the Commission that his Government was aware of the importance of research facilities to the work of the Commission. The appropriate Austrian authorities were actively exploring all possible means, including financial, that would provide the Commission and its secretariat with such facilities. Contacts had been established between representatives of the Austrian Government and the Commission's secretariat to ascertain the latter's needs in this regard and these would continue in the months ahead.

66. On the question of where the Commission would hold its sessions in the event of a transfer of its secretariat to Vienna, most representatives who spoke on the matter urged the retention of New York as one of the regular meeting places. It was recalled in this connexion that it had been the understanding when the Commission was established that it would hold its sessions on a regular basis alternately in New York and in Geneva. The principle of rotation, it was urged, should be respected.

67. Many representatives expressed support for holding the sessions alternately between New York and Vienna, although the view was also advanced that the sessions might rotate between New York, Vienna and Geneva. There was, however, consensus that the Commission should not take an official stand on this question at this time either because it would be premature to do so since everything was based on a contingency — the relocation to Vienna of the secretariat — which would at any event not materialize until after the next session or because the question involved certain complex and delicate issues which required particular consideration.

68. The Commission concluded its consideration of the question of venue without formal decisions but with the understanding that the matter would again be considered at its next session.

D. Report of the Secretary-General on current activities of other international organizations

69. The Commission took note of the report of the Secretary-General on this item (A/CN.9/129 and Add.1).*

* Reproduced in this volume, part two, VI.

ANNEX I


I. INTRODUCTION

1. The Committee of the Whole I was established by the Commission at its 180th meeting, on 23 May 1977. The Committee met under the chairmanship of Mr. Gyula Eörsi (Hungary) and held 32 meetings. At its 4th meeting, on 25 March 1977, the Committee elected Mr. Jorge Barrera-Graf (Mexico) as Rapporteur.

2. Under the terms of reference given to it by the Commission, the Committee was requested to consider the draft Convention on the International Sale of Goods as adopted by the Commission's Working Group on the International Sale of Goods. The text of the draft Convention is set forth in annex I to the report of the Working Group on the work of its sessions (A/CN.9/116). The articles of the draft Convention may be found in annex II to that report.

3. In the course of its discussions, the Committee gave consideration to the comments on the draft Convention submitted by Governments and international organizations. These comments are set forth in A/CN.9/125 and Add.1 to 3.** An analysis of these comments, except those set forth in addenda 2 and 3, is contained in A/CN.9/126.***

4. A summary of the Committee's discussions in respect of the articles of the draft Convention and its recommendations to the Commission are set forth in paragraphs 13 to 561 of this report. At the beginning of the summary of discussions on each article, the text of that article as adopted by the Working Group on the International Sale of Goods, is reproduced.

5. At its 3rd meeting, on 24 May 1977, the Committee established a Drafting Group composed of the representatives of Colombia, Czecho-Slovakia, France, Mexico, Nigeria, Singapore, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America. The Drafting Group was requested to redraft those articles of the draft Convention in respect of which modifications of substance had been agreed upon in the Committee, to consider drafting proposals submitted by Governments and international organizations in their written comments and in the course of the Committee's discussions and, generally, to examine the text of the draft Convention from the point of view of consistency of the terminology used and to ensure consistency between language versions.

6. The Committee also established several ad hoc groups for the purpose of reaching consensus or compromise on important legal issues dealt with in the draft Convention.

7. The Committee did not have sufficient time to consider the draft text proposed by the Drafting Group. It was noted that the Committee had considered in detail each individual article of the draft Convention and that the Drafting Group had based its work on the decisions taken and the conclusions reached in the Committee. The Committee therefore adopted the text of the draft Convention as revised by the Drafting Group with the changes described in paragraph 9 below.

8. The text of each article of the draft Convention, as recommended by the Committee for approval by the Commission, is set forth in the summary of the discussions on that article.

9. The Committee noted that the Drafting Group had placed two portions of the text in square brackets in order to bring them to the special attention of the Committee:

(a) The Committee deleted, in paragraph (1) of article 23, the words "[in the circumstances]" which appear within the expression "after he has discovered it or ought [in the circumstances] to have discovered it." In its original discussion the Committee had requested the Drafting Group to consider includ-
ing this expression in the text. However, the Drafting Group queried whether the expression should be included because, although the length of the period clearly depended on the circumstances of the case, the insertion of this expression in only one article could lead to a contrary conclusion in other articles of the draft Convention which did not use this expression in relation to other time-limits imposed on the parties. The Committee agreed with this reasoning.

(b) The Committee deleted the square brackets which the Drafting Group had placed around article 25 (2). The Drafting Group had taken this action in order to bring to the attention of the Committee the question whether it wished to have a provision on the subject in article 25. The Committee decided to have such a provision and, accordingly, removed the square brackets. Two representatives indicated that they preferred to retain the square brackets as they were opposed to the substance of the provision.

10. The Committee also accepted the recommendation of the Drafting Group to reverse the order of articles 48 and 49 and authorized the Secretary-General to renumber the articles of the draft Convention.

11. The Committee recommends that the Commission should request the Secretary-General: (a) to prepare, under his own authority, a Commentary on the draft Convention; and (b) to suggest titles for each article by inserting such titles in the Commentary.

12. The Committee approved this report at its 32nd meeting, on 17 June 1977.

II. DELIBERATIONS AND DECISIONS


PART I. SUBSTANTIVE PROVISIONS

Chapter I. Sphere of application

ARTICLE 1

13. The text of article 1, as adopted by the Working Group on the International Sale of Goods, is as follows:

“(1) This Convention applies to 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 contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.”

Paragraph (1)

Basic criterion

14. The Committee considered a proposal that would narrow the basic criterion for the application of the Convention by requiring that the parties to a contract of sale, besides having their places of business in different States, should also be of different nationalities. The purpose of this proposal was to ensure that, if buyer and seller were of the same nationality, their national law would apply, even if the place of business of the buyer was in a State other than the State in which the seller’s place of business was situated.

15. The Committee did not retain this proposal on the grounds that the determination of nationality, particularly in relation to corporations, was a complex issue over which national laws differed. In addition, the nationality of the other party may not be evident to each party at the time of contracting. Accordingly, the adoption of the nationality requirement would greatly complicate the task of determining whether the Convention applied and could thus lead to uncertainty.

Places of business

16. Two proposals were made in regard to the concept of "places of business". Under one proposal, that concept should be replaced by the concept of "residence" since the test of "places of business" of the parties could have considerable disadvantages in practice. For example, if two enterprises having their residence in the same country had places of business in different countries the Convention would apply. After deliberation, the Committee decided not to retain the proposal on the grounds that the test of "residence" would not simplify the determination of whether the Convention applied and would, in some cases, not be appropriate. The Committee also did not retain a second proposal under which the relevant places of business of the parties should be limited to their "main" places of business. The Committee’s views in this respect are set forth under article 6 (a).

Subparagraph (1) (a)

17. The Committee considered, but did not retain, a proposal that it should be sufficient for the Convention to apply if one of the States in which the parties have their places of business was a Contracting State. The Committee noted that the present text reflected the approach of article 3 of the Convention on the Limitation Period in the International Sale of Goods, hereinafter referred to as the "Conventions on the Limitation Period", and that the requirement that the States in which the parties have their places of business be Contracting States was preferable since it was based on the principle of reciprocity.

Subparagraph (1) (b)

18. Subparagraph (1) (b) provides that the Convention is applicable if the rules of private international law of the forum leads to the application of the law of a Contracting State and, that, in such a case, it is immaterial whether the place of business of one or both parties is in a Contracting State.

19. The Committee considered two proposals which were addressed to this issue. Under the first proposal, subparagraph (b) should be deleted; under the second proposal, the Convention should be attracted only if the rules of private international law of a Contracting State led to its application.

20. Neither of these proposals commanded sufficient support in the Committee to be retained and the Committee recommends therefore to the Commission that the present wording of subparagraph (b) should be adopted.

Paragraph (2)

21. The Committee approved paragraph (2) without change.

Proposed paragraph (3)

22. The Committee, in its deliberations on article 6, referred to the Drafting Group the question whether article 6 (c) should be relocated as article 1 (1) (c).

Decision

23. The Committee accordingly recommends that the Commission should adopt the following text:

"Article 1

“(1) This Convention applies to 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.

* Article 6 (a) provides that "if a party to a contract of sale of goods has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract."

"
“(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 contract 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 contract is to be taken into consideration.”

ARTICLE 2

24. The text of article 2, as adopted by the Working Group on the International Sale of Goods, is as follows:

“This Convention does not apply to sales:

“(a) Of goods bought for personal, family or household use, unless the seller, at the time of 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.”

Subparagraph (a)

Exclusion of consumer sales

25. The Committee was agreed that consumer sales should be excluded from the scope of the Convention on the ground that such transactions were, in a number of countries, subject to special laws and regulations designed to protect consumers. Such an exclusion would not significantly limit the scope of application since consumer sales would only in relatively few cases qualify as an international sale within the meaning of the Convention.

26. The Committee considered a proposal that would delete the words “unless the seller, at the time of the conclusion of the contract, did not know and had no reason to know that the goods were bought for any such use”. The proposal was based on the ground that these words, which do not appear in the corresponding provision (article 4 (a)) of the Convention on the Limitation Period, introduced a subjective element in that it depended on the subjective view of the seller whether or not the sale was a consumer sale and, consequently, whether or not the Convention would apply.

27. The Committee was of the view that the knowledge of the seller that the contract of sale was one falling within the scope of the Convention was important. In the framework of the Convention on the Limitation Period, the parties had ample time and opportunity to establish whether the sale was a consumer sale or a commercial sale and, accordingly, to determine whether the limitation of legal proceedings and the prescription of the parties’ rights against each other would, or would not, be governed by that Convention. The Committee therefore concluded that the present wording of subparagraph (a) should be retained.

Exclusion of sales by auction, on execution or otherwise by authority of law, and of stocks, shares, investment securities, negotiable instruments or money

28. There were no proposals made to amend or delete any of the provisions of subparagraphs (b), (c) or (d) and the Committee recommends that these subparagraphs should be retained in their present wording.

Exclusion of sales of ships, vessels or aircraft

29. Opinions were divided on the question whether the sale of ships, vessels and aircraft should, as under the present text, be excluded from the scope of application of the Convention.

30. Under one view, these sales should fall within the scope of the Convention because:

(a) The ground invoked for exclusion of these sales, namely, that vessels and aircraft are subject to special registration requirements, was not convincing since these requirements had little to do with the relations between buyer and seller. In this connection, it was noted that the sale of pleasure craft had, in recent years, gained in importance on the international level and could, from a legal point of view, be assimilated to the sale of motor-vehicles which, though subject to registration, did fall within the scope of the Convention;

(b) The sale of large vessels and aircraft was usually made subject to special conditions of sale and would, under article 5, to that extent be taken out of the Convention.

31. Under another view, the exclusion of sales of ships, vessels and aircraft was justified on the ground that:

(a) In many legal systems, ships and aircraft, once registered, are assimilated to immovables;

(b) Article 4 (e) of the Convention on the Limitation Period excludes such sales from the scope of the Convention and a proposal made at the Conference of Plenipotentiaries at which that Convention was adopted to include such sales had been rejected.

32. The Committee, after deliberation, concluded that the issue could not be solved by a compromise text based on consensus. It therefore recommends that the Commission adopt the present text of subparagraph (e).

Exclusion of sales of electricity

33. The Committee considered two proposals:

(a) That subparagraph (f) be deleted so that the sale of electricity would be within the scope of the Convention; and

(b) To exclude from the scope of the Convention also the sale of gas.

34. The Committee did not retain the proposal for deletion of subparagraph (f). It noted that, in many legal systems, electricity was not considered to be a corporeal movable and that, consequently, the deletion of the subparagraph would not necessarily bring the sale of electricity within the Convention but might, on the contrary, give rise to uncertainty.

35. The Committee also did not accept the proposal that the sale of gas be assimilated to the sale of electricity and thus be excluded from the scope of the Convention. It was noted that since a considerable number of both simple and compound bodies existed in either gaseous, liquid or solid state, the sale of these goods would be excluded under the proposal or, at least, present borderline cases. The Committee was of the view that the drawing up of a list of all borderline cases would be a lengthy process and would be inadvisable. In cases where the application of the Convention to the sale of gas was not desired, the parties could, under article 5, vary the effect of any of its provisions. The Committee was therefore agreed to maintain the present wording of subparagraph (f).

Decision

36. The Committee concludes that no change of substance is called for in respect of article 2. It therefore recommends that the Commission should adopt the following text:

“Article 2

“This Convention does not apply to sales:

“(a) Of goods bought for personal, family or household use, unless the seller, at the time of 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.”
ARTICLE 3

37. The text of article 3, as adopted by the Working Group on the International Sale of Goods, is as follows:

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

“(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.”

38. The Committee considered a proposal that article 3 be deleted and then considered proposals relating to paragraph (2).

Deletion of provision

39. The proposal to delete article 3 was based on the ground that the types of contract envisaged by the article fell outside the sphere of the sale of goods and that the article was therefore not appropriate in a Convention which regulated the obligations of the buyer and the seller. There was, however, a considerable body of opinion in favour of retaining article 3, particularly for the reason that the provision was useful for determining whether the Convention applied in borderline cases. It also provided a useful guideline for the courts of a number of common law countries which otherwise might assume that the Convention would not apply. After deliberation, the Committee decided not to retain the proposal to delete article 3.

Paragraph (2)

40. The Committee, for the same reasons, did not retain a proposal that paragraph (2) be deleted.

41. The Committee also considered a proposal under which the words “a substantive part of the materials” were to be replaced by the words “materials or any part of them”, so that, if any part of the materials were supplied by the buyer, the Convention would not apply. The proposal was based on the premise that it would not be equitable to make the seller responsible for conformity of the goods if some of the materials for the production of those goods were supplied by the buyer. In opposition to this proposal it was pointed out that the text provided a useful guideline for a number of legal systems. It was also noted that the provision followed article 6 (2) of the Convention on the Limitation Period. After deliberation, the Committee decided to retain the original text.

Relationship of article 3 (2) to seller’s responsibility for defects

42. The Committee considered a proposal to amend article 3 (2) to regulate the question of the seller’s responsibility for the goods in cases where the buyer has supplied less than a “substantial part” of the materials. This proposal is discussed in paragraphs 179 to 184 of the report relating to article 19.

Decision

43. The Committee concludes that no change of substance is called for in respect of article 3. It therefore recommends that the Commission should adopt the following text:

“Article 3

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

“(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production.”

ARTICLE 4

44. The text of article 4, as adopted by the Working Group on the International Sale of Goods, is as follows:

“This Convention also applies where it has been chosen as the law of the contract by the parties.”

45. The Committee noted that article 4 was based on the premise, accepted by most legal systems, that the parties to a sales transaction were at liberty to choose the law applicable to their contract, and that the article was designed to extend the application of the Convention to contracts of sale in circumstances not envisaged by article 1.

46. The discussions in the Committee revealed that the article was not free from ambiguities and was thus open to divergent interpretations. Whilst it was generally agreed that parties were free to incorporate provisions of the Convention into their contract to the extent that these provisions did not conflict with the applicable law, opinions differed greatly on the question as to the extent to which and the circumstances in which parties could choose the Convention as the law of the contract. Amongst the issues that were raised in this context was that of the relationship of article 4 to the preceding articles of the Convention, in particular whether the article could be interpreted as permitting parties to make the Convention applicable to domestic sales contracts and to the types of contract that were excluded from the Convention by virtue of articles 2 or 3.

47. The Committee considered various proposals which, by restricting the tenor of article 4, were designed to clarify these issues. None of these proposals commanded sufficient support and were therefore not retained.

48. Under one proposal, the choice of the Convention as the law of the contract would be effective only if the contract was entered into by parties whose places of business were in different States and one of these States was a Contracting State. The purpose of this proposal was to ensure that the Convention would apply only to international sales and, by its insertion into article 1, prevent its application to sales excluded from the Convention under articles 2 or 3. However, there was significant support for the view that the proposal, if adopted, would needlessly restrict the application of the Convention, for instance in circumstances where a business firm had a branch in another State which sold goods to a buyer whose place of business was situated in that same State. Under the terms of article 6 (o), the parties would have their place of business in the same State and the Convention would not apply, although the transaction could be qualified as international. Adherent to the view that the parties should be able, in such a case, to choose the Convention as the law of the contract were therefore opposed to the restriction to party autonomy which the proposal sought to achieve. Consequently, the Committee did not retain this proposal.

49. Concern was, however, expressed, also amongst those opposing the proposal, that article 4, if retained, should not be used to circumvent article 2 (a) which expressly excluded consumer sales, since many countries had enacted consumer protection legislation governing important aspects of this type of sale.

50. The Committee did not retain a proposal, based on article 4 of the 1964 Hague Uniform Law on the International Sale of Goods (ULIS), that the Convention, if chosen as the law of the contract, would be subject to the mandatory provisions of the law that would have been applicable if the parties had not chosen the Convention.

51. At the close of the discussions on article 4, there was a considerable body of opinion in the Committee which questioned the practical need for a special provision on the lines of article 4. Whatever the parties agreed would only be valid within the limits of mandatory law.

Decision

52. The Committee concludes that article 4 raises many difficult questions of interpretation which even protracted discussions have failed to solve. Because of this, and in view of the fact that a provision on the lines of article 4 is not strictly necessary to achieve the purpose for which it was drafted, the Committee recommends to the Commission that the article should be deleted.
ARTICLE 5

53. The text of article 5, as adopted by the Working Group on the International Sale of Goods, is as follows:

"The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions."

54. The Committee considered a proposal that the Convention apply to a sales transaction only if it is made so applicable by the parties to the transaction. The purpose of this proposal was to facilitate accession to the Convention by States which, though viewing the Convention favourably as a whole, had reservations concerning particular issues. A subsidiary reason cited in support was that, since many rights under the Convention depended upon compliance with the Convention and the contract, it would be preferable to require that the parties expressly adopt the Convention rather than relying on article 5 to ensure that inconsistent contractual provisions will govern.

55. The proposal did not command sufficient support in the Committee and was therefore not retained. Amongst the arguments put forward against its retention was the view that to make the application of the Convention dependent upon any express stipulation by the parties would turn the Convention into a model law and would thereby remove the raison d'être of the Convention, namely, that it would apply automatically unless the parties had excluded it, or derogated from or varied the effect of any of its provisions.

56. The Committee also did not retain a proposal that the Convention may be excluded only by an express stipulation of the parties. In support of this proposal it was submitted that it should not be possible that the Convention, which was to apply as the law of the contract, could be set aside by mere implication. The suggestion was also made that the faculty which the parties had to exclude the Convention should be subject to their choosing another law of the contract to replace the Convention.

57. The proposal, and the allied suggestion, were opposed on the ground that it may be perfectly clear that the parties do not wish the Convention to apply even though this intention was not stated expressly. Another argument against the proposal was that the Convention itself envisaged exclusion or modification of its provisions by other than express means, as in article 8 on usages.

Decision

58. The Committee concludes that no change of substance is called for in respect of this article, now renumbered as article 4. It therefore recommends that the Commission should adopt the following text:

"Article 4

"The parties may exclude the application of this Convention or derogate from or vary the effect of any of its provisions.""

ARTICLE 6

59. The text of article 6, as adopted by the Working Group on the International Sale of Goods, is as follows:

"For the purposes of this Convention:

(a) If a party to a contract of sale of goods has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at the time of 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 contract is to be taken into consideration."

Subparagraph (a)

(i) Deletion of subparagraph (a)

60. The Committee considered a proposal that article 6 (a) be deleted and that the introductory words of article 1 (1) be amended so that the Convention would apply to contracts entered into by parties whose main places of business are in different States. In support of this proposal it was pointed out that it would be simpler to determine the main place of business rather than ascertaining which place of business had "the closest relationship to the contract and its performance". In opposition to the proposal, it was pointed out that use of the main place of business departed from the concept of relationship with the contract, with the result that the Convention may be applied to transactions wholly formed and performed in one State, e.g. if the contracting parties have their main places of business in different States. Similarly, the Convention may not apply to international transactions because the contracting parties have their main places of business in one State. It was also noted that the present text was likely to correspond to the intention of the parties. Further, it was observed that article 6 (a) corresponds to article 2 (c) of the Convention on the Limitation Period. After considerable discussion and deliberation, the Committee did not retain the proposal to delete article 6 (a).

(ii) Insertion of new definition of "place of business"

61. It was proposed that a new definition of "place of business" be formulated which did not relate "place of business" to the contract and its performance. In support of this proposal, it was stated that a clear definition would enable the relevant "place of business" to be determined at the moment of the conclusion of the contract. Such determination was difficult with the present definition which required that account be taken on the performance of the contract. A further problem was that as each party may have numerous obligations it may be difficult in practice to apply the test of "closest relationship with the contract and its performance". However, in opposition to the proposal, it was stated that article 6 (a) is a good indication of the intention of the parties and also gives a clear method of determining which places of business are relevant for the purposes of the Convention. It was also observed that although performance naturally occurs after the conclusion of the contract the last part of article 6 (a) specifically limits consideration of performance "to the circumstances known to or contemplated by the parties at the time of the conclusion of the contract". After extensive deliberations the Committee decided to reject the proposal to reformulate the definition of "place of business".

(iii) Relationship of place of business to performance

62. The Committee considered a proposal to delete the reference to the performance of the contract which, in the proposed text, is relevant in determining which of more than one place of business should be selected for the purposes of the Convention. The view was expressed that the concept of performance did not necessarily relate to a single act but could cover a series of actions, such as handing the goods over to a carrier and delivery to the buyer. There could thus arise an ambiguity if a branch of the seller's business, participating in the performance of the contract, were situated in the buyer's State since it might be doubtful if the Convention would be applicable. It was further argued that it was at the time of the conclusion of the contract that it was necessary to know whether it was the national law or the Convention which applied, and that this question should not be resolved in the light of subsequent circumstances.

63. In favour of retention of the reference to performance it was argued that the question at issue should be considered in the light of the last phrase of paragraph (a): "having regard to the circumstances known to or contemplated by the parties at the conclusion of the contract". It should be the transaction as a whole, "the contract and its performance", which should determine the relevant place of business.

64. The Committee, after deliberation, decided not to retain the proposal to delete the reference to performance.
65. The Committee adopted the present text after noting a proposal that rather than making reference to the habitual residence of the parties it would be preferable to clearly define the meaning of "place of business".

Subparagraph (c)

66. The Committee considered three proposals:
   (i) That the substance of article 6 (c) be transferred to a new location as article 1 (3);
   (ii) That article 6 (c) be deleted;
   (iii) That article 6 (c) be separated into two articles, the first dealing with nationality and the second with the character of the parties.

(i) Transfer of article 6 (c)

67. In support of the proposal to transfer the substance of article 6 (c) to a new location as article 1 (1) (c), it was pointed out that this change would make it possible to take into consideration the civil or commercial character of the parties or of the contract for such purposes as determining the time for sending notices to the other party. The proposal was also supported on the ground that article 6 (c) was better located in article 1 as it dealt with the sphere of application of the Convention whereas articles 6 (a) and (b) were concerned with the definition of "place of business". In opposition to the proposal, it was stated that it would be preferable to retain article 6 (c) in its present location so that it would conform to article 2 (c) of the Convention on the Limitation Period. It was also noted that since article 2 (a) of the Sales Convention did not exclude all consumer sales from the sphere of application of the Convention, it would be desirable to preface article 6 (c) by the words "except as provided in article 2 (a)." A representative stated that while he would not object to such a change it was on the understanding that nationality of the parties was always irrelevant, even in consumer sales.

68. After considerable discussion, the Committee referred the question of the location of article 6 (c) to the Drafting Committee which was also requested to consider whether article 6 (c) should exclude article 2 (a).

(ii) Deletion of subparagraph (c)

69. In support of the proposal to delete article 6 (c), it was stated that as no other article dealt with nationality or with the civil or commercial character of the parties it was superfluous to have a separate provision stating that these matters were not to be taken into consideration. In opposition to this proposal, it was noted that many civil law systems apply different standards depending on the civil or commercial nature of the parties or of the contract. Accordingly, it was helpful to have a provision which clearly indicated that these considerations did not affect the application of the Convention. Similarly, it was helpful to provide that the nationality of the parties did not affect the operation of the Convention. The proposal was also opposed on the basis that it would create unnecessary conflict with the Convention on the Limitation Period. The Committee, after deliberation, did not retain the proposal for deletion.

(iii) Separation of article 6 (c) into two articles

70. In support of this proposal, it was stated that the question of the civil or commercial character of the parties, or of the contract, was distinct from the question of nationality and so should be dealt with in a separate article as was the case in ULIS (article 1 (3) and article 7). It was also suggested that the question of nationality should be dealt with in article 1 as it related to the scope of application of the Convention. The Committee referred this matter to the Drafting Committee.

Decision

71. The Committee recommends that the Commission should adopt the following text of this article, now renumbered as article 5:

"For the purposes of this Convention:

"(c) If a party has more than one place of business, the place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known or contemplated by the parties at the time of 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 7

72. The text of article 7, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) This Convention governs only the rights and obligations of the seller and the buyer arising from a contract of sale. In particular this Convention is not, except as otherwise expressly provided therein, concerned with the formation of the contract, nor with the effect which the contract may have on the property in the goods sold, nor with the validity of the contract or of any of its provisions or of any usage.

"(2) This Convention does not govern the rights and obligations which might arise between the seller and the buyer because of the existence in any person of rights or claims which relate to industrial or intellectual property or the like."

Further limitations to the scope of the Convention

73. The Committee considered a proposal that additional matters be excluded from the scope of application of the Convention. In this connexion, reference was made to national legislation designed to protect the buyer in instalment sales and "door to door" sales. Not all of these types of sales were excluded under article 2 (a) of the Convention, but national legislation regulating these types of sales should nevertheless take precedence over the Convention.

74. The Committee did not retain this proposal on the ground that the Convention did not relate to matters of validity and that the question of whether the types of sales contract to which the proposal referred were valid would be left to national law.

Deletion of paragraph (1)

75. It was suggested that paragraph (1) be deleted since it was a declaratory provision which did not appear to serve any useful purpose. It was unusual for a Convention to specify the matters which it did not purport to settle.

76. Deletion of the provision was opposed on the ground that paragraph (1) served the purpose of preventing the Convention from overriding domestic law relating to the validity of contracts. In this connexion, reference was made to article 36 of the Convention relating to open-price contracts: the question of the validity of such contracts was, as article 7 (1) made clear, left to national law.

77. The Committee, after deliberation, did not retain the proposal to delete paragraph (1).

Deletion of paragraph (2)

78. The Committee retained a proposal to delete paragraph (2) after having decided that the matter of rights and claims relating to industrial or intellectual property should be dealt with in article 25.

Decision

79. The Committee recommends to the Commission that paragraph (1) of this article, now renumbered as article 6 should

b The Working Group left paragraph (2) in square brackets to indicate that it was a matter which it considered should be decided by the Commission.
be retained and that paragraph (2) should be deleted, and that, accordingly, the Commission should adopt the following text:

"Article 6

1. This Convention governs only the rights and obligations of the seller and the buyer arising from a contract of sale. In particular, except as otherwise expressly provided therein, this Convention is not concerned with:

(a) The formation of the contract;

(b) The validity of the contract or of any of its provisions or of any usage;

(c) The effect which the contract may have on the property in the goods sold."

Chapter II. General provisions

ARTICLE 8

80. The text of article 8, as adopted by the Working Group on the International Sale of Goods, 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 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."

Relevance of usages

81. It was noted that article 8 had not retained the provision of paragraph (2) of article 9 of ULIS according to which, in the event of conflict with the uniform law, usages would prevail unless otherwise agreed by the parties.

82. However, the view was expressed that the proposed article 8 still attached too much importance to usages and that the unification of law could well become compromised unless it was made clear that usages were only an additional faction which, in the case of implied usages, become binding on the parties only if the usage was not in conflict with the contract or the Convention.

83. The prevalent opinion in the Committee was in favour of maintaining the proposed text of article 8 and the suggestion was therefore not retained.

"New paragraph (3): interpretation of trade terms"

84. The Committee considered a proposal designed to reintroduce a provision along the lines of paragraph 3 of article 9 of ULIS which provides that:

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

The proposal was made on the ground that a distinction should be drawn between the application of usages, covered by paragraphs (1) and (2) of article 8, and the application of trade terms such as FOB or CIF, in respect of which there existed several interpretations.

85. The contrary view was expressed that the subject-matter of the proposed new paragraph was already covered by paragraphs (1) and (2) and was therefore unnecessary.

86. The Committee did not retain the proposal as a slight majority of views expressed were in favour of retaining the text proposed by the Working Group on the International Sale of Goods.

Decision

87. The Committee concludes that no change of substance is called for in respect of this article, now renumbered as article 7. It therefore recommends that the Commission should adopt the following text:

"Article 7

(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."

ARTICLE 9

88. The text of article 9 as adopted by the Working Group on the International Sale of Goods is as follows:

"A breach committed by one of the parties to the contract is fundamental if it results in substantial detriment to the other party and the party in breach foresaw or had reason to foresee such a result."

89. The view was expressed that the definition of fundamental breach is appropriate only if it was furthered to the point that one of the prerequisites of a fundamental breach was that the substantial detriment to the other party had been foreseen by the party in breach or that that party had reason to foresee such detriment. In cases of litigation, the burden of proof would thus be on the innocent party and this could not be considered a proper solution. In this connection, the Committee considered and accepted the suggestion that the final phrase of the proposed article should read:

"unless the party in breach did not foresee and had no reason to foresee such a result."

90. It was noted that the proposed text did not deal with the point of the time at which it was possible to foresee the result. It was pointed out that article 10 of ULIS referred to "the time of the conclusion of the contract". According to another view, it would be fairer to refer to the time at which the breach was actually committed rather than the time at which the breach was concluded. The Committee, after deliberation, did not consider it necessary to specify at what moment the party in breach should have foreseen or had reason to foresee the consequences of the breach.

91. The proposal was made that the criterion of fundamental breach should be a "loss of interest in the contract" on the part of the innocent party. This suggestion was opposed on the ground that a proof of loss of interest would be too subjective an element. The Committee did not retain this proposal.

92. The Committee also did not retain a proposal that the text of foreseeability be deleted. It was pointed out that without this provision the text that article 9 was designed to avoid the cancellation of a contract for reasons which were not sufficient to warrant avoiding it.

Relationship to right of seller to cure

93. During its consideration of article 29, the Committee considered a proposal that article 9 read as follows (new language in italics):

"A breach committed by one of the parties to the contract is fundamental if, under all the circumstances, including a reasonable offer to cure, it results in substantial detriment to the other party and the party in breach foresaw or had reason to foresee such a result."

94. In support of this proposal, it was stated that the proposed addition to article 9 would protect against technical avoidance of the contract when there had been an offer to cure under article 29. However, under another view this change was unnecessary because the conditions governing an offer by the seller to cure were governed by article 29 and, if there was no offer to cure, the situation was governed by article 9. Accordingly, the proposal was superfluous.

* See paras. 271 to 284 below.
95. The Committee did not retain the proposal.

Decision

96. The Committee recommends that the Commission should adopt the following text of this article, now renumbered as article 8:

"Article 8

A breach committed by one of the parties is fundamental if it results in substantial detriment to the other party unless the party in breach did not foresee and had no reason to foresee such a result."

97. The text of article 10 as adopted by the Working Group on the International Sale of Goods is as follows:

"(1) Notices provided for by this Convention must be made by the means appropriate in the circumstances.

(2) A declaration of avoidance of the contract is effective only if notice is given to the other party.

(3) If a notice of avoidance or any notice required by article 23 is sent by appropriate means within the required time, the fact that the notice fails to arrive or fails to arrive within such time or that its contents have been inaccurately transmitted does not deprive the sender of the right to rely on the notice."

Article 10 in general

98. The Committee considered a proposal that the general rule in article 10 be that communications must be received by the addressee. In support of this proposal, it was stated that this "receipt theory" accorded with principles of equity because the sender would always know if he had dispatched a notice. Consequently, if there was no reaction from the addressee he could easily take steps to ensure whether the notice had in fact arrived. In opposition to this proposal, it was pointed out that countries which utilized the "receipt theory" had supporting procedural rules which enabled the theory to work in practice since it was extremely difficult to establish whether a notice had in fact been received by the addressee. But as such procedural rules were not present in countries which utilized the "dispatch theory", it would be necessary to include them in the Convention which would complicate the text of the Convention.

99. After deliberation, the Committee decided not to adopt the "receipt theory" as the basis of article 10. However, it was understood that this decision did not preclude particular provisions from requiring that communications called for by that provision be received.

Paragraph (1)

100. The Committee considered a proposal that paragraph (1) be deleted. In support of this proposal, it was stated that paragraph (1) might be interpreted to mean that the sanction for non-compliance with its provisions is that the notice will be denied effect. However, this result would be unjust if the notice was actually received in time although it had not been sent by the "means appropriate in the circumstances". Furthermore, since the provision was designed to mean that the sender will be deprived of the benefit of article 10 (3), which derives him from transmission hazards, it would be more appropriate to delete the provision and introduce the requirement of appropriate means of transmission directly into article 10 (3).

101. After noting the concern of an observer that it may be difficult for a judge to determine whether particular means of transmission were "appropriate", the Committee retained the proposal to delete paragraph (1) and to introduce the requirement of appropriate means of transmission directly in article 10 (3).

Paragraph (2)

102. The Committee considered proposals that the declaration of avoidance must be made by written notice to the other party or, alternatively, be immediately followed by written notice. The Committee decided to consider these proposals in connexion with article 11. The Special Drafting Group created in connexion of article 11 did not retain these proposals and, therefore, the present text of paragraph (2) was retained.

103. However, the Committee referred the provision to the Drafting Group for reformulation to make it clear that prior notice of a declaration of avoidance is not required.

Paragraph (3)

104. The Committee considered a proposal that paragraph (3) be replaced by the following text:

"If any notice, request or communication provided for by this Convention is sent by means appropriate in the circumstances within the requested time, the fact that the notice fails to arrive or fails to arrive within such time or that its contents have been inaccurately transmitted does not deprive the sender of the right to rely on the notice."

105. In support of this proposal, it was stated that since the Convention required a large number of communications there should be a general provision which deals with questions of their transmission to the addressee. It was pointed out that the proposal would ensure errors in transmission or lost or delayed transmission would be treated uniformly throughout the Convention. Furthermore, a clear rule governing hazards of transmission was very important since the terminology governing the giving of notices varied considerably throughout the Convention. The present text of paragraph (3) deals with only two situations which could give the impression that the varying terminology used throughout the Convention implied varying rules concerning whether communications must be received or merely sent. In addition, it was stated that the provision proposed in paragraph 104 above could easily be amended so as to exclude any communications for which a different rule was considered to be more appropriate.

106. There was general support for the proposal that the risk of transmission of lost or delayed notices, or errors in transmission, be governed by one article. However, it was also agreed that adoption of such a provision should be subject to any contrary provisions in the existing text or to any future contrary provisions which might be formulated during the course of the present session.

107. The Committee, after deliberation, tentatively retained this proposal by placing it within square brackets. After having examined the other provisions of the Convention, the Committee adopted the tentatively retained text with the addition of a phrase indicating that some articles contained a different rule. The Drafting Group was requested to use appropriate language which clearly indicated the reversal of the general rule established by paragraph (3) in each article that made communications effective only on receipt.

108. The Committee also considered a proposal that paragraph (3) apply to all communications required by the Convention except communications under articles 28, 29 (2), 29 (3), 44, 46 and 47 (3).

109. In support of this proposal, it was stated that the rule in paragraph (3) was appropriate to most, but not all, communications required by the Convention. In particular, article 46 and the second sentence of article 47 (3) expressly provided for the receipt of notices. In addition, it was noted that it appears inappropriate to extend the benefit of paragraph (3) to a defaulting party's request for an additional period of time to perform, or to cure defects, pursuant to articles 29 (2) and (3). The provision was also suggested to be inappropriate to articles 28 and 44.

110. In opposition to the proposal, it was argued that it would be preferable to adopt a general rule and to decide on specific exceptions when later articles were being considered.

111. After deliberation, the Committee did not retain the proposal to specifically exclude, at this stage, articles 28, 29 (2), 29 (3), 44, 46 and 47 (3) from the operation of article 10 (3).
112. The view was expressed that the article should be operative only if the addressee had no reason to know, or foresee, the error in transmission or the failure of the notice to arrive or arrive on time. There was, however, no support for this proposal.

113. The Committee further considered a proposal that paragraph (3) be limited to cases where the sender repeated the communication within a period of three months. It was stated that this would balance the rights and obligations of the contracting parties in cases where there had been lost or delayed communications or errors in transmission. The Committee did not retain this proposal for want of support.

Decision

114. The Committee accepted a recommendation of the Drafting Group that paragraphs (2) and (3) of article 10 be contained in separate articles with paragraph (2) now renumbered as article 9 and paragraph (3) as article 10. The Committee therefore recommends that the Commission should adopt the following text:

"Article 9

A declaration of avoidance of the contract is effective only if made by notice to the other party.

"Article 10

"Unless otherwise expressly provided in this Convention, if any notice, request or other communication is given by a party in accordance with this Convention and by means appropriate in the circumstances, a delay or error in the transmission of the communication or its failure to arrive does not deprive that party of the right to rely on the communication."

ARTICLE 11

115. The text of article 11 as approved by the Working Group on the International Sale of Goods is as follows:

"["A contract of sale need not be evidenced by writing and is not subject to any other requirements as to form. It may be proved by means of witnesses."

116. The Committee considered a proposal for the deletion of article 11 and then considered a number of compromise proposals.

Deletion of article 11

117. It was proposed that article 11 be deleted as it related to matters of formation and validity of contracts which were outside the scope of the Convention. The view was expressed that such matters should be dealt with in a Convention on Formation or be left to the applicable national law. It was also pointed out that the Sales Convention should not concern itself with how the contents of the contract could be proved as this was a matter of procedure which was also outside its scope. However, the contrary view was expressed that it was crucial that the Convention gave a clear indication of how the contract and its contents can be established for otherwise many of the rights given by the Convention might be put at great risk. In this connection, reference was made to article 36 on determination of the price. It was also pointed out that deletion of article 11 would be satisfactory only if the matter was in fact dealt with in an international Convention, ratified by the same parties as had ratified the Sales Convention, or if matters of formation were dealt with in the same Convention as matters regulating the rights and obligations of the parties to the contract. In addition, failure to provide a clear rule, whether it be a strict requirement for writing or a flexible approach, would cause great uncertainty to the parties to the contract who may have considerable difficulty in ascertaining national law requirements.

4 The Working Group left this article in square brackets to indicate that it was a matter which it considered should be decided by the Commission.

118. The Committee decided, in view of the importance of the question, to consider a number of compromise proposals and to refer these proposals to a special drafting group with the mandate to formulate an acceptable compromise proposal.

119. The representatives of Brazil, the German Democratic Republic, Niger, Singapore, Sweden, the Union of Soviet Socialist Republics, and the United States of America were appointed to the Special Drafting Group.

120. The Committee also requested the Special Drafting Group to consider the proposals relating to article 10 (2) which required declarations of avoidance to be in writing or to be followed by written notification.

Compromise proposals

121. The Committee considered three compromise proposals.

122. It was proposed that the following be added to the existing text of article 11:

"However, when so required by the legislation of any of the States in which the places of business of the parties are situated, a contract must be concluded in written form, failing which it shall [be null and void] [produce the consequences provided for under such legislation].

"Written form" or "writing" includes communications by telegraph and teleprinter."

123. In support of this proposal, it was stated that it constituted a compromise in that it permitted the retention of article 11 although, in the view of several representatives, article 11 dealt with matters of formation and validity of contracts which were outside the proper scope of the Convention. However, in order to achieve a proper balance in the text it would be necessary to make an exception for cases where the legislation of any of the States in which the places of business of the parties are situated require that a contract must be concluded in "written form" which was defined to include communications by telegraph and teleprinter as well as those in handwritten or typed form.

124. However, under another view the proposal did not constitute an effective compromise because the substantive rules in article 11 would be set aside if contrary to the legislation in any of the States in which the places of business of the parties are situated even where, if the compromise proposal was not adopted, such legislation would not regulate the contract. In this respect it was stated that the proposal was less of a compromise than the original proposal to delete article 11.

125. The Committee, after deliberation, referred the proposal to the Special Drafting Group.

126. It was also proposed that the following paragraph be added to article 11:

"(2) The provisions of paragraph (1) do not affect an otherwise valid restriction on the authority of a party to conclude a contract other than in a prescribed form or manner if that restriction is prescribed by statutory law of the State where the party has its place of business and is either known to the other party or is widely known and regularly observed by parties to contracts of the type involved."
130. The Special Drafting Group proposed the following text:

"Article 11"

"A contract of sale need not be evidenced by writing and is not subject to other requirements as to form. It may be proved by means of witnesses."

"Article (X)"

"A Contracting State under whose legislation a contract of sale shall 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 its place of business in a State which has made such a declaration."

131. The Committee adopted a proposal that article 11 (1) should conform to article (X) by providing that a contract of sale need not be concluded in writing as well as that it need not be evidenced by writing. Several representatives opposed this proposal because it appeared to imply that the draft Convention was regulating matters concerning the formation of contracts rather than confining itself to contracts which were considered valid by the applicable law. These representatives considered that the proposal was appropriate for a Convention on Formation but not appropriate for a Convention on Sales.

132. The Committee rejected a proposal that article 11 (1) be divided into two articles, one dealing with the form of contracts and the other dealing with questions of proof.

133. A representative stated that the definition of "place of business" in article 6 (a) would create difficulties in practice in relation to the application of article 11 and article (X). The same representative also indicated that article (X) was based on a system of reciprocity since article 11 (1) would only be excluded if both Contracting States had made declarations under article (X). In his view, a declaration by one Contracting State should be sufficient to exclude the operation of article 11 (1).

Decision

134. The Committee therefore recommends that the Commission should adopt the following text:

"Article 11"

"(1) A contract of sale need not be concluded in or evidenced by writing and is not subject to 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."

"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 its place of business in a State which has made such a declaration."

135. The text of article 12, as adopted by the Working Group on the International Sale of Goods is as follows:

"If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment providing for specific performance unless this could be required by the court under its own law in respect of similar contracts of sale not governed by this Convention."

136. The Committee concludes that no change of substance is called for in respect of article 12. It therefore recommends that the Commission should adopt the following text:

"Article 12"

"If, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment providing for specific performance unless the court could do so under its own law in respect of similar contracts of sale not governed by this Convention."

ARTICLE 13

137. The text of article 13, as approved by the Working Group on the International Sale of Goods, is as follows:

"In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity."

138. The Committee considered several proposals seeking to specify more clearly the criteria of interpretation. These proposals were based on the premise that the proposed wording of article 13 was too general and lacked substance.

Intention of the parties as basis for interpretation

139. It was noted that article 13 was concerned with the interpretation and application of the provisions of the Convention and that the Convention did not contain a provision on the interpretation of the contract. The proposal was made that article 13 be preceded by a provision stating that "in the interpretation of contracts regard is to be had to the purpose of the contract and the interdependence of its various provisions". It was submitted that a rule governing interpretation of a contract of sale was needed in order to enable the courts to establish the respective rights and obligations of the parties as specified in the contract and contemplated by the parties.

140. Because it lacked sufficient support, the proposal was not adopted. It was pointed out that the proposal enunciated a universally accepted principle of interpretation which had no place in the Convention and that the Working Group on the International Sale of Goods was engaged in preparing a draft text on the validity of a contract of sale, a matter which extended to some issues relating to interpretation of contracts of sale of goods.

Private international law

141. Another proposal considered by the Committee was worded as follows:

"With regard to matters pertaining to the relations between the parties to a contract of sale which are not covered by this Convention, the substantive rules of the State where the seller has his place of business shall apply."

142. In support of this proposal, the view was expressed that the Commission, in addition to unifying substantive law, should also endeavor to unify the rules of conflict of laws which affect the contract of sale. A rule on the lines of the proposed text would be a step in that direction. Moreover, the proposed provision was in harmony with article 3 of the 1955 Hague Convention on the Law Applicable to International Sale of Goods. If parties should find such a rule too rigid they could derogate from it under article 5 of the Sales Convention.

143. The Committee, after deliberation, did not retain the

proposals. The view was expressed that a rule of private international law had no place in an international convention providing substantive rules to regulate the relationship of buyer and seller, such as the one under consideration. Whilst it was true that article 3 of the 1955 Hague Convention opted for the law of the country where the seller had his place of business, that article listed exceptions. Thus, a contract of sale concluded in the country of the buyer, as the result of an attempt on the part of the seller to attract customers, would come under the 1955 Hague Convention. The point was also made that, unless a reservation clause were included in the final clauses of the Convention, the proposal, if adopted, would give rise to problems for those States which were parties to the 1955 Hague Convention.

General principles on which the Convention is based

144. A third proposal was as follows:

"In the interpretation and application of the provisions of this Convention regard is to be had to the general principles on which this Convention is based, to its international character and to the need to promote uniformity."

145. The proposal was made on the ground that the guidelines offered by article 13 were insufficient and that it would be desirable to refer expressly to the general principles on which the Convention is based. It was of great importance that, in case of doubt as to the interpretation of certain provisions of the Convention, the Courts should not refer to domestic law.

146. The Committee did not retain this proposal since it did not receive sufficient support.

Decision

147. The Committee concludes that no change of substance is called for in respect of article 13. It therefore recommends that the Commission should adopt the following text:

"Article 13

"In the interpretation and application of the provisions of this Convention, regard is to be had to its international character and to the need to promote uniformity."

Chapter III. Obligations of the seller

ARTICLE 14

148. The text of article 14, as adopted by the Working Group on the International Sale of Goods, is as follows:

"The seller must deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and this Convention."

149. The Committee concludes that no change in substance is called for in respect of article 14. It therefore recommends that the Commission should adopt the following text:

"Article 14

"The seller must deliver the goods, hand over any documents relating thereto and transfer the property in the goods, as required by the contract and this Convention."

Section I. Delivery of the goods and handing over of documents

ARTICLE 15

150. The text of article 15 as adopted by the Working Group on the International Sale of Goods, is as follows:

"If the seller is not required to deliver the goods at a particular place, delivery is made:

(a) If the contract of sale involves carriage of the goods, by handing the goods over to the first carrier for transmission to the buyer;

(b) If, in cases not within the preceding paragraph, the contract relates to

(i) Specific goods, or

(ii) Unidentified goods to be drawn from a specific stock or to be manufactured or produced,

and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place, by placing the goods at the buyer's disposal at that place;

(c) In other cases by placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract."

Introductory phrase

151. The Committee did not retain a proposal that the words "or in accordance with a particular trade term" be added to the opening phrase of article 15 so that it would read:

"If the seller is not required to deliver the goods at a particular place or in accordance with a particular trade term, delivery is made:"

This proposal was considered to be unnecessary since the seller's obligation to deliver arose out of the contract, which would include any trade term used in the contract.

152. The Committee considered and adopted, subject to review by the Drafting Group, a proposal that the opening phrase of article 15 read:

"Where no other place for delivery is fixed or determinable by agreement or usage, delivery is made:"

The new language was intended to make it clear that the rules in article 15 would apply only if the contract did not specify that the seller was bound to deliver the goods at any other particular place.

"Usages"

153. The Committee agreed that the "usages" referred to in the proposed text as well as in article 17, referred to usages as defined under article 8. It left to the Drafting Group to consider whether it was opportune to refer to "usages" or whether, in the light of article 8, it was unnecessary to do so.

Paragraph (a)

154. The Committee rejected a proposal to add the words "or to the shipper" after the phrase "handing the goods over to the first carrier". These words were considered unnecessary since whoever took the goods for shipment was the "first carrier" for the purposes of the Convention.

Decision

155. The Committee concludes that no change of substance is called for in respect of article 15. It therefore recommends that the Commission should adopt the following text:

"Article 15

"If the seller is not bound to deliver the goods at any other particular place, his obligation to deliver consists:

(a) If the contract of sale involves carriage of the goods—in handing the goods over to the first carrier for transmission to the buyer;

(b) If, in cases not within the preceding subparagraph, the contract relates to specific goods, or unidentified goods to be drawn from a specific stock or to be manufactured or produced, and at the time of the conclusion of the contract the parties knew that the goods were at, or were to be manufactured or produced at, a particular place—in placing the goods at the buyer's disposal at that place;

(c) In other cases—in placing the goods at the buyer's disposal at the place where the seller had his place of business at the time of the conclusion of the contract."
ARTICLE 16

156. The text of article 16 as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) If the seller is required to hand the goods over to a carrier and if the goods are not clearly marked with an address or are not otherwise identified to the contract, the seller must send the buyer a notice of the consignment which specifies the goods.

"(2) If the seller is required to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation.

"(3) If the seller is not required to effect insurance in respect of the carriage of the goods, the seller must provide the buyer, at his request, with all available information necessary to enable him to effect such insurance."

157. The Committee considered but did not retain a proposal for an exception to the general rule in article 10 as adopted by the Committee which provides that a party who has sent a notice by appropriate means may rely on the notice even if it does not arrive. Under the proposal the seller could have relied on a notice sent under article 16 (1) only if the notice arrived.

Decision

158. The Committee concludes that no change of substance is called for in respect of article 16. It therefore recommends that the Commission should adopt the following text:

"Article 16

"(1) If the seller is bound to hand the goods over to a carrier and if the goods are not clearly marked with an address or are not otherwise identified to the contract, the seller must send the buyer a notice of the consignment which specifies the goods.

"(2) If the seller is bound to arrange for carriage of the goods, he must make such contracts as are necessary for the carriage to the place fixed by means of transportation which are appropriate in the circumstances and according to the usual terms for such transportation.

"(3) If the seller is not bound to effect insurance in respect of the carriage of the goods, he must provide the buyer, at his request, with all available information necessary to enable him to effect such insurance."

ARTICLE 17

159. The text of article 17, as adopted by the Working Group on the International Sale of Goods, is as follows:

"The seller must deliver the goods:

"(a) If a date is fixed or determinable by agreement or usage, on that date; or

"(b) If a period (such as a stated month or season) is fixed or determinable by agreement or usage, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

"(c) In any other case, within a reasonable time after the conclusion of the contract."

160. The Committee considered but did not retain the following proposals:

(i) That the reference to usages be deleted from paragraph (a);
(ii) That the word "circumstances" in paragraph (b) be made more precise;
(iii) That the phrase "within a reasonable time" in paragraph (c) be made more precise by adding the words "taking into account the nature of the goods and the circumstances of the contract.""

(iv) That a new paragraph (2) be added which would require the seller to give the buyer notice of the date for delivery reasonably in advance of delivery where that date is fixed by the seller.

Decision

161. The Committee concludes that no change of substance is called for in respect of article 17. It therefore recommends that the Commission should adopt the following text:

"Article 17

"The seller must deliver the goods:

"(a) If a date is fixed by or determinable from the contract, on that date; or

"(b) If a period of time is fixed by or determinable from the contract, at any time within that period unless circumstances indicate that the buyer is to choose a date; or

"(c) In any other case, within a reasonable time after the conclusion of the contract."

ARTICLE 18

162. The text of article 18, as adopted by the Working Group on the International Sale of Goods, is as follows:

"If the seller is required to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract."

163. The Committee concludes that no change of substance is called for in respect of article 18. It therefore recommends that the Commission adopt the following text:

"Article 18

"If the seller is bound to hand over documents relating to the goods, he must hand them over at the time and place and in the form required by the contract."

PROPOSED ARTICLE 18 bis

164. The Committee considered a proposal to add the following article as article 18 bis:

"The buyer loses the right to rely on any late performance by the seller if he does not give the seller notice thereof within a reasonable time after performance was rendered."

165. In support of this proposal, it was stated that the article would parallel the requirement in article 23 of the giving of a notice specifying the nature of any lack of conformity of the goods. However, the Committee did not retain the proposal as it was generally considered that the buyer should not lose his remedies for late performance by the seller simply because he had failed to give notice.

Section II. Conformity of the Goods

ARTICLE 19

166. The text of article 19 as adopted by the Working Group on the International Sale of Goods is as follows:

"(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they:

"(a) Are fit for the purposes for which goods of the same description would ordinarily be used;

"(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement;"
"(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

"(d) Are contained or packaged in the manner usual for such goods.

"(2) The seller is not liable under subparagraphs (a) to (d) of paragraph (1) of this article for any non-conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity."

Subparagraph (1) (b)

167. The Committee considered a proposal that this subparagraph apply only to those particular purposes which are expressly made known to the seller and that the exception to the seller's responsibility contained in the latter part of the subparagraph be deleted. The proposal would thus amend the subparagraph to read as follows:

"(b) Are fit for any particular purpose expressly made known to the seller at the time of the conclusion of the contract;"

The two aspects of this proposal are considered separately.

(i) Limitation of subparagraph to those particular purposes expressly made known to the seller

168. In support of the proposal to delete reference to particular purposes impliedly made known to the seller, it was stated that the present text of article 19 (1) (b) imposes the difficult task on a tribunal of determining whether the seller had the requisite implied knowledge. However, the Committee did not retain this proposal as it found little support.

(ii) Deletion of exceptions to the seller's responsibility

169. Under this aspect of the proposal the words "except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement" would have been deleted from article 19 (1) (b). In support of this proposal, it was stated that it would avoid complicated litigation in which the seller sought to establish that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgement. It was noted that the proposal also had the advantage of greatly simplifying the language of article 19 (1) (b). In addition, the proposed text would ensure that the seller must supply goods which conform to the contract. It was pointed out that should the seller consider that the goods may not be fit for the particular purposes stated by the buyer, the seller should decline to enter into the contract. It was also suggested that article 19 (1) (b) may be superfluous because the seller would be responsible under the first sentence of article 19 (1) for any failure of the goods to be fit for any purposes expressly or impliedly made part of the contract. Article 19 (1) (b) simply contained a rule of interpretation which may aid a court to decide whether those particular purposes were part of the contract. As this result would follow under most national rules of interpretation, it would do little harm to delete this portion of article 19 (1) (b) which was couched in language which caused considerable difficulty.

170. In opposition to the proposal to delete the second part of the subparagraph, it was stated that it was equitable for the seller to escape responsibility where it demonstrated that a buyer did not rely upon the seller's skill and judgement or where the special expertise of the buyer made it unreasonable for him to claim reliance on the general expertise of the seller. It was also stated that since all the subparagraphs of article 19 (1) were prefaced by the expression "except where otherwise agreed" it followed that if the last part of article 19 (1) (b) were deleted, the rules of interpretation in many jurisdictions may entail the result that the seller would be liable for any failure of the goods to be fit for a particular purpose made known to the buyer whether or not that particular purpose was made part of the contract. It was pointed out that the existing text created an equitable balance between seller and buyer. Furthermore, under article 19 (1) (a) the seller would, unless otherwise agreed, always be responsible for goods which were not fit for the purposes for which goods of the same description would ordinarily be used.

171. After considerable discussion and deliberation, the Committee did not retain the proposal.

Other proposals relating to subparagraph (1) (b)

172. The Committee also considered a proposal that article 19 (1) (b) be replaced by the following:

"(b) Are fit for any particular purpose [expressly or impliedly] made part of the contract;"

173. In support of this proposal, it was stated that the buyer should be able to rely upon the goods not being suitable for a particular purpose only if that particular purpose was made part of the contract. A further advantage of this proposal was stated to be that it avoided the complications of the second part of the present text of article 19 (1) (b). However, it was pointed out that limiting the provision to particular purposes which were made part of the contract was an unjustified narrowing of the seller's obligations and that accordingly it was desirable to retain the original text.

174. After considerable discussion the Committee did not retain this proposal.

175. The Committee also considered, during its deliberations on the major proposals discussed above, the following proposals which were designed to overcome some of the difficulties expressed in relation to article 19 (1) (b):

(i) That article 19 (1) (b) be deleted because of the difficulties that it had generated;

(ii) That the exception in article 19 (1) (b) only operate in cases where the particular purposes were impliedly made known to the seller but not where the particular purposes were expressly made known to him;

(iii) That the words "or that it was unreasonable for him to rely" be deleted from article 19 (1) (b);

(iv) That the words "expressly or impliedly made known to the seller" be replaced by "expressly or impliedly specified to the seller".

176. None of these proposals commanded sufficient support in the Committee and were not retained.

Burden of proof

177. The Committee considered a proposal that the following paragraph be added to article 19:

"(3) The seller has to prove that the goods delivered by him conform to the contract. However, if the buyer wants to rely on a lack of conformity which he discovered after the expiration of the period within which he had to examine the goods under article 22, the buyer has to prove this lack of conformity. The buyer is considered to have discovered the lack of conformity before the expiration of this period if he has given the seller notice of the lack of conformity within a reasonable time after the expiration of this period."

178. There was little support for this proposal as it was considered inappropriate for the Convention, which relates to the international sale of goods, to deal with matters of evidence or procedure. The Committee, accordingly did not retain the proposal.

Contracts where buyer supplies a small part of the materials

179. The Committee considered a proposal to introduce a rule into article 19 to deal with the situation where the goods do not conform with the contract because of a defect in materials supplied by the buyer. It was pointed out that article 3 (2) did not exclude such cases from the scope of application of the Convention where the amount of material supplied by the buyer was less than a substantial part of the materials necessary for the manufacture and production of the goods. The Committee also considered a proposal that article 3 (2) be amended to deal with this problem to achieve essentially the same result.

180. These proposals, in their final form, were as follows:

(i) That the following paragraph be added to article 19:
"(3) The seller is not liable under paragraph (1) of this article for lack of conformity caused by defects in material supplied by the buyer for use in manufacture or production of the goods:

(a) Unless the seller knew, or could not have been unaware, of such defects;

(b) The same provision applies if the buyer insisted on using such material even after having been notified of its defects."

(ii) That the underscored words be added to article 3 (2):

"(2) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. If the buyer undertakes to supply less than a substantial part of those materials, this Convention applies to such supply as it would to a sale unless the circumstances indicate the contrary."

181. In support of the first proposal it was pointed out that even though the amount of material supplied by the buyer was not substantial, a defect in these materials might cause a major lack of conformity in the goods as produced by the seller. It was pointed out that the seller should be liable for any lack of conformity of goods produced by him caused by defects in materials supplied by the buyer but that this obligation should not be absolute. The seller should not be liable if the seller did not know or could not have been aware of such defects or if the buyer insisted on the use of those materials after notification of the defects in the materials supplied.

182. Under another view, the proposal was unnecessary since it dealt with a matter of minor importance and merely stated an obvious result.

183. The second proposal, which sought to achieve the same result by amending article 3 (2), was met by the same criticisms that were directed against the first proposal. In addition, it was stated that the notion that the Convention applied to the supply of materials by the buyer to the seller "as it would to a sale unless the circumstances indicate the contrary" could raise difficulties of interpretation since the buyer would have to be treated as the seller and vice versa. Further, such a fictional contract, without a price, would cause difficulties in a number of legal systems.

184. Although there was considerable support for the general principle contained in these proposals the Committee, after extensive discussion centered on eliminating drafting difficulties, decided to reject both proposals.

Decision

185. The Committee concludes that no change of substance is called for in respect of article 19. It therefore recommends that the Commission should adopt the following text:

"Article 19"

"(1) The seller must deliver goods which are of the quantity, quality and description required by the contract and which are contained or packaged in the manner required by the contract. Except where otherwise agreed, the goods do not conform with the contract unless they:

(a) Are fit for the purposes for which goods of the same description would ordinarily be used;

(b) Are fit for any particular purpose expressly or impliedly made known to the seller at the time of the conclusion of the contract, except where the circumstances show that the buyer did not rely, or that it was unreasonable for him to rely, on the seller's skill and judgment;

(c) Possess the qualities of goods which the seller has held out to the buyer as a sample or model;

(d) Are contained or packaged in the manner usual for such goods.

(2) The seller is not liable under subparagraphs (a) to (d) of paragraph (1) of this article for any non-conformity of the goods if at the time of the conclusion of the contract the buyer knew or could not have been unaware of such non-conformity."

ARTICLE 20

186. The text of article 20 as adopted by the Working Group on the International Sale of Goods is as follows:

"(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and which is due to a breach of any of his obligations, including a breach of any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period."

Decision

187. The Committee concludes that no change of substance is called for in respect of article 20. It therefore recommends that the Commission should adopt the following text:

"Article 20"

"(1) The seller is liable in accordance with the contract and this Convention for any lack of conformity which exists at the time when the risk passes to the buyer, even though the lack of conformity becomes apparent only after that time.

(2) The seller is also liable for any lack of conformity which occurs after the time indicated in paragraph (1) of this article and which is due to a breach of any of his obligations, including a breach of any express guarantee that the goods will remain fit for their ordinary purpose or for some particular purpose, or that they will retain specified qualities or characteristics for a specific period."

ARTICLE 21

188. The text of article 21 as adopted by the Working Group on the International Sale of Goods is as follows:

"If the seller has delivered goods before the date for delivery, up to that date he may deliver any missing part or quantity of the goods or deliver other conforming goods or cure any lack of conformity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. However, the buyer retains any right to claim damages as provided in article 55."

189. The Committee considered, but did not retain, a proposal that article 21 expressly state that the seller has a right to deliver the goods before the date of delivery in order to make explicit what is already implicit in the language of article 21. However, there was little support for this proposal as it was considered that the emphasis in article 21 should remain on the seller's right to cure and that it would be inappropriate to confer on a party to a contract the right to breach that contract.

Decision

190. The Committee concludes that no change of substance is called for in respect of article 21. It therefore recommends that the Commission should adopt the following text:

"Article 21"

"If the seller has delivered goods before the date for delivery, he may, up to that date, deliver any missing part or make up any deficiency in the quantity of the goods delivered, or deliver goods in replacement of any non-conforming goods delivered or remedy any lack of con-
formity in the goods delivered, provided that the exercise of this right does not cause the buyer unreasonable inconvenience or unreasonable expense. The buyer retains any right to claim damages as provided for in this Convention.'

ARTICLE 22

191. The text of article 22 as adopted by the Working Group on the International Sale of Goods is as follows:

“(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

“(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at the place of destination.

“(3) If the goods are redelivered by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redelivery, examination may be deferred until after the goods have arrived at the new destination.”

Paragraph (1)

192. The Committee considered a proposal to replace paragraph (1) with the following provision:

“(1) Where the goods are delivered to the buyer, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.”

193. In support of this proposal, it was stated that the buyer should have a right to examine the goods and that accordingly acceptance should be postponed until the buyer had such an opportunity for examination. However, it was pointed out that the framing of the proposal in terms of acceptance rather than in terms of an obligation to examine the goods would cause needless difficulties since national law doctrines relating to acceptance differed widely. In any case, the buyer was adequately protected by article 23 (1) which provides that the right to rely on a lack of conformity is lost only if the buyer does not give notice “within a reasonable time after he has discovered or ought to have discovered it”.

194. The Committee, after deliberation, decided not to retain this proposal.

Paragraph (2)

195. The Committee considered a proposal that in cases involving carriage of goods the examination may be deferred until the goods arrive at the final place of destination. The Committee did not retain this proposal as it commanded no support.

Decision

196. The Committee concludes that no change in substance is called for in respect of article 22. It therefore recommends the following text to the Commission:

“Article 22

“(1) The buyer must examine the goods, or cause them to be examined, within as short a period as is practicable in the circumstances.

“(2) If the contract involves carriage of the goods, examination may be deferred until after the goods have arrived at their destination.

“(3) If the goods are redelivered by the buyer without a reasonable opportunity for examination by him and at the time of the conclusion of the contract the seller knew or ought to have known of the possibility of such redelivery, examination may be deferred until after the goods have arrived at the new destination.”

ARTICLE 23

197. The text of article 23, as adopted by the Working Group on the International Sale of Goods, is as follows:

“(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller a notice specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

“(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless such time-limit is inconsistent with a contractual period of guarantee.”

Paragraph (1)

198. The Committee considered a proposal that the text should be reworded to indicate that the buyer does not lose his “right” to rely on a lack of conformity in the goods if he fails to give notice but that he loses the power to enforce his rights. This would furnish a better legal basis for the common occurrence that, without being obligated to do so, the seller recognizes his obligations in respect of his having delivered goods which failed to conform to the contract, in spite of not having received notice of the lack of conformity in proper time.

199. The Committee did not retain this proposal for lack of support.

200. The Committee considered two proposals to reduce the obligation of the buyer to examine the goods. The first proposal was for the replacement of the words “ought to have discovered [the lack of conformity]” by “could have discovered it in the circumstances”. The second proposal would have deleted the words “within a reasonable time”. It was suggested that the buyer be placed under no obligation to discover defects. In particular, buyers from developing countries are at a particular disadvantage when it comes to examining technologically complicated machinery.

201. The Committee did not retain these proposals since it was of the view that the buyer should have the duty both to examine the goods and to notify the seller of lack of conformity. However, the Committee referred to the Drafting Group the question as to whether the words “in the circumstances” should be added to the words “ought to have discovered it”.

Recommendation of the Drafting Group

202. The Drafting Group, however, queried whether the expression “in the circumstances” should be included in paragraph (1) of article 23 because, although the length of the period clearly depended on the circumstances of the case, the insertion of this expression in only one article could lead to a contrary conclusion in other articles of the Convention which did not use this expression in relation to other time-limits imposed on the parties. The Drafting Group accordingly placed the expression “in the circumstances” within square brackets. The Committee accepted the recommendation of the Drafting Group and deleted the expression from the article.

Paragraph (2)

203. The Committee considered a proposal to shorten the maximum period during which notice can be given from two years to one year. A two-year period was said to be longer than that which is found in most national legislation and to be an excessively long period for a seller not to know whether a claim for lack of conformity of the goods would be made by the buyer.

204. On the other hand it was said that it would work to the disadvantage of the developing countries if the maximum period of time for giving notice were to be shortened. The Committee decided not to retain this proposal.

205. The Committee also considered various proposals to

‘See para. 9 above.
have the point of time at which the two-year time-limit commences more clearly associated with the point of time at which the buyer is required to examine the goods under article 22, and especially where examination of the goods may be deferred because of redelivery. It was noted that under article 22 the buyer is required to examine the goods within a period as is practicable in the circumstances, which, in the case where the contract involves the carriage of goods, is after the goods have arrived at their place of destination. It was also noted that where the goods are redelivered by the buyer without a reasonable opportunity for examination by him, in certain circumstances the examination may be deferred until after the goods have arrived at the new destination. However, under article 23 (2) the two-year time-limit for giving notice of lack of conformity commenced on the date the goods "were actually handed over to the buyer".

206. However, it was pointed out that a period of fixed length, such as the two-year maximum period for giving notice under article 23 (2), should commence on an expressly ascertainable date. The most easily ascertainable date is the date on which the goods were actually handed over to the buyer. Even if that date may be as much as several months prior to the date on which examination of the goods is practicable or required under article 22 (3) in those cases in which the goods have been redelivered, it is not an unreasonable point of time from which to measure the maximum period for giving notice in view of the fact that two years is a relatively long time for giving such notice. It was also noted that the time the goods were actually handed over to the buyer was the point of time at which the four-year period of limitation commences under the Convention on the Limitation Period. As a result the Committee did not retain this proposal.

Decision

207. The Committee concludes that no change of substance is called for in respect of article 23. It therefore recommends that the Commission should adopt the following text:

"Article 23

"(1) The buyer loses the right to rely on a lack of conformity of the goods if he does not give notice to the seller specifying the nature of the lack of conformity within a reasonable time after he has discovered it or ought to have discovered it.

(2) In any event, the buyer loses the right to rely on a lack of conformity of the goods if he does not give the seller notice thereof at the latest within a period of two years from the date on which the goods were actually handed over to the buyer, unless such time-limit is inconsistent with a contractual period of guarantee."

ARTICLE 24

208. The text of article 24, as adopted by the Working Group on the International Sale of Goods, is as follows:

"The seller is not entitled to rely on the provisions of articles 22 and 23 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer."

Decision

209. The Committee concludes that no change of substance is called for in respect of article 24. It therefore recommends that the Commission should adopt the following text:

"Article 24

"The seller is not entitled to rely on the provisions of articles 22 and 23 if the lack of conformity relates to facts of which he knew or could not have been unaware and which he did not disclose to the buyer."

ARTICLE 25

210. The text of article 25, as adopted by the Working Group on the International Sale of Goods, is as follows:

"The seller must deliver goods which are free from the right or claim of a third person, unless the buyer agreed to take the goods subject to such right or claim."

211. The Committee established a Special Working Group consisting of the representatives of Finland, German Democratic Republic, Ghana, India, Japan and Mexico to prepare a revised article 25 to cover situations in which the goods sold were subject to a right or claim of a third party based on industrial or intellectual property.

212. The text of article 25, as proposed by the Special Working Group, is as follows:

"(1) The seller must deliver goods which are free from the right or claim of a third party, other than one based on industrial or intellectual property, unless the buyer agreed to take the goods subject to that right or claim.

(2) The seller must deliver goods which are free from any right or claim of a third party, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, if that right or claim is based on industrial or intellectual property:

(a) Under the law of the State where the goods will be used if it was contemplated by the parties at the time of the conclusion of the contract that the goods will be used in that State; or

(b) In any case under the law of the State where the buyer has his place of business.

(3) The obligation of the seller under paragraph (2) of this article does not extend to cases where:

(a) At the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

(b) The right or claim results from the seller's compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

(4) Failure by the buyer to give notice of the right or claim has the same consequences as failure to give notice of lack of conformity under article 23."

Paragraph (1)

213. The Committee noted that paragraph (1) reproduced in principle the text of article 25 as adopted by the Working Group on the International Sale of Goods with the exception that basics based on industrial or intellectual property were expressly excluded as they were to be dealt with in articles 25 (2) to 25 (4).

214. The Committee adopted paragraph (1).

Paragraph (2)

215. The Committee noted that the Special Working Group had two major objectives in formulating paragraph (2). The first was to define the limits of the seller's responsibility to supply goods which were free from any right or claim of a third party based on industrial or intellectual property. The objective was achieved by making the seller responsible for those rights or claims of which, at the time of the conclusion of the contract, he knew or could not have been unaware. The second objective was to indicate that industrial or intellectual property laws were relevant in determining whether the seller had breached his obligation to supply goods free from the industrial or intellectual property rights or claims of a third party. This was achieved by selecting the law of the State where the goods would be used, if use in that State was contemplated by the parties at the time of the conclusion of the contract or, in any other case, under the law where the buyer had his place of business.

216. Although there was general support for the text proposed by the Special Working Group, two representatives reserved their position in relation to this paragraph and to
paragraphs (3) and (4). One representative indicated that he was not prepared to discuss the substantive rules contained in articles 25 (2) to 25 (4) because the regulation of industrial or intellectual property rights was too complex a matter to be resolved in the context of a draft Convention on the International Sale of Goods. Another representative stated that industrial or intellectual property rights should be regulated in a separate instrument and not in a draft Sales Convention.

217. An observer, while not objecting to the fact that industrial or intellectual property rights were dealt with in the Convention, objected to the substance of the rules contained in paragraphs (2) to (4) since, in his view, they would encourage the breach of existing international Conventions which regulated industrial or intellectual property rights.

218. The Committee adopted a proposal to make it clear that the seller had breached his obligation if, because of the right or claim of the third party, the buyer was precluded from reselling the goods as well as if he was precluded from using them.

219. The Committee considered, but did not retain, the following proposals to amend article 25 (2):

(i) That subparagraphs (c) and (d) be cumulative rather than alternative in order to give added protection to persons who had bought goods subject to claims based on industrial or intellectual property;

(ii) That the expression "industrial or intellectual property" be replaced by "intellectual property" to accord with modern commercial usage. The Committee retained the expression "industrial or intellectual property" to ensure that the scope of the provision was not misunderstood.

Limits to paragraph (2)

220. It was noted that the Special Working Group did not deal with the question of breaches of administrative regulations which might restrict the use or sale of goods and consequently, this matter was to be regulated by national law.

Paragraph (3)

221. The Commission noted that the objective of the Special Working Group in relation to paragraph (3) was to state limits to the responsibility of the seller in terms of the knowledge of the buyer. The general notion was that the seller would not be liable under paragraph (2) if the buyer knew or could not have been unaware at the time of the conclusion of the contract of the existence of those rights or claims or where the right or claim resulted from the seller’s compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

Paragraph (4)

222. The Committee noted that the objective of the Special Working Group in relation to paragraph (4) was to regulate the consequences of failure by the buyer to give notice of a right or claim of a third party based on industrial or intellectual property.

223. There was considerable discussion on whether both paragraphs (1) and (2) of article 23 should apply to a right or claim based on industrial or intellectual property. It was generally considered that the two-year period during which notice had to be given in accordance with article 23 (2) was inappropriate in relation to article 25 (4).

224. The Committee, in order to clarify the situation, decided to incorporate as nearly as possible the text of the notice requirements of article 23 (1) into article 25 (4).

Structure of article 25

225. The Committee decided to separate the proposed article 25 into two provisions. Article 25 (1) would become a separate article, numbered article 25, referring to third party rights or claims other than those based on industrial or intellectual property. Paragraphs (2) to (4) of article 25 would be contained in a separate article (article 26) dealing with industrial or intellectual property claims. The Committee also decided to broaden the title of section II of chapter III of the Convention so that it would refer to claims of third persons.

Relationship to article 7

226. As a consequence of adopting article 26, the Committee deleted article 7 (2).

Recommendation of the Drafting Groups

227. The Drafting Group noted that, as a result of the action of the Committee in separating the proposed article 25 into two provisions, the notice requirement of the proposed article 25 (4) would no longer apply to the provision on third party rights or claims other than those based on industrial or intellectual property (now article 25). However, because it was not clear that this was a deliberately intended result of the Committee’s action, the Drafting Group prepared a new paragraph (2) to article 25 on the consequences of the failure by the buyer to give notice of a right or claim of a third party. This new paragraph, which was identical to the notice requirement as proposed by the Drafting Group for article 26 (3) (the new numbering of the original proposed article 25 (4)), was placed in square brackets by the Drafting Group to bring to the attention of the Committee the question as to whether it should be retained.

228. The Committee decided to have such a provision and accordingly removed the square brackets. Two representatives indicated that they preferred to retain the square brackets as they were opposed to the substance of the provision.

Decision

229. The Committee, therefore, recommends that the Commission adopt the following texts of articles 25 and 26:

"Article 25"

“(1) The seller must deliver goods which are free from any right or claim of a third party, other than one based on industrial or intellectual property, unless the buyer agreed to take the goods subject to that right or claim.

“(2) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim.

"Article 26"

“(1) The seller must deliver goods which are free from any right or claim of a third party based on industrial or intellectual property, of which at the time of the conclusion of the contract the seller knew or could not have been unaware, provided that that right or claim is based on industrial or intellectual property:

“(a) Under the law of the State where the goods will be resold or otherwise used if it was contemplated by the parties at the time of the conclusion of the contract that the goods would be resold or otherwise used in that State; or

“(b) In any other case under the law of the State where the buyer has his place of business.

“(2) The obligation of the seller under paragraph (1) of this article does not extend to cases where:

“(a) At the time of the conclusion of the contract the buyer knew or could not have been unaware of the right or claim; or

“(b) The right or claim results from the seller’s compliance with technical drawings, designs, formulae or other such specifications furnished by the buyer.

“(3) The buyer does not have the right to rely on the provisions of this article if he does not give notice to the seller specifying the nature of the right or claim of the third party within a reasonable time after he became aware or ought to have become aware of the right or claim.”

*See para. 9 above.*
230. The text of article 26 as adopted by the Working Group on the International Sale of Goods is as follows:

“(1) If the seller fails to perform any of his obligations under the contract and this Convention, the buyer may:

(a) Exercise the rights provided in articles 27 to 33;
(b) Claim damages as provided in articles 55 to 59.

“(2) The buyer is not deprived of any right he may to claim damages even though he resorts to other remedies.

“(3) If the buyer resorts to a remedy for breach of contract, the seller is not entitled to apply to a court or arbitral tribunal to grant him a period of grace.”

Paragraph (1)

231. The Committee considered a suggestion that the enumeration of remedies in article 26 (1) did not make it clear whether the buyer could claim damages in addition to exercising the rights provided in articles 27 to 33. It was suggested that this problem might be overcome by placing appropriate connecting words between subparagraphs (a) and (b) of article 26 (1). Despite the preference of some representatives that the draft Convention not allow an accumulation of remedies, the generally accepted view was that the buyer should not be deprived of the right to claim for any damages he might have suffered by the mere fact that he had exercised other remedies. Even in cases where the buyer had declared the price reduced pursuant to article 31, he might have suffered additional damages, for instance because of delay. It was considered that the remedy scheme of the Convention should not preclude the buyer from obtaining such damages from the seller. It was pointed out that the Working Group on the International Sale of Goods had not placed the word “and” between subparagraphs (a) and (b) of article 26 (1) since accumulation of remedies may not be appropriate in all cases. It was also pointed out that the Working Group was of the opinion that this result could be more clearly obtained by the language of article 26 (2). However, the Committee considered that since the draft text might be misunderstood, it should be sent to the Drafting Group for possible clarification. The Drafting Group was also requested to consider whether any articles should be added or deleted from the enumeration of provisions contained in articles 26 (1) (a) and (b).

Paragraph (3)

232. The Committee considered a proposal that article 26 (3) be deleted. It was stated in support of this proposal that the object of the Convention should be to maintain the contract with the result that the seller should be permitted to apply to a court for a period of grace to perform the contract. In opposition to the proposal, it was stated that to allow a court to grant delay of grace would mean in some legal systems that a seller who performed within the additional time would not have breached the contract and could not, therefore, be liable for any damages for late delivery. As a result the Committee did not retain this proposal.

Exclusivity of remedies

233. The Committee considered a proposal that the Convention limit the rights of the buyer to those conferred on him by the Convention so that, except in cases of fraud, remedies based upon national law are excluded.

234. In support of this proposal it was stated that exclusion of national law remedies was desirable on grounds of uniformity since those remedies may permit a party to escape from the application of the sanctions in the draft Convention. On the other hand, the continued right to resort to national law remedies in cases of fraud would permit the continued application of the public policy of the State concerned.

235. In opposition to this proposal it was stated that even if the proposal were accepted, national rules which affected the formation and validity of the contract could still be applicable because these matters were excluded from the ambit of the draft Convention by article 7. The proposal contained the added risk that it may be interpreted in some legal systems to prevent the buyer from relying upon remedies stipulated in the contract despite the existence of article 5 which gave supremacy to the will of the parties. It was also pointed out that in situations where defective products had caused damage it may be inadvisable to protect the seller by preventing the buyer from relying on remedies in tort.

236. The Committee, after deliberation, did not retain the proposal.

Decision

237. The Committee concludes that no change of substance is called for in respect of this article, now renumbered as article 27. The Committee therefore recommends that the Commission should adopt the following text:

“Article 27

“(1) If the seller fails to perform any of his obligations under the contract and this Convention, the buyer may:

(a) Exercise the rights provided in articles 28 to 34;
(b) Claim damages as provided in articles 56 to 59.

“(2) The buyer is not deprived of any right he may to claim damages by exercising his right to other remedies.

“(3) No period of grace may be granted to the seller by a court or arbitral tribunal when the buyer resorts to a remedy for breach of contract.”

ARTICLE 27

238. The text of article 27 as adopted by the Working Group on the International Sale of Goods is as follows:

“(1) The buyer may require performance by the seller unless he has resorted to a remedy which is inconsistent with such requirement.

“(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 23 or within a reasonable time thereafter.”

Paragraph (1)

(i) Cover purchase

239. The Committee considered a proposal that the buyer has no right to require performance if “it is reasonably possible for the buyer to purchase goods to replace those to which the contract relates”. In support of this proposal, which adopted the approach of article 25 of ULIS, it was stated that if the buyer could easily purchase substitute goods it would be unreasonable to compel the seller to supply such goods when this may involve him in great expense. It was stated that the proposal was a particular application of the principle of mitigation of damages set forth in article 59 and accorded with commercial practice since rights to specific performance would usually be ineffective because of the delay in obtaining such relief from a court.

240. The contrary view was expressed that the proposal, if accepted, would unjustifiably restrict the rights of the buyer to require performance of the contract. The interests of the seller would be adequately protected under article 59 which imposed on the party who relies on a breach of contract the duty to mitigate the loss resulting from the breach. Furthermore, it was not equitable to compel the innocent party, i.e. the buyer, to go to the trouble of obtaining replacement goods. There was also the danger that the proposal, if adopted, might be abused by a seller anxious to avoid his contractual obligations. Finally, the proposal could complicate calculation of damages pursuant to article 56.

241. The Committee, after discussion, did not retain the proposal.
(ii) Non-delivery

242. The Committee also considered, but did not retain, a proposal that in case of non-delivery the buyer should be able to require the seller to deliver the goods only if he presents his request within a reasonable time after the last deadline for delivery.

Paragraphs (1) and (2)

Buyer's right to require repair

243. The Committee considered a number of proposals whose objective was to make it clear that article 27 authorized the buyer to demand that the seller remedy any defects in the goods.

244. There was general agreement that article 27 included the right of the buyer to require that defects in the goods be remedied but there was difference of opinion on whether this should be explicitly stated.

245. It was stated that some legal systems did not recognize the right to demand cure. Accordingly, if this result were to be achieved under the Convention, the right to demand cure should be made explicit in the text. However, under another view the present text of article 27 was clear and the complex changes proposed would only confuse the situation.

246. There was also difference of opinion on whether there should be any limitations on the exercise of the buyer's right to demand cure.

247. Under one view, the right to require cure should be limited to cases of fundamental breach and, if the goods had been delivered, the cure should not cause the seller unreasonable inconvenience or unreasonable expense. A prerequisite for the exercise of the right to demand cure should be that such demand be made in conjunction with the notice of conformity under article 23 or within a reasonable time thereafter. It was important to set out carefully the limits to the buyer's right to demand cure because national rules on specific performance differed widely. It was also noted that these limitations should be broadly similar to those governing the right to demand substitute goods pursuant to article 27 (2).

248. Another view was that there should be no limitations on the right of the innocent party to require the party in breach to perform the contract.

249. It was generally agreed that it may be possible to re-examine this question if all the proposals and suggestions were submitted to a Special Working Group whose task was to submit a unified text.

250. The Committee accordingly referred the matter to a Special Working Group consisting of the representatives of Australia, Chile, Germany, Federal Republic of, Ghana, Japan, Norway and Yugoslavia.

251. The text submitted by the Special Working Group is as follows:

"(1) The buyer may require performance by the seller unless he has resorted to a remedy which is inconsistent with such requirement or the seller has requested the buyer to purchase goods to replace those to which the contract relates and it is reasonably practicable for the buyer to do so.

"(2) The buyer may require the seller to remedy a lack of conformity in the goods by repairing them only if the seller can do so without unreasonable inconvenience or unreasonable expense.

"(3) The buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and it is reasonably practicable for the seller to supply substitute goods.

"(4) Any request to repair or to deliver substitute goods may be made only in conjunction with notice given under article 23 or within a reasonable time thereafter.""

Discussion of text submitted by Special Working Group

252. The Special Working Group reported that the words in square brackets were a further attempt by some members of the Special Working Group to deal with the problem of cover purchase. These words were not retained by the Committee in view of its previous deliberations on the matter (see paras. 239 and 240 above).

253. The Special Working Group reported that the proposed paragraph (2) made it clear that repair of defective goods was encompassed within article 27. The provision also regulated the conditions under which repair of defects in the goods could be required. The objective of the proposed paragraph (3) was to regulate the conditions under which the buyer can require delivery of substitute goods. In addition to the requirement in the present text of article 27 (2) that the defect constitute a fundamental breach, a requirement that the delivery of substitute goods also be "reasonably practicable" for the seller was added. The proposed paragraph (4) dealt with notice requirements in the same way as was done in the latter part of article 27 (2), with the exception that the notice requirement was extended to specifically include cases of repair.

254. In support of the proposed text, it was stated that it was realistic to limit the right of the buyer to require specific performance because frequently the seller would not be able to perform. Limiting the right to require specific performance also accorded with the practice of most jurisdictions which had such a remedy. Furthermore, if the costs to the seller of curing defects, or supplying substitute goods, were prohibitive, the buyer should be compelled to accept damages. This rule would coincide with the principle of mitigation of damages set out in article 59.

255. In support of proposed paragraph (2), it was stated that without such an express provision a number of legal systems would not permit the buyer to compel the seller to cure defects in goods which had been delivered. Accordingly, the proposal would ensure a similar result to that obtained in those legal systems which consider the concept of requiring "performance" to encompass cure of defective goods.

256. In opposition to the proposed article, it was stated that as the seller was in breach the buyer must have the right to compel performance. This right to demand performance of the contract should not be subject to any pre-conditions. Prior to the breach the buyer had a right to expect performance and accordingly this right should not be lessened by the fact of breach. Further, it was stated that the proposal placed the determination of whether the seller should perform the contract, prima facie, in the hands of the seller who could compel the innocent party to litigate to determine whether he had a right to compel performance. It was also noted that while it was clear that in many cases specific performance would be impossible and that the buyer would have to accept damages, the statement of general principle in the Convention should be that the buyer is entitled to performance of the contract.

257. The Committee, after deliberation, did not retain the proposed text of the Special Working Group. In view of this decision, the Committee did not consider a number of proposals which sought to amend the proposed text submitted by the Special Working Group.

258. Two representatives stated that as a consequence of failing to deal specifically with cure, a buyer seeking redress in the courts of their legal systems would not be able to demand cure of defective goods under article 27 (1). One representative stated that, in his view, the right to demand cure was encompassed within the concept of requiring "performance" contained in article 27 (1).

Decision

259. The Committee concludes that no change of substance is proposed in respect of this article, now renumbered as article 28. It therefore recommends that the Commission should adopt the following text:

"Article 28

"(1) The buyer may require performance by the seller of his obligations unless the buyer has resorted to a remedy which is inconsistent with such requirement."
"(2) If the goods do not conform with the contract, the buyer may require delivery of substitute goods only if the lack of conformity constitutes a fundamental breach and a request for substitute goods is made either in conjunction with notice given under article 23 or within a reasonable time thereafter."

ARTICLE 28

260. The text of article 28 as adopted by the Working Group on the International Sale of Goods is as follows:

"The buyer may request performance within an additional period of time of reasonable length. In such a case, the buyer may not resort to any remedy for breach of contract, unless the seller has declared that he will not comply with the request."

Effect of request for performance on remedies

261. The Committee was of the view that article 28 was intended to prevent the buyer from relying on any remedies for breach of contract during the additional period of time that he had fixed for performance. After the expiration of this period the buyer could resort to any of the remedies available to him. However, a number of representatives considered that this result may not flow from the present wording of article 28. Accordingly, the matter was referred to the Drafting Group together with a number of drafting suggestions which sought to make it clear that the purpose of article 28 was to regulate the power of the buyer to fix an additional period for performance and to define the consequences of such a request on the buyer's remedies during that period.

Nature of the additional period

262. The Commission considered a proposal that the following text be added as paragraph (2) to article 28:

"(2) Where the buyer requests the seller to perform, without fixing an additional period referred to in paragraph (1), the request is assumed [for the purpose of the provisions thereof] to include the fixing of a period of reasonable length."

263. In support of this proposal it was stated that the effect of a request by the buyer for performance by the seller which did not state an additional period of time for performance should be the same as a request which stated an additional specific period of time. However, a request for performance which did not state a fixed period and which was not acceded to by the seller should not authorize the buyer to avoid the contract under article 30 (1) (b), unless that failure to perform constituted a fundamental breach of contract under article 30 (1) (a).

264. It was generally considered that the essence of the Nachfrist principle embodied in article 28 was that the buyer had requested performance within a fixed additional period of time which was also of reasonable length. The purpose of such a period was to enable the buyer to specify the period during which he could still accept performance. The only limit to the length of the period chosen by the buyer was that it be of reasonable length. It was because the fixed additional period was of reasonable length that failure on the part of the seller to comply with that request enabled the buyer to declare the contract avoided under article 30 (1) (b).

265. The Committee accordingly did not retain the proposal to insert a provision into article 28 which would enable the mechanism of the article to be used in relation to requests for performance which did not fix an additional period of time.

266. The Committee referred article 28 to the Drafting Group to ensure that it reflected the fact that the additional period be of fixed duration and that the fixed period be of reasonable length.

267. The Committee also referred to the Drafting Group a proposal that a declaration by the seller that he will not comply with a request by the buyer for performance must arrive before it can be relied upon by the seller.

Decision

268. The Committee recommends that the Commission should adopt the following text, now renumbered as article 29:

"Article 29"

"(1) The buyer may fix an additional period of time of reasonable length for performance by the seller of his obligations.

"(2) Unless the buyer has received notice from the seller that he will not perform within the period so fixed, the buyer may not, during that period, resort to any remedy for breach of contract. However, the buyer is not deprived thereby of any right he may have to claim damages for delay in the performance."

ARTICLE 29

269. The text of article 29 as adopted by the Working Group on the International Sale of Goods is as follows:

"(1) The seller may cure, even after the date for delivery, any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or unreasonable expense, unless the buyer has declared the contract avoided in accordance with article 30 or has declared the price to be reduced in accordance with article 31.

"(2) If the seller requests the buyer to make known whether he will accept performance and the buyer does not so declare within a reasonable time, the seller may perform within the time indicated in his request or, if no time is indicated, within a reasonable time. The buyer cannot, during either period of time, resort to any remedy which is inconsistent with performance by the seller.

"(3) A notice by the seller that he will perform within a specified period of time or within a reasonable period of time is assumed to include a request, under paragraph (2) of this article, that the buyer make known his decision."

Relationship of seller's right to cure with buyer's right to claim damages

270. The Committee decided to request the Drafting Committee to include in both article 21 and this article a reference to the fact that even though the seller may cure any failure to perform his obligations the buyer still retains any right to claim damages as provided in article 55.

Paragraph (1)

Relationship of seller's right to cure with other remedies of buyer

271. The Committee considered several proposals which sought to clarify the relationship of the seller's right to remedy any failure to perform his obligations with the buyer's remedies, notably, the buyer's right to declare the contract avoided and his right to declare a reduction in the price.

272. These proposals were as follows:

(i) That the words "unless the buyer has declared the contract avoided in accordance with article 30 or has declared the price to be reduced in accordance with article 31" be deleted.

(ii) That the words "or has declared the price to be reduced in accordance with article 31" be deleted. In addition, article 31 should be amended to make it clear that the seller's right to cure his failure to perform takes precedence over the buyer's right to have the price reduced.

(iii) That the following sentence be added to paragraph (1): "The seller is, however, obliged to compensate the buyer for any expense caused by the seller in exercising his right to cure the failure to perform."
273. The central issue in discussing these proposals was whether the buyer may preclude the seller from curing any failure to perform his obligations where the cure can be effected without such delay as would amount to a fundamental breach and without causing the buyer unreasonable inconvenience or unreasonable expense. This issue was discussed in the context of a defect in the goods which, in the absence of repair, was so serious as to constitute a fundamental breach but where the delay in remedying that defect would not constitute a fundamental breach and would not even cause the buyer unreasonable inconvenience or unreasonable expense.

274. One view was that the seller’s right to cure should take precedence over the buyer’s right to declare the contract avoided to declare a reduction in the price. It was stated that this rule would promote the upholding of contracts and prevent the needless expense to the seller of avoidance or price reduction where the defect could be quickly cured. The buyer would be protected by the fact that the seller’s right would only operate where the cure could be effected without such delay as would constitute a fundamental breach and only where the cure did not cause the buyer unreasonable inconvenience or unreasonable expense. In addition, the seller would have to compensate the buyer for all expenses suffered by him because of the exercise of the seller’s right to cure.

275. Under another view if the defect could be cured easily there would be no fundamental breach of the contract since the notion of fundamental breach must be considered both in the light of the defect itself and in the light of the possibility of cure. However, it was pointed out that this rule would not be evident to many common law jurisdictions if the words “unless the buyer has declared the contract avoided in accordance with article 30” were retained in article 29 (1).

276. There was considerable opposition in the Committee to the idea that the buyer’s right to declare the contract avoided could be affected by an offer to cure the defect. The seller was in breach and any possibility to cure was a privilege which depended upon the consent of the buyer who had the right to declare the contract avoided.

277. There was substantial support for the proposition that the buyer’s right to declare a reduction in the price was subject to the seller’s right to cure provided that the seller bore all expenses of such cure. The Committee accordingly decided to accept this principle and requested the Drafting Group to formulate appropriate language.

278. The Committee then considered the following proposals which had been submitted in the light of its deliberations:

(i) That article 29 (1) read as follows:

“(1) The seller may, at his own expense, cure, even after the date of delivery, any failure to perform his obligations, if he can do so within a reasonable time and without causing the buyer unreasonable inconvenience, unless the buyer has declared the contract avoided in accordance with article 30.”

(ii) That article 29 (1) read as follows:

“(1) The seller may, at his own expense, cure, even after the date for delivery, any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience including any uncertainty in reimbursement by the seller of expenses advanced by the buyer, unless the buyer has declared the contract avoided in accordance with article 30.”

279. It was stated in support of both of these proposals that the buyer would not bear any expenses caused by the exercise of the seller’s right to cure and since the buyer would not even suffer any “unreasonable inconvenience” it was reasonable to compel the buyer to accept the cure rather than declare the contract avoided.

280. In support of the second proposal (para. 278 (ii) above), it was stated that making the exercise of the seller’s right to cure subject to not causing “any uncertainty in reimbursement by the seller of expenses advanced by the buyer” would further protect the buyer and ensure an equitable distribution of rights between the parties.

281. In opposition to these proposals, it was argued that as the seller was in breach, any right to cure should be subject to the cure not causing any expense or unreasonable inconvenience to the buyer. In addition, the proposals did not make it clear that the buyer has the right to any consequential damages in addition to expenses caused by the cure.

282. Opposition to the proposals was also based on the ground that questions of reimbursement for damages should be included among the provisions on damages rather than in a provision dealing with the seller’s right to cure.

283. The second proposal (para. 278 (ii) above) was also opposed on the grounds that it was too detailed for inclusion in a Convention which dealt with general matters of principle.

284. The Committee, after considerable deliberation, decided to adopt in principle the text of the second proposal set out in paragraph 278 (ii) above.

285. A representative stated that in his view article 29 (1) could not be concerned with a breach of contract in relation to the time of performance.

Paragraph (2)

286. The Committee adopted a proposal that the seller in breach bear the risk of transmission of a request to the buyer whether he would accept performance. However, the general rule in article 10 should apply to the reply of the buyer.

Paragraphs (2) and (3)

287. The Committee retained a proposal to delete the words “or, if no time is indicated, within a reasonable time” from paragraph (2) and to delete the words “or within a reasonable period of time” from paragraph (3). This decision reflected the generally accepted notion that a seller in breach who requests whether the buyer will accept performance, but does not indicate to the buyer when that performance can be expected, can draw no conclusions, nor derive any rights, from the failure of the buyer to reply.

Definition of fundamental breach

288. The Committee reconsidered the definition of fundamental breach contained in article 9 in the light of the discussion on the relationship between the buyer’s right to cure under article 29 (1) and the buyer’s right to declare the contract avoided under article 30 (1) (a) because of the existence of a fundamental breach of contract by the seller. This reconsideration is discussed at paragraphs 93 to 95 above.

Decision

289. The Committee adopted in principle the text set out in paragraph 278 (ii) above. It also approved in principle article 29 (2) and article 29 (3) with deletion of the words “or, if no time is indicated, within a reasonable time” from article 29 (2) and deletion of the words “or within a reasonable period of time” from article 29 (3). An additional paragraph was added to reflect the fact that the seller bears the risk in transmission of a request to the buyer whether he will accept performance. Accordingly the Committee recommends that the Commission should adopt the following text, now renumbered as article 30:

“Article 30

“(1) Unless the buyer has declared the contract avoided in accordance with article 31, the seller may, even after the date for delivery, remedy at his own expense any failure to perform his obligations, if he can do so without such delay as will amount to a fundamental breach of contract and without causing the buyer unreasonable inconvenience or uncertainty of reimbursement by the seller of expenses advanced by the buyer. The buyer retains any right to claim damages as provided for in this Convention.

“(2) If the seller requests the buyer to make known
whether he will accept performance and the buyer does not comply with the request within a reasonable time, the seller may perform within the time indicated in his request. The buyer may not, during that period of time, resort to any remedy which is inconsistent with performance by the seller.

"(3) A notice by the seller that he will perform within a specified period of time is assumed to include a request, under paragraph (2) of this article, that the buyer make known his decision.

"(4) A request or notice by the seller under paragraphs (2) and (3) of this article is not effective unless received by the buyer."

ARTICLE 30

290. The text of article 30 as adopted by the Working Group on the International Sale of Goods is as follows:

"(1) The buyer may declare the contract avoided:

"(a) If the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

"(b) If the seller has been requested to make delivery under article 28 and has not delivered the goods within the additional period of time fixed by the buyer in accordance with that article or has declared that he will not comply with the request.

"(2) However, in cases where the seller has made delivery, the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time:

"(a) In respect of late delivery, after he has become aware that delivery has been made; or

"(b) In respect of any breach other than late delivery, after he knew or ought to have known of such breach or, if the buyer has requested the seller to perform under article 28, after the expiration of the additional period of time or after the seller has declared that he will not comply with the request.

Subparagraph (1) (b)

291. The Committee considered a proposal that the words "if the seller has been requested to make delivery" be followed by "or to cure a lack of conformity". In support of this proposal it was stated that the buyer's right to declare the contract avoided should exist where the seller does not cure a lack of conformity when requested to do so pursuant to article 28, as well as when he does not make delivery pursuant to that article. The possibility that the buyer might attempt to abuse this right by insisting that the seller's failure to cure a minor lack of conformity in the goods gave grounds to avoid the contract could be prevented by adding a provision similar to article 33 (2) of ULIS that "no difference in quantity, lack of part of the goods or absence of any quality or characteristic shall be taken into consideration where it is not material".

292. However, under another view the proposal might give unwarranted power to a buyer to avoid the contract for a lack of conformity in the goods which, although not minimal, would not be very serious.

293. The Committee, after deliberation, did not retain this proposal.

Subparagraph (2) (b)

294. The Committee considered a proposal that article 30 (2) (b) should apply also to the cases envisaged by articles 29 paragraphs (2) and (3). In other words, if the seller had made delivery, the buyer would lose his right to declare the contract avoided if he did not do so within a reasonable time after the expiration of any additional period of time requested by the seller for performance pursuant to those articles.

295. The Committee did not retain this proposal. It was considered inappropriate to include a reference to article 29 in article 30 (2) (b) since the period in article 29 is set by the seller who is in breach. The fact that the period which he has set had expired should not affect the rights of the innocent buyer.

Unilateral declarations of avoidance

296. The view was expressed by several representatives that article 30 improperly granted to the buyer the power to declare the contract avoided unilaterally and without the intervention of a court or tribunal. It was noted that article 30 was but the first of several articles which granted the injured party the power to act unilaterally. Although those representatives did not oppose at this stage the adoption of article 30, or of the other articles which granted to the injured party a similar power, they requested that their views be noted in this report.

Decision

297. The Committee concludes that no change in substance is called for in respect of this article. It therefore recommends that the Commission should adopt the following text, now renumbered as article 31.

"Article 31

"(1) The buyer may declare the contract avoided:

"(a) If the failure by the seller to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

"(b) If the seller has not delivered the goods within the additional period of time fixed by the buyer in accordance with paragraph (1) of article 29 or has declared that he will not deliver within the period so fixed.

"(2) However, in cases where the seller has made delivery, the buyer loses his right to declare the contract avoided unless he has done so within a reasonable time:

"(a) In respect of late delivery, after he has become aware that delivery has been made; or

"(b) In respect of any breach other than late delivery, after he knew or ought to have known of such breach or, after the expiration of any additional period of time fixed by the buyer in accordance with article 29, after the seller has declared that he will not perform his obligations within such an additional period."

ARTICLE 31

298. The text of article 31 as adopted by the Working Group on the International Sale of Goods is as follows:

"If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value of the goods at the time of the conclusion of the contract has been diminished because of the non-conformity."

Relationship with seller's right to cure

299. In accordance with its decision in relation to article 29 (see para. 277 above), the Committee was agreed that the declaration of reduction of the price was subject to the seller's right to cure defects under article 29 and that, therefore, a declaration of price reduction would have no effect if the seller subsequently cured the defect pursuant to article 29.

Calculation of diminished value

300. The Committee decided to rephrase the provision to make it clear that the proportion by which the price was to be reduced is the same proportion as that existing between the value that the goods actually delivered would have had at the time of the conclusion of the contract and the value that conforming goods would have had at that time.

Unilateral reduction of the price

301. The view was expressed by several representatives that article 31, like article 30, improperly granted the buyer unilateral
power to effect the remedy in question, in this case reduction of the price. It was stated that once the buyer had declared a reduction of the price, the only question which might come before a court was the propriety of the amount by which the price was reduced.

302. Under another view, a court or tribunal would also have the power to review whether the fact of a price reduction was justified because of, for example, a cure of the lack of conformity by the seller.

Decision

303. The Committee concludes that no change in substance is called for in respect of this article. It therefore recommends that the Commission should adopt the following text, now renumbered as article 32:

"Article 32

"If the goods do not conform with the contract and whether or not the price has already been paid, the buyer may declare the price to be reduced in the same proportion as the value that the goods actually delivered would have had at the time of the conclusion of the contract bears to the value that conforming goods would have had at that time. However, if the seller remedies any failure to perform his obligations in accordance with article 30 or if he is not allowed by the buyer to remedy that failure in accordance with that article, the buyer's declaration of reduction of the price is of no effect."

ARTICLE 32

304. The text of article 32 as adopted by the Working Group on the International Sale of Goods is as follows:

"(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, the provisions of articles 27 to 31 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely and in conformity with the contract amounts to a fundamental breach of the contract."

Paragraph (2)

305. The Committee decided that paragraph (2) should be drafted in such a manner as to make it clear that the buyer had the power to declare the contract avoided under this provision where there was either a failure to make a complete delivery or a failure to deliver goods which conform to the contract.

Decision

306. The Committee concludes that no change in substance is called for in respect of this article. It therefore recommends that the Commission should adopt the following text, now renumbered as article 33:

"Article 33

"(1) If the seller delivers only a part of the goods or if only a part of the goods delivered is in conformity with the contract, the provisions of articles 28 to 32 apply in respect of the part which is missing or which does not conform.

(2) The buyer may declare the contract avoided in its entirety only if the failure to make delivery completely or in conformity with the contract amounts to a fundamental breach of the contract."

ARTICLE 33

307. The text of article 33 as adopted by the Working Group on the International Sale of Goods is as follows:

"(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate."

Article as a whole

308. The Committee considered a proposal to add the following words to paragraph (1):

"If the buyer takes delivery before the date fixed, the buyer must pay the price at a correspondingly earlier date. If the buyer refuses to take delivery, he shall be entitled to recover within a reasonable time, otherwise he loses his right to refuse."

and the following words to paragraph (2):

"In case the buyer does not refuse to take delivery of the goods within a reasonable time, at the latest, however, within three months after passing of the risk, or if he uses or disposes of the goods, delivery of the excess quantity is regarded as taken."

309. In support of this proposal, it was stated that the additions to the text would specify the consequences flowing from a decision by the buyer to take delivery or to refuse to take delivery. In particular, it was stated, if the buyer takes early delivery, it is only equitable that he make a correspondingly earlier payment of the purchase price. Further, if the buyer refuses to take delivery, that refusal should only be permitted within a reasonable time after the goods arrive.

310. However, there was considerable opposition to the notion that a buyer who takes early delivery must make a correspondingly early payment of the purchase price. It was stated that early delivery was a breach of contract by the seller and consequently the buyer should not be penalized because he took early delivery of the goods to accommodate the seller. In addition, a rule which compelled early payment would tend to encourage rejection of the goods which was an undesirable result. In any case, the question of change in payment terms should be left to the negotiations between the parties since such negotiations could easily take place at the time the buyer was considering whether to take early delivery of the goods. It was undesirable to restrict the freedom of the parties by requiring, unless otherwise agreed, that early delivery entailed early payment.

311. There was also opposition to the concept of permitting the buyer to refuse to take delivery "within a reasonable time" after delivery or within three months after the risk had passed. It was stated that the existing text of article 33 made it clear that the refusal to take delivery must be made when the goods were tendered to the buyer and there seemed to be no reason to relax this requirement. The proposal also created difficulties since it was difficult to envisage how the buyer who had accepted the goods could refuse to take delivery at a later time.

312. The Committee, after deliberation, did not retain the proposal.

Paragraph (1)

313. The Committee also did not retain, for reasons similar to those outlined in paragraph 311 above, a proposal that the following words be added to paragraph (1):

"however the buyer must take delivery before the date fixed if it is unreasonable to refuse it and the seller has reason for such delivery."

Decision

314. The Committee concludes that no change of substance is called for in respect of this article. It therefore recommends that the Commission should adopt the following text, now renumbered as article 34:
"Article 34

(1) If the seller delivers the goods before the date fixed, the buyer may take delivery or refuse to take delivery.

(2) If the seller delivers a quantity of goods greater than that provided for in the contract, the buyer may take delivery or refuse to take delivery of the excess quantity. If the buyer takes delivery of all or part of the excess quantity, he must pay for it at the contract rate."

ARTICLE 34

315. The text of article 34 as adopted by the Working Group on the International Sale of Goods is as follows:

"The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention."

Decision

316. The Committee concludes that no change of substance is called for in respect of this article. It therefore recommends that the Commission should adopt the following text, now renumbered as article 35:

"Article 35

The buyer must pay the price for the goods and take delivery of them as required by the contract and this Convention."

ARTICLE 35

317. The text of article 35 as adopted by the Working Group on the International Sale of Goods is as follows:

"The buyer must take the necessary steps to enable the price to be paid or to procure the issuance of documents assuring payment, such as a letter of credit or a banker's guarantee."

Deletion of article 35

318. The Committee considered a proposal to delete article 35. In support of this proposal it was stated that the obligation to pay the price is already stated in article 34. Included in that obligation is the obligation to take all necessary steps to enable the price to be paid. It was noted that there was no parallel provision in the Convention that the seller must take the necessary steps to enable the goods to be delivered. The view was also expressed that the provision raises questions as to which documents were envisaged.

319. In opposition to the proposal to delete article 35, it was stated that the provision served a useful purpose in indicating that the buyer's obligation to pay may encompass several steps prior to the date of payment. It also gave an indication of the form in which the obligation to pay the price or to assure its payment may be required to be performed.

320. The Committee, after deliberation, decided not to retain this proposal.

Redrafting article 35

321. The Committee concluded that the discussion in respect of the proposal to delete article 35 had demonstrated that it should not be drafted in such a manner as to appear to apply to the steps necessary for the buyer to cause his bank to pay the price but only to the steps necessary to assure that the price can be paid, such as the obligation of applying for permission to remit foreign exchange.

Decision

322. The Committee, after deliberation, recommends that the Commission should adopt the following text, now renumbered as article 36:

"Article 36

The buyer's obligation to pay the price includes taking such steps and complying with such formalities as may be required under the contract or any relevant laws and regulations to enable payment to be made."

ARTICLE 36

323. The text of article 36, as adopted by the Working Group on the International Sale of Goods, is as follows:

"When a contract has been concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances."

324. This article, which was the subject of considerable discussion, was examined under the following major headings: (i) deletion of article 36; (ii) various proposals for the amendment of article 36; (iii) proposal for placing article 36 in square brackets.

(i) Deletion of article 36

325. Support for the proposal to delete the article was based on the fact that price was an essential element of a contract of sale and there could be no contract between the parties unless a price had been determined or was determinable from the agreement between the parties. If the price was not ascertainable in this way, the Courts should not impose a price on the parties. This was a commercially sound rule since it would be a very rare case where there was in fact a concluded agreement but no express or implied agreement on the price. Under another view, article 36 related to matters of formation and validity of contracts and it was thus inappropriate to include it in a Convention on Sales but the question should rather be dealt with in the future Convention on Formation and Validity. Finally it was noted that many legal systems considered that a determined or determinable price was an essential ingredient of a contract and accordingly article 36 would have no application in those legal systems. It was thus more appropriate to leave the question of price determination in such agreements to those legal systems which recognized the validity of those agreements.

326. In support of the retention of article 36, it was stated that the article did not confer validity on an agreement in which the price was neither determined nor determinable. The article merely provided a uniform method for the calculation of the price if the applicable law enabled the agreement in question to constitute a valid contract. It was useful to have such a rule since some goods, for instance spare parts, were frequently ordered, and later dispatched, without reference to price. If such a transaction was valid by the applicable law, it would be preferable to have a common provision for the determination of price rather than leave the matter to widely differing national laws governing the determination of price. It was also stated that as the future Convention on Formation and Validity was not yet finalized, it was very important to retain article 36 to determine the price in agreements without a determined or determinable price which are considered valid by the applicable law.

327. The Committee, after discussion, by a narrow majority, retained article 36.

(ii) Various proposals for amendment of article 36

(a) Limitation of application to valid agreements

328. In view of the lack of consensus to retain article 36, there was considerable support in the Committee for a number of proposals which sought to have a clear statement in article 36 that the provision only operated if the agreement was otherwise valid pursuant to the applicable national law. There was, how-
ever, some opposition to the inclusion of this express statement in article 36. This view was based on the fact that the entire draft Convention proceeded on the assumption that there was a valid contract in existence. Accordingly, the introduction of an express statement to this effect in only one provision could well cause difficulties of interpretation in relation to other provisions.

329. The Committee, after deliberation, decided to introduce an express statement into article 36 to make it clear that the provision only applied to agreements which were considered valid by the applicable law. The precise wording of this statement was referred to the Drafting Group.

330. One representative expressed a reservation in respect of this decision.

(b) Change in criteria for determining price

331. It was suggested that it would be more equitable to make as the primary rule for price determination the price generally prevailing at the time of the conclusion of the contract for substitute goods sold under comparable circumstances. Only if there was no such price should the determination of the price be made by reference to that generally charged by the seller at the conclusion of the contract.

332. Under another view, the existing text of article 36 was preferable. Since the buyer had chosen to deal with that particular seller, it should be assumed that the buyer anticipated that he would pay the price generally charged by that seller. This assumption was strengthened by the fact that no price was stated in the agreement. This was particularly important where the seller was marketing goods at a comparatively low price.

333. The Committee, after deliberation, retained the original order of methods used for calculation of the price, i.e. the primary rule was the price generally charged by the seller at the time of the conclusion of the contract and only if no such price was determinable would the price be determined by reference to the market price.

334. The Committee did not retain a suggestion that the choice between the two methods of price determination be resolved in favour of the method which produced the lower price.

335. The Committee also considered the following proposals, which did not attract sufficient support for retention:

(i) That the price be determined as at the time of delivery rather than as at the time of the conclusion of the contract;
(ii) That article 36 state the place at which the market price is to be calculated;
(iii) That the last sentence of article 36 be deleted so that the price can be determined by the article only when there is a price generally charged by the seller at the time of the conclusion of the contract.

(iii) Proposal for placing article 36 in square brackets

336. It was proposed that, in view of the narrow majority for the retention of article 36, it would better accord with the Commission’s principle of arriving at decisions by consensus if the text of the article were placed in square brackets. However, under another view the question of the size of the majority was not decisive since a number of provisions had been retained by small majorities. It was also stated that it would be preferable to propose a text for the consideration of the diplomatic conference rather than place the provision in square brackets which would indicate that no agreement had been possible.

337. The Committee, after deliberation, did not retain the proposal to place article 36 in square brackets.

Reservations

338. The representatives of Ghana, the Philippines and the Union of Soviet Socialist Republics expressed their formal reservation to article 36 and requested that these reservations together with the names of those delegations be recorded not only in the report but also in a foot-note to the text of article 36 of the draft Convention.

339. An observer also expressed his disagreement with article 36.

Decision

340. The Committee decided to introduce an express statement into the article to make it clear that it only applied to agreements which were considered valid by the applicable law. It therefore recommends that the Commission should adopt the following text, now renumbered as article 37:

"Article 37

"If a contract has been validly concluded but does not state the price or expressly or impliedly make provision for the determination of the price of the goods, the buyer must pay the price generally charged by the seller at the time of the conclusion of the contract. If no such price is ascertainable, the buyer must pay the price generally prevailing at the aforesaid time for such goods sold under comparable circumstances."

ARTICLE 37

341. The text of article 37, as approved by the Working Group on the International Sale of Goods, is as follows:

"If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight."

Decision

342. The Committee concludes that no change of substance is called for in respect of article 37. It therefore recommends that the Commission should adopt the following text, now renumbered as article 38:

"Article 38

"If the price is fixed according to the weight of the goods, in case of doubt it is to be determined by the net weight."

ARTICLE 38

343. The text of article 38, as approved by the Working Group on the International Sale of Goods, is as follows:

(1) The buyer must pay the price to the seller at the seller’s place of business. However, if the payment is to be made against the handing over of the goods or of documents, the price must be paid at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in the place of business of the seller subsequent to the conclusion of the contract.

344. One representative indicated that the definition of "place of business" contained in article 6 (a) was difficult to apply to paragraph (1) of this article and almost impossible to apply to paragraph (2).

Decision

345. The Committee decides that no change of substance is called for in respect of this article. It therefore recommends that the Commission should adopt the following text, now renumbered as article 39:

"Article 39

(1) If the buyer is not bound to pay the price at any other particular place, he must pay it to the seller:
(a) At the seller's place of business; or
(b) If the payment is to be made against the handing over of the goods or of documents, at the place where the handing over takes place.

(2) The seller must bear any increase in the expenses incidental to payment which is caused by a change in the
place of business of the seller subsequent to the conclusion of the contract."

ARTICLE 39

346. The text of article 39, as approved by the Working Group on the International Sale of Goods, is as follows:

"(1) If the buyer pays the price when the seller places either the goods or a document controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or document.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer at the place of destination except against payment of the price.

(3) The buyer is not required to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with such opportunity."

Paragraph (3)

347. The Committee considered a proposal that the words "unless the procedures for delivery or payment agreed upon by the parties are inconsistent with such opportunity" be deleted as they did not add anything to the notion of supremacy of the will of the parties contained in article 5. However, there was no support for this proposal because the procedures agreed upon for delivery of the goods may not deal explicitly with payment of the purchase price yet indicate that payment is to be made prior to examination of the goods. Accordingly, the original provision was considered to serve a useful purpose and was retained by the Committee.

Decision

348. The Committee concludes that no change of substance is called for in respect of this article. It therefore recommends that the Commission should adopt the following text, now renumbered as article 40:

"Article 40

(1) The buyer must pay the price when the seller places either the goods or documents controlling their disposition at the buyer's disposal in accordance with the contract and this Convention. The seller may make such payment a condition for handing over the goods or documents.

(2) If the contract involves carriage of the goods, the seller may dispatch the goods on terms whereby the goods, or documents controlling their disposition, will not be handed over to the buyer except against payment of the price.

(3) The buyer is not bound to pay the price until he has had an opportunity to examine the goods, unless the procedures for delivery or payment agreed upon by the parties are inconsistent with his having such an opportunity."

ARTICLE 40

349. The text of article 40, as approved by the Working Group on the International Sale of Goods, is as follows:

"The buyer must pay the price on the date fixed or determinable by the contract or this Convention without the need for any formalities."

350. The Committee considered a proposal that article 40 read as follows:

"The buyer must pay the price on the date fixed or determinable by the contract or this Convention without the need for any request or other formality on the part of the seller."

351. There was general support for this proposal which would make it clear that the buyer's obligation to pay the price on a date fixed or determinable by the contract and the Convention was not dependent upon the seller making a request or going through any other formality. The proposal was therefore adopted.

Decision

352. The Committee adopted in substance the proposal to amend this article to specify that the article is concerned only with eliminating the need for formalities on the part of the seller. It therefore recommends that the Commission should adopt the following text, now renumbered as article 41:

"Article 41

"The buyer must pay the price on the date fixed or determinable from the contract and this Convention without the need for any request or other formality on the part of the seller."

ARTICLE 41

353. The text of article 41, as approved by the Working Group on the International Sale of Goods, is as follows:

"The buyer's obligation to take delivery consists:

(a) In doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery, and

(b) In taking over the goods."

Subparagraph (a)

354. The proposal was made that the obligation of the buyer under subparagraph (a) should consist in "not doing acts which would prevent the seller to effect delivery". Support for this proposal was based on the view that the existing text placed too onerous a burden on the buyer. It was noted that the seller must deliver the goods and that all that should be expected of the buyer is that he does not hinder the seller in performing his contractual obligation to deliver. This proposal was not retained since it was generally considered that there were many instances in international trade where active assistance from the buyer would be required to effect delivery e.g. precise delivery instructions or assisting in overcoming local administrative problems which would be exceptionally difficult for a seller, located in a distant country, to deal with.

Subparagraph (b)

355. The Committee considered a proposal that subparagraph (b) should read as follows:

"(b) In taking over the goods on such date or at any time within such period as fixed or determinable by agreement or usage or, in any other case, within a reasonable time after the goods were placed at his disposal."

356. The proposal was based on the grounds that it would overcome the deficiency in the present text of not indicating the time when the goods must be taken over by the buyer. It was important to be able to determine this point of time since article 66 (2) provided that in certain circumstances "the risk passes to the buyer at the last moment he could have taken over the goods without committing a breach of the contract."

357. However, the Committee did not retain this proposal as it was considered that article 17 defined the time at which the seller must deliver the goods and article 34 already indicated when those goods must be taken over by the buyer, although the proposal added a new alternative criterion of taking over the goods within a reasonable time after those goods were placed at the disposal of the buyer. It was also considered that this added alternative requirement, with its reference to goods being placed at the disposal of the buyer, would be difficult to apply in connexion with documentary sales.

Decision

358. The Committee concludes that no change in substance is called for in respect of this article. It therefore recom-
mends that the Commission should adopt the following text, now renumbered as article 42:

"Article 42

"The buyer's obligation to take delivery consists:

"(a) In doing all the acts which could reasonably be expected of him in order to enable the seller to make delivery; and

"(b) In taking over the goods."

PROPOSED ARTICLE 41 BIS

359. The Committee considered a proposal that a new article 41 bis be added to the Convention. The text of this proposed article is as follows:

"The buyer may terminate [cancel] a contract of sale of goods in which he has ordered the goods to be manufactured by the seller in accordance with specifications set out in the contract or given by the buyer, provided he gives the seller notice thereof before the manufacture has been completed and further provided that it does not cause the seller unreasonable inconvenience to discontinue the manufacture. The buyer must pay damages in accordance with the provisions of articles 55, 56, [57] and 59, which apply correspondingly."

360. Support for this proposal was based on the fact that in contracts for the sale of goods by specification, changes in circumstances may make acceptance of those goods financially burdensome for the buyer. From the seller's point of view, the market value of specialized goods made to order could frequently be less than their cost of production. It therefore accorded with equity to enable the buyer to terminate the contract before the manufacture was complete, provided that this did not cause the seller unreasonable inconvenience. In addition, the buyer must pay any damages to the seller, including his loss of profits, resulting from the termination.

361. Although there was sympathy for the objectives of the proposed article 41 bis, it was generally considered that the proposal caused more difficulties than it solved. In particular, the concept that the buyer would be liable for all damages including loss of profits was criticized as was the idea of attempting to apply articles 56 and 57 to a termination situation. Under one view, the proper approach would be to require the buyer to pay the purchase price less any savings caused by the termination of production. It was also suggested that the place for such a rule would be in article 45, or possibly in article 59 on mitigation.

Decision

362. The Committee, after deliberation, decided not to retain the proposal to introduce a new article 41 bis.

ARTICLE 42

363. The text of article 42, as approved by the Working Group on the International Sale of Goods, is as follows:

"(1) If the buyer fails to perform any of his obligations under the contract and this Convention, the seller may:

"(a) exercise the rights provided in articles 43 to 46;

"(b) claim damages as provided in articles 55 to 59.

(2) The seller is not deprived of any right he may have to claim damages even though he exercises his right to other remedies.

(3) If the seller resorts to a remedy for breach of contract, the buyer is not entitled to apply to a court or arbitral tribunal to grant him a period of grace."

Combination of remedy provisions

364. The Committee did not retain a suggestion that the remedy provisions for breach of contract by the buyer be combined with those for breach of contract by the seller.
ARTICLE 44

373. The text of article 44, as adopted by the Working Group on the International Sale of Goods, is as follows:

"The seller may request performance within an additional period of time of reasonable length. In such a case, the seller cannot during such period resort to any remedy for breach of contract, unless the buyer has declared that he will not comply with the request."

374. The Commission considered a proposal that the following paragraph be added to article 44:

"Where the seller has not requested performance, the buyer may request the seller to make known whether he will accept performance. If the seller does not comply with a reasonable time, the buyer may perform within the time indicated in his request. The seller cannot, during either period of time, resort to any remedy which is inconsistent with performance by the buyer. A notice by the buyer that he will perform within a specified period of time is assumed to include a request under this paragraph that the seller make known his decision."

375. It was stated that this proposal, which was modelled on articles 29 (2) and 29 (3), would thus achieve a balance between the rights of buyer and seller.

376. However, under another view the proposal was unnecessary and would merely complicate the text of the Convention. It was pointed out that the primary obligation of the buyer is to pay the price and, once this is paid, the seller loses the right to declare the contract avoided in respect of any late performance by the buyer unless the seller has avoided the contract before that late performance is rendered (article 45 (2)).

377. The Committee did not retain this proposal.

Risk of loss or errors in transmission

378. The Committee was agreed that the rule in article 10 should be reversed in relation to declarations by the defaulting buyer that he will not comply with the request for performance by the seller. Consequently, the buyer would bear the consequences of any loss, delay or errors in transmission of the notice. The implementation of this principle was referred to the Drafting Group.

Decision

379. The Committee adopted, in principle, the present text of article 44 with the exception that the risk of loss, delay or errors in transmission of declarations of non-compliance by the defaulting buyer are placed on that buyer. The Committee therefore recommends that the Commission adopt the following text, now renumbered as article 45:

"Article 45

"(1) The seller may fix an additional period of time of reasonable length for performance by the buyer of his obligations.

"(2) Unless the buyer has received notice from the buyer that he will not perform within the period so fixed, the seller may not, during that period, resort to any remedy for breach of contract. However, the seller is not deprived thereby of any right he may have to claim damages for delay in the performance.""

ARTICLE 45

380. The text of article 45, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) The seller may declare the contract avoided:

"(a) If the failure by the buyer to perform any of his obligations under the contract and this Convention amounts to a fundamental breach of contract; or

"(b) If the buyer has been requested under article 44 to pay the price or to take delivery of the goods and has not paid the price or taken delivery within the additional period of time fixed by the seller in accordance with that article or has declared that he will not comply with the request.

"(2) However, in cases where the buyer has paid the price, the seller loses his right to declare the contract avoided if he has not done so:

"(a) In respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

"(b) In respect of any breach other than late performance, within a reasonable time after the seller knew or ought to have known of such breach or, if the seller has requested the buyer to perform under article 44, within a reasonable time after the expiration of the additional period of time or after the buyer has declared that he will not comply with the request."

Paragraph (1)

381. The Committee did not retain a proposal that article 45 (1) be amended to the effect that if the seller had allowed the buyer to take possession of the goods, he could not take them back from the buyer unless the seller had failed to pay the price within the additional period set by the seller pursuant to article 44.

Subparagraph (1) (b)

382. The Committee considered a proposal that article 45 (1) (b) be amended to read as follows:

"(b) If the buyer has been requested under article 44 to pay the price, or to take the steps with respect to payment required under article 35, or to take delivery of the goods, and has not complied with the request within the additional period of time fixed by the seller in accordance with article 44 or has declared that he will not comply with the request."

383. In support of this proposal, it was noted that in international sales the critical step in the buyer's performance was often not the buyer's actual payment of the price but the establishment of a letter of credit or a bankers' guarantee. These steps were within the concept of "request performance" in article 44 but the present text of article 45 (1) (b), in implementing article 44, provided merely for avoidance by the seller if the buyer, after a request, had failed "to pay the price or take delivery". This failure "to pay" would not include a failure to take the steps required under article 35 to ensure payment.

384. The Committee, after deliberation, retained the substance of this proposal.

Paragraph (2)

385. The Committee considered a proposal that article 45 (2) be amended to read as follows:

"(2) However, in cases where the buyer had paid the price the seller loses his right to declare the contract avoided if he has not done so:

"(a) In respect of late payment, before the seller has become aware that payment has been made; or

"(b) In respect of any other breach than late payment, within a reasonable time after the seller knew or ought to have known of such breach, or after the expiration of any additional period of time applicable under article 44."

386. In support of this proposal, it was stated that it was necessary to distinguish cases of late payment of the purchase price from all other breaches. In the case of late payment, the right to declare the contract avoided should be lost if not done before the seller had become aware that payment had been made. However, in respect of any other breach the seller should be able to declare the contract avoided even after he has received payment, if he has requested performance by the buyer under article 44.

387. There was considerable opposition to narrowing the scope of application of article 45 (2) (a) to cases of late payment and dealing with all other matters under article 45 (2) (b). It was considered that if the buyer had paid the price, the
seller should lose the right to declare the contract avoided in respect of any late performance if he had not done so before becoming aware that the buyer had performed.

388. The Committee, accordingly, did not retain the proposal.

Subparagraph (2) (a)

389. The Committee considered a proposal that article 45 (2) (a) read as follows:

"(a) In respect of late performance by the buyer within a reasonable time after the seller has become aware that payment has been rendered; or"

390. In support of this proposal it was stated that the present text of article 45 (2) (a) could result in harsh results in cases where payment is due before delivery of the goods. Should the payment not eventuate, the seller may reasonably assume that the transaction is at an end and sell the goods to a third party. If the buyer subsequently pays the purchase price the seller should have a reasonable period of time to declare the contract avoided.

391. Under another view the seller should be compelled to declare the contract avoided before he becomes aware of performance. This was a clear rule and works no hardship as the seller will know when performance is due and can react if that performance is late.

392. The Committee, after deliberation, decided not to retain the proposal.

393. The Committee also considered, but did not retain, a proposal that if the goods were delivered but the price had not been paid the seller would have to require that payment of the price be made within an additional period or the right to declare the contract avoided would be lost.

Decision

394. The Committee decided to adopt, in principle, the present text of this article. It therefore recommends that the Commission should adopt the following text, now renumbered as article 46:

"Article 46

(1) The seller may declare the contract avoided:

(a) if the failure by the buyer to perform any of his obligations under this contract and this Convention amounts to a fundamental breach of contract; or

(b) if the buyer has not, within the additional period of time fixed by the seller in accordance with paragraph (1) of article 45, performed his obligation to pay the price or taken delivery of the goods, or if he has declared that he will not do so within the period so fixed.

(2) However, in cases where the buyer has paid the price, the seller loses his right to declare the contract avoided if he has not done so:

(a) In respect of late performance by the buyer, before the seller has become aware that performance has been rendered; or

(b) In respect of any breach other than late performance, within a reasonable time after he knew or ought to have known of such breach, or within a reasonable time after the expiration of any additional period of time fixed by the seller in accordance with paragraph (1) of article 45 or the declaration by the buyer that he will not perform his obligations within such an additional period."

ARTICLE 46

395. The text of article 46, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date expressly or impliedly agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with any requirement of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may submit a different specification. If the buyer fails to do so, the specification made by the seller is binding."

Paragraph (2)

396. The Committee adopted, subject to drafting changes, a proposal that the last sentence of paragraph (2) read:

"If the buyer fails to do so after having received the request, the specification made by the seller is binding."

This amendment ensures that the risk of transmission of the specification made by the seller is on the seller.

Decision

397. The Committee therefore recommends that the Commission should adopt the following text, now renumbered as article 47:

"Article 47

(1) If under the contract the buyer is to specify the form, measurement or other features of the goods and he fails to make such specification either on the date agreed upon or within a reasonable time after receipt of a request from the seller, the seller may, without prejudice to any other rights he may have, make the specification himself in accordance with any requirement of the buyer that may be known to him.

(2) If the seller makes the specification himself, he must inform the buyer of the details thereof and must fix a reasonable time within which the buyer may make a different specification. If the buyer fails to do so after receipt of a communication, the specification made by the seller is binding."

ARTICLE 47

398. The text of article 47, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the capacity to perform or creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives grounds to conclude that the other party will not perform a substantial part of his obligations.

(2) If the seller has already dispatched the goods before the grounds described in paragraph (1) of this article become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.

(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice to the other party thereof and must continue with performance if the other party provides adequate assurance of his performance. If the other party fails to provide such assurance within a reasonable time after he has received the notice, the party who suspended performance may avoid the contract."

Proposal for deletion of article 47

399. The Committee considered a proposal to delete article 47.

400. In support of this proposal, it was stated that the right given to one party to suspend his contractual obligations, and later to avoid the contract, gave too much power to that party because the exercise of that right was primarily dependent on
his own subjective assessment of the other party's future course of conduct. Such a right was stated to be too easy of abuse, particularly by those representatives who considered that a party's assessment as to whether the other party would not perform a substantial part of his obligations was not subject to judicial review.

401. In opposition to this proposal it was stated that article 47 served a useful purpose in international trade. It reflected the normal business concern that the other party would in fact perform his obligations at the time they were due. If there were serious grounds to conclude that the other party would not perform a substantial part of his obligations, it was appropriate to be allowed to suspend one's own obligations until given adequate assurances that the other party would perform. If the other party would be able to perform as he was obligated to do, it should not be difficult for him to provide the necessary assurances.

402. Most representatives were of the opinion that a decision to suspend performance under article 47 was subject to judicial review as were all cases where the draft Convention gave one party the right to make a determination which affected the contractual relationship. Accordingly, a suggestion to state this principle specifically in article 47 was not retained. It was also noted that should the suspension be unjustified the other party would have recourse to all remedies under the contract and Convention for the suspending party's failure to perform.

403. The Committee, after deliberation, decided to retain article 47.

**Paragraph (1)**

404. The Committee considered a proposal that article 47 (1) operate only if "it is clear" that the other party would not perform a substantial part of its obligations.

405. In support of this proposal it was stated that the right to suspend a contract should be given only when there was no doubt that a substantial part of the other party's obligations would not be performed.

406. However, under another view it was desirable to have a less rigorous test for suspending performance than the determination that it be "clear" that the other party would not perform a substantial part of its obligations. If it was "clear" that the other party would commit a fundamental breach of contract, the contract could be avoided under article 49.

407. The Committee, after deliberation, decided not to retain this proposal.

**Paragraph (2)**

408. The Committee considered the following proposals in respect of paragraph (2):

(a) That paragraph (2) be deleted;

(b) That paragraph (2) also enable the buyer to stop payment of the price.

(a) **Proposal for deletion of paragraph (2)**

409. The proposal to delete paragraph (2) was based on the view that the provision gave an advantage to the seller because the buyer did not have a similar right. Furthermore, it was considered that if the buyer had title, or property in, the goods the seller should not be able to prevent the buyer from obtaining possession of them.

410. However, it was pointed out that the right of "stoppage in transit" of the goods, as set out in paragraph (2), appears in many legal systems.

411. The Committee decided not to retain the proposal to delete article 47 (2).

(b) **Proposals for extension of principle contained in paragraph (2) to the buyer**

412. The Committee considered a proposal that paragraph (2) be amended, and read as follows (italized words indicate proposed addition to present text):

"(2) If a party has already dispatched the goods or sent
the money (including having had issued a letter of credit) for the goods before the grounds mentioned in paragraph (1) become evident, he may prevent the handing over of the goods or the payment of the money even though the other party holds a document that entitles him to delivery of the goods or payment of the money, as the case may be. This paragraph relates only to rights in the goods or in the money as between the buyer and the seller."

413. In support of this proposal, it was stated that it was equitable to extend to the buyer a right to prevent the payment of the money to the seller parallel to the right of the seller to prevent the handing over of the goods to the buyer. It was further stated that, although paragraph (2) could not affect the rights and obligations of third parties, it would enable a party who had sought to prevent the handing over of the goods, or sought to prevent payment of the price, to obtain restitution of those goods or the price. It was noted that this could have important consequences in bankruptcy proceedings.

414. In opposition to this proposal it was stated that article 47 (1) already gave the buyer power to withhold payment of the price or to stop transfer of funds. However, this right should not extend to cases of irrevocable letters of credit or bills of exchange which had been accepted by the buyer as this would seriously disrupt commercial practice, particularly in relation to documentary sales. It was noted that as a bank has an obligation to pay under an irrevocable letter of credit, the proposed article, which dealt with the rights of only the buyer and the seller, would have no effect but that it might cause confusion in commercial circles. It was also observed that in some countries the stopping of payment of a cheque was a criminal offence. Acceptance of the proposal would make ratification of the Convention difficult in those countries.

415. The Committee, after deliberation, decided not to retain the proposal. It also did not retain a suggestion, designed to overcome the difficulties in relation to letters of credit, that a new paragraph be added to the effect that article 47 (2) "applies to payment provided the goods or part of them have not yet been sent to the buyer when the grounds mentioned in paragraph (1) became evident".

**Paragraph (3)**

416. The Committee considered a proposal to delete the second sentence of paragraph (3) so that article 47 would be limited to the right to suspend performance. The right to avoid the contract prior to the date for performance would be dealt with under article 49.

417. Support for this proposal was based on the consideration that there may be justifiable differences of opinion on what constitutes "adequate assurance" in a particular case. While this question could, in relation to suspension, be left to the parties, and if necessary to the courts, it was desirable to have a clear rule in relation to the right to declare the contract avoided. This right should not flow automatically from a failure to give "adequate assurance" but should only occur if the conditions of article 49 are satisfied, i.e. if "it is clear that one of the parties will commit a fundamental breach".

418. Opposition to this proposal was based on the view that it was important to be able to terminate the contract if adequate assurance was not given. Any problems as to the meaning of "adequate assurance" could be solved by alternate forms of drafting.

419. The Committee decided to adopt the proposal.

**Decision**

420. The Committee concludes that the second sentence of paragraph (3) should be deleted so that the right of a party to avoid the contract prior to the date for performance would be governed by article 49. It therefore recommends that the Commission should adopt the following text, now renumbered as article 48:
"Article 48"

“(1) A party may suspend the performance of his obligations if it is reasonable to do so because, after the conclusion of the contract, a serious deterioration in the ability to perform or in the creditworthiness of the other party or his conduct in preparing to perform or in actually performing the contract gives good grounds to conclude that the other party will not perform a substantial part of his obligations.

“(2) If the seller has already dispatched the goods before the grounds described in paragraph (1) of this article become evident, he may prevent the handing over of the goods to the buyer even though the buyer holds a document which entitles him to obtain them. This paragraph relates only to the rights in the goods as between the buyer and the seller.

“(3) A party suspending performance, whether before or after dispatch of the goods, must immediately give notice to the other party thereof and must continue with performance if the other party provides adequate assurance of his performance.”

ARTICLE 48

421. The text of article 48 as adopted by the Working Group on the International Sale of Goods, is as follows:

“(1) If, in the case of a contract for delivery of goods by instalments, the failure of one party to perform any of his obligations in respect of any instalment gives the other party good reason to fear a fundamental breach in respect of future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

“(2) A buyer, avoiding the contract in respect of future deliveries, may also, provided that he does so at the same time, declare the contract avoided in respect of deliveries already made if, by reason of their interdependence, deliveries already made could not be used for the purpose contemplated by the parties in entering the contract.”

Avoidance of the contract in respect of a single instalment

422. The Committee considered a proposal that the following paragraph be added to article 48 as paragraph (1) and that the current paragraphs (1) and (2) be renumbered as paragraphs (2) and (3):

“(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.”

423. Support for this proposal was based on the fact that there is no provision enabling the seller to avoid a part of the contract equivalent to article 32 which permits the buyer to do so. It was generally considered that such a provision was useful since, if the buyer’s performance is seriously deficient with respect to one instalment, the seller should be permitted to refuse his counter-performance in respect of that instalment even though the failure in respect of that instalment did not give him good reason to fear a fundamental breach in respect of future instalments.

424. However, under another view the right to declare the contract avoided under article 45 (1) (a) was sufficient protection for the seller.

425. The Committee adopted the proposal to enable the seller to make partial avoidance of an instalment contract. The Committee also decided to make an appropriate change to the caption to section I of chapter V to reflect this decision.

Paragraph (2)

426. The Committee adopted a proposal which would permit a buyer, who avoids a contract with respect to one delivery, to avoid the contract with respect to other deliveries already made or to be made in the future if the interdependence of that delivery with the deliveries already made or to be made prevents those goods from being used for the purpose contemplated by the parties at the time of the conclusion of the contract.

Decision

427. The Committee concludes that a new paragraph (1) and an amendment to paragraph (2) should be adopted with a consequent change in the caption to section I of chapter V. The Committee recommends that the order of articles 48 and 49 be reversed. It therefore recommends that the Commission should adopt the following text, now renumbered as article 50:

"Article 50"

“(1) In the case of a contract for delivery of goods by instalments, if the failure of one party to perform any of his obligations in respect of any instalment constitutes a fundamental breach with respect to that instalment, the other party may declare the contract avoided with respect to that instalment.

“(2) If one party’s failure to perform any of his obligations in respect of any instalment gives the other party good reason to fear a fundamental breach in respect of future instalments, he may declare the contract avoided for the future, provided that he does so within a reasonable time.

“(3) A buyer, avoiding the contract in respect of any delivery, may, at the same time, declare the contract avoided in respect of deliveries already made or of future deliveries if, by reason of their interdependence, those deliveries could not be used for the purpose contemplated by the parties at the time of the conclusion of the contract.”

ARTICLE 49

428. The text of article 49, as adopted by the Working Group on the International Sale of Goods, is as follows:

“If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided.”

429. Four representatives indicated that they were of the view that this article should be deleted as it enabled one party to declare the contract avoided unilaterally after that party had committed a breach. It was stated that it was wrong in principle to allow one party to terminate the contractual relationship unilaterally. This same objection had been raised in relation to other articles of this Convention.

430. A suggestion was made that article 49 might be merged with article 47. However, the Commission was of the view that article 49 should remain separate from article 47 because it covered, in addition to those cases contemplated by article 47, cases in which it was clear that one party would commit a fundamental breach because of his express refusal to perform or because it was impossible for him to perform.

Decision

431. The Committee concludes that no change in substance is called for in respect of article 49. The Committee recommends that the order of article 48 (now article 50) and article 49 should be reversed. It therefore recommends that the Commission should adopt the following text of article 49:

"Article 49"

"If prior to the date for performance of the contract it is clear that one of the parties will commit a fundamental breach, the other party may declare the contract avoided."
"Article 52"

(1) Avoidance of the contract releases both parties from their obligations thereunder, subject to any damages which may be due. Avoidance does not affect any provisions of the contract for the settlement of disputes or any other provisions of the contract governing the respective rights and obligations of the parties consequent upon the avoidance of the contract.

(2) If one party has performed the contract either wholly or in part, he may claim from the other party restitution of whatever he has supplied or paid under the contract. If both parties are bound to make restitution, they must do so concurrently."

ARTICLE 52

463. The text of article 52, as adopted by the Working Group on the International Sale of Goods, is as follows:

(1) The buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) Paragraph (1) of this article does not apply:
(a) If the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which he received them is not due to an act of the buyer; or
(b) If the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 22; or
(c) If the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered the lack of conformity or ought to have discovered it."

Decision

464. The Committee concludes that no change in substance is called for in respect of this article. It therefore recommends that the Commission should adopt the following text, now renumbered as article 53:

"Article 53"

(1) The buyer loses his right to declare the contract avoided or to require the seller to deliver substitute goods if it is impossible for him to make restitution of the goods substantially in the condition in which he received them.

(2) Paragraph (1) of this article does not apply:
(a) If the impossibility of making restitution of the goods or of making restitution of the goods substantially in the condition in which he received them is not due to an act or omission of the buyer; or
(b) If the goods or part of the goods have perished or deteriorated as a result of the examination provided for in article 22; or
(c) If the goods or part of the goods have been sold in the normal course of business or have been consumed or transformed by the buyer in the course of normal use before he discovered the lack of conformity or ought to have discovered it."

ARTICLE 53

465. The text of article 53, as adopted by the Working Group on the International Sale of Goods, is as follows:

"The buyer who has lost the right to declare the contract avoided or to require the seller to deliver substitute goods in accordance with article 52 retains all other remedies."
472. Furthermore, the Committee was agreed that a party who had in fact arranged a substitute transaction of the nature described in article 56 should not be allowed to claim damages under article 57 were that article would provide for a higher measure of damages.

ARTICLE 55

473. The text of article 55, as adopted by the Working Group on the International Sale of Goods, is as follows:

"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages cannot exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract."

Limit on damages

474. The Committee considered a proposal that the second sentence of article 55 be replaced by the following:

"Such damages shall not include compensation for loss of a nature which the party in breach could not reasonably have foreseen at the time of the conclusion of the contract or of an extent which would be excessive in relation to the price, the ability of the party in breach to foresee or prevent the loss as well as other circumstances of the case."

475. In support of this proposal, it was stated that the present text of article 55 contained a limitation on the amount of damages which was hypothetical and gave little effective guidance in practice. While it would be difficult for a party to foresee the extent of the loss which the other party might suffer as a consequence of the breach, as was now required under article 55, it should not be difficult to foresee the nature of any such loss. However, the damages should also be limited to an amount which would not be excessive in relation to the price, the ability of the party in breach to prevent the loss and "other circumstances of the case."

476. There was little support for this proposal as it was considered to introduce many difficulties, in particular, the determination of whether damages were excessive in relation to the price and the determination of the "other circumstances of the case" which might be relevant. It was further pointed out that, since article 50 provided an exemption from damages if certain conditions were fulfilled, additional criteria in terms of ability to prevent the loss were not appropriate in article 55.

477. The Committee did not retain this proposal.

478. The Committee also did not retain a suggestion that the second sentence of article 55 be deleted so that the question of any limitation on the amount of damages would be left to national law.

Decision

479. The Committee considers that no change of substance is called for in respect of this article. It therefore recommends that the Commission should adopt the following text, now renumbered as article 56:

"Article 56

"Damages for breach of contract by one party consist of a sum equal to the loss, including loss of profit, suffered by the other party as a consequence of the breach. Such damages may not exceed the loss which the party in breach foresaw or ought to have foreseen at the time of the conclusion of the contract, in the light of the facts and matters which he then knew or ought to have known, as a possible consequence of the breach of contract."

ARTICLE 56

480. The text of article 56, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may, if he does not rely upon the provisions of articles 55 or 57, recover the difference between the contract price and the price in the substitute transaction.

"(2) Damages under paragraph (1) of this article may include additional loss, including loss of profit, if the conditions of article 55 are satisfied."

481. As noted in paragraph 471 above, the Committee decided that article 56 was an illustration of the general rule of damages set out in article 55. It considered several ways in which this article might be rephrased in order to make this relationship clear.

482. The Committee referred to the Drafting Group a proposal that paragraph (2) be rephrased so as to delete any direct reference to loss of profit since, in the first place it was already referred to in article 55, where it was stated that damages were understood to cover loss of profit, and, in the second place, in such a situation it would be difficult to imagine a loss of profit over and above the difference in prices.

Decision

483. The Committee, therefore, recommends that the Commission should adopt the following text, now renumbered as article 57:

"Article 57

"If the contract is avoided and if, in a reasonable manner and within a reasonable time after avoidance, the buyer has bought goods in replacement or the seller has resold the goods, the party claiming damages may recover the difference between the contract price and the price in the substitute transaction and any further damages recoverable under the provisions of article 56."

ARTICLE 57

484. The text of article 57, as approved by the Working Group on the International Sale of Goods, is as follows:

"(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he does not rely upon the provisions of articles 55 or 56, recover the difference between the price fixed by the contract and the current price on the date on which the contract is avoided.

"(2) In calculating the amount of damages under paragraph (1) of this article, the current price to be taken into account is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

"(3) Damages under paragraph (1) of this article may include additional loss, including loss of profit, if the conditions of article 55 are satisfied."

Paragraph (1)

Relevant date for determination of current price

485. The Committee considered a proposal that damages under paragraph (1) be based on the current price on the date delivery was performed or ought to have been performed.

486. Support for this proposal was based on the view that calculating the current price on the date that the contract was avoided would permit a party to speculate on whether his damages would increase because of future price changes if he were to delay the date on which he declared the contract avoided.

487. However, another view was that this proposal could cause difficulties in practice, particularly in cases of non-performance where there was no fixed delivery date but delivery was to be made within a fixed period pursuant to article
17 (b) or within a reasonable time after the conclusion of the contract pursuant to article 17 (c). It was also noted that the proposed new method of calculation of current price might still permit speculation. In any case, any abuses of the method of calculating damages under this article would be dealt with by the principle of mitigation of damages contained in article 59.

488. The Committee decided not to retain the proposal to base the calculation of damages on the current price on the date delivery was performed or ought to have been performed. However, in view of the difficulties which were expressed in relation to the current text the Committee decided to adopt a compromise proposal that the current price be calculated on the day on which the party first had the right to declare the contract avoided. Although it was stated that this test might encourage the seller to avoid the contract before he otherwise would, the general view was that this test selected a sufficiently clear and objective date for the calculation of the current price and one which did not encourage the party claiming damages to speculate on the future price level.

Paragraphs (2) and (3)

489. As noted in paragraph 471 above, the Committee decided that article 57 was an illustration of the general rule of damages set out in article 55. It also decided that a party who had in fact arranged a substitute transaction of the nature described in article 56 should not be allowed to claim damages under article 57 where that article would provide for a higher measure of damages.

490. The Committee referred to the Drafting Group the same proposal in respect of article 57 (3) as is described in paragraph 482 above in respect of article 56 (2).

Decision

491. The Committee recommends that the Commission should adopt the following text, now renumbered as article 58:

"Article 58

(1) If the contract is avoided and there is a current price for the goods, the party claiming damages may, if he has not made a purchase or resale under article 57, recover the difference between the price fixed by the contract and the current price at the time he first had the right to declare the contract avoided and any further damages recoverable under the provisions of article 56.

(2) For the purposes of paragraph (1) of this article, the current price is the price prevailing at the place where delivery of the goods should have been made or, if there is no current price at that place, the price at another place which serves as a reasonable substitute, making due allowance for differences in the cost of transporting the goods.

ARTICLE 58

492. The text of article 58, as adopted by the Working Group on the International Sale of Goods, is as follows:

"If the breach of contract consists of delay in the payment of the price, the seller is in any event entitled to interest on such sum as is in arrears at a rate equal to the official discount rate in the country where he has his place of business, plus 1 per cent, but his entitlement is not to be lower than the rate applied to unsecured short-term commercial credits in the country where the seller has his place of business.

Place at which interest should be calculated

493. The Committee considered a proposal that the place at which interest should be calculated should be the buyer's country. It was stated that if the rate of interest in the seller's country was significantly lower than the rate of interest in the buyer's country, the buyer might be tempted to delay payment so as to take advantage of this favourable rate. Alternatively, it was suggested that the rate might be based upon the average of the rate in the buyer's country and the rate in the seller's country.

494. In opposition to this proposal it was stated that, if the buyer did not pay the price when due and the seller had to borrow money because of the late payment, he would normally have to borrow in his own country at the prevailing rates there. Even if he did not have to borrow money as a result of the late payment, he would have less money on deposit in his own country gaining interest. If the prevailing rate of interest in his country was 15 per cent but it was only 6 per cent in the buyer's country, it would not be appropriate for him to be limited to the lower interest rate in the buyer's country.

Proposals to delete article 58 or to make a declaration or reservation

495. The discussions in respect of the place at which the interest should be calculated brought forth a number of proposals whose objective was the deletion of article 58 or the possibility of rendering it inoperative in relation to individual States, either by means of reservation or by means of declaration.

496. These proposals arose from the fact that many countries had mandatory rules of public policy prohibiting interest rates to exceed a specified maximum, frequently of the order of 6 to 7 per cent. Furthermore, some countries prohibited the charging of any interest whatsoever. A provision along the lines of article 58, which would require the charging of interest and its calculation at a rate which might be far in excess of that usual or allowed in the buyer's country, the place at which any judicial procedure for late payment would normally take place, would make it difficult for some countries to adhere to the Convention.

497. There was general sympathy expressed for those countries whose national laws set maximum rates of interest which could conflict with the rate produced by the formula in article 58. It was noted that article 58 contained a particular method of assessing damages which, although it was convenient in practice, was not essential. Loss suffered by a seller due to delay in payment of the price could be recovered under the general formula for recovery of damages expressed in article 55.

498. In addition, apart from many drafting problems, the following matters would require clarification if the article was retained:

(a) Article 58 referred to an "official discount rate" but many countries did not have an "official discount rate";

(b) Article 58 referred to "the rate applied to unsecured short-term commercial credits" but there was usually no such rate since the rate would vary depending on the parties or the nature of the sale;

(c) The addition of "one per cent" to the "official discount rate" was considered by some representatives to be unjust.

499. In view of these difficulties, coupled with the fact that the article was, in any version, inherently unacceptable to a number of representatives, particularly those of developing countries, the Committee, after considerable deliberation, decided to delete article 58.

Decision

500. The Committee recommends that the Commission should delete article 58.

ARTICLE 59

501. The text of article 59, as adopted by the Working Group on the International Sale of Goods, is as follows:

"The party who relies on a breach of contract must adopt such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to adopt such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated."
Right to recover the price

502. The Committee considered a proposal that the second sentence of article 59 read as follows (the proposed additional words are in italics):

"If he fails to adopt such measures, the party in breach may claim a reduction in the damages, including any claim for the price, in the amount which should have been mitigated."

503. In support of this proposal it was stated if the seller was in breach, the buyer’s duty to mitigate the damages might encompass the purchase of substitute goods. However, under the present text of article 59 it would appear that if the buyer was in breach, the seller could maintain an action for the price even if he could have sold the goods elsewhere. The proposal was designed to ensure that in such cases the seller’s right of recovery would be limited to the amount recoverable under article 57.

504. However, there was considerable opposition to this proposal which was considered to permit a defaulting buyer to avoid payment of the purchase price by showing that the seller could have sold goods elsewhere. This would destroy the distinction between an action for the price and an action for damages, a distinction which was fundamental in many legal systems. The price was agreed upon by the parties and if the contract was still in existence, the seller must have the right to sue for the price. There was no duty on the seller to seek, or accept, from a third party a price lower than that agreed upon by the buyer even if he might then recover the difference from the buyer.

505. The Committee, after deliberation, decided not to retain the proposal extending the principle of mitigation to actions for the price.

Duty to notify

506. The Committee did not retain a proposal that article 59 specifically provide that part of the duty to mitigate should be that the injured party give notice of the breach to the party in breach, within a reasonable time of its occurrence.

Decision

507. The Committee concludes that no change of substance is called for in respect of article 59. It therefore recommends that the Commission should adopt the following text:

"Article 59

The party who relies on a breach of contract must take such measures as are reasonable in the circumstances to mitigate the loss, including loss of profit, resulting from the breach. If he fails to take such measures, the party in breach may claim a reduction in the damages in the amount which should have been mitigated."

PROPOSED ARTICLE ON FRAUD

508. The Committee considered a proposal to review the decision of the Working Group on the International Sale of Goods which had deleted article 89 of ULIS (which provided that in case of fraud, the determination of damages was to be made by reference to national law).

509. This proposal did not attract sufficient support to be discussed in detail.

PROPOSED ARTICLE ON LIQUIDATED DAMAGES

510. The Committee considered a proposal that the Convention include a provision on liquidated damages clauses in contracts of sale. The following text was proposed as a basis for discussion:

"(1) The parties may agree in the contract or otherwise that a party who breaches the contract in a particular manner will pay liquidated damages to the other party.

(2) Unless otherwise agreed upon by the parties, the payment of liquidated damages may be asked together with the request for the performance of the contract.

(3) The judge or arbitrator may, on the request of the party required to pay, reduce the amount of liquidated damages if the other party contributed to the loss or did not co-operate in the performance of the contract where such co-operation was [needed] under the circumstances of the case.

(4) The other party may claim, instead of the liquidated damages agreed upon in the contract, damages according to article 55 if the loss sustained by him is substantially higher than the damages agreed upon in the contract."

511. In support of this proposal, it was stated that the Convention should contain a provision on liquidated damage clauses because this type of contractual clause was widely used in international commerce. Since the rules governing liquidated damage clauses vary between legal systems it would be a practical contribution to international trade to establish a uniform regime governing these types of contractual clauses. It was noted that the proposed article was intended to initiate discussion along these lines.

512. After a brief review of the main features of the draft article, which revealed a number of technical problems, it became apparent that there was considerable support for the idea behind the proposal i.e. that a uniform regime governing liquidated damage clauses would be an important contribution to the facilitation of international trade and commerce. However, it was generally considered that establishing a unified regime to regulate liquidated damage clauses was a complex problem which warranted more attention than could be given at this stage of the deliberations in respect of this draft Convention. Furthermore, liquidated damage clauses were also important in many types of contracts which fell outside the scope of the Convention. For all these reasons it would be preferable to deal with the liquidated damage clauses in a separate instrument which could be applied to all types of international contracts and not be restricted to international contracts for the sale of goods.

Decision

513. The Committee, after deliberation, recommends to the Commission that it request the Secretary-General to consider, as part of the study on the future long-term programme of work of the Commission which is to be presented at the eleventh session of the Commission, the feasibility and desirability of establishing a uniform regime governing liquidated damage clauses in international contracts.

ARTICLE 60

514. The text of article 60, as adopted by the Working Group on the International Sale of Goods, is as follows:

"If the buyer is in delay in taking delivery of the goods and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the buyer."

Decision

515. The Committee concludes that no change of substance is called for in respect of article 60. It therefore recommends that the Commission should adopt the following text:

"Article 60

"If the buyer is in delay in taking delivery of the goods and the seller is either in possession of the goods or otherwise able to control their disposition, the seller must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the buyer."
ARTICLE 61

516. The text of article 61, as adopted by the Working Group on the International Sale of Goods, is as follows:

“(1) If the goods have been received by the buyer and he intends to reject them he must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the seller.

“(2) If goods dispatched to the buyer have been put at his disposal at the place of destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination."

Decision

517. The Committee concludes that no change of substance is called for in respect of article 61. It therefore recommends that the Commission should adopt the following text:

“Article 61

“(1) If the goods have been received by the buyer and he intends to reject them, he must take such steps as are reasonable in the circumstances to preserve them. He may retain them until he has been reimbursed his reasonable expenses by the seller.

“(2) If goods dispatched to the buyer have been placed at his disposal at their destination and he exercises the right to reject them, he must take possession of them on behalf of the seller, provided that he can do so without payment of the price and without unreasonable inconvenience or unreasonable expense. This provision does not apply if the seller or a person authorized to take charge of the goods on his behalf is present at the destination."

ARTICLE 62

518. The text of article 62, as adopted by the Working Group on the International Sale of Goods, is as follows:

“The party who is under an obligation to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.”

Decision

519. The Committee considers that no change of substance is called for in respect of article 62. It therefore recommends that the Commission should adopt the following text:

“Article 62

“The party who is bound to take steps to preserve the goods may deposit them in a warehouse of a third person at the expense of the other party provided that the expense incurred is not unreasonable.”

ARTICLE 63

520. The text of article 63, as adopted by the Working Group on the International Sale of Goods, is as follows:

“(1) If there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation and notice of his intention to sell has been given, the party who is under an obligation to preserve the goods in accordance with articles 60 or 61 may sell them by any appropriate means.

“(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is under an obligation to preserve the goods in accordance with articles 60 or 61 must make reasonable efforts to resell the goods if the buyer so requests”.}

Paragraph (1)

521. The Committee did not retain a proposal to add a sentence to paragraph (1) to the effect that a seller under an obligation to preserve the goods in accordance with article 60 "must make reasonable efforts to resell the goods if the buyer so requests".

Decision

522. The Committee concludes that no change in substance is called for in respect of article 63. It therefore recommends that the Commission should adopt the following text:

“Article 63

“(1) The party who is bound to preserve the goods in accordance with articles 60 or 61 may sell them by any appropriate means if there has been an unreasonable delay by the other party in taking possession of the goods or in taking them back or in paying the cost of preservation, provided that notice of the intention to sell has been given to the other party.

“(2) If the goods are subject to loss or rapid deterioration or their preservation would involve unreasonable expense, the party who is bound to preserve the goods in accordance with articles 60 or 61 must make reasonable measures to sell them. To the extent possible he must give notice to the other party of his intention to sell.

“(3) The party selling the goods has the right to retain out of the proceeds of sale an amount equal to the reasonable costs of preserving the goods and of selling them. He must account to the other party for the balance.”

ARTICLE 64

523. The text of article 64, as adopted by the Working Group on the International Sale of Goods, is as follows:

“If the risk has passed to the buyer, he must pay the price notwithstanding loss of or damage to the goods, unless the loss or damage is due to act of the seller.”

General rule on passage of risk

524. The view was expressed that the first part of article 64, which stated a general rule on the passage of risk, should be deleted as it merely stated the self-evident proposition that once the risk had passed to the buyer he must bear the risk of loss or damage to the goods.

525. However, there was considerable support for the retention of the first part of article 64 as it, together with articles 65 to 67, provided a uniform rule for the passage of risk. It was noted that this was important since the rules on risk of loss varied in different legal systems.

526. The Committee decided to retain the general rule on the passage of risk.

Exception to the general rule on passage of risk

527. It was proposed that the second part of the article should be deleted as it was too much of a simplification to be helpful and could be misinterpreted to mean that the buyer did not have to pay the price if there was a fault or defect in the goods.

528. In opposition to this proposal, it was argued that the exception stated in the second part of article 64 was of great importance since, even though the risk had passed, the seller could still interfere with the goods in such a manner as to cause loss. The second part of the article made it clear that the buyer
would not have to pay the price to the extent that loss or damage to the goods had been caused by such an act of the seller.

529. The proposal to delete the second part of article 64 was withdrawn.

530. The Committee decided that the text should make it clear that an omission to perform an act which resulted in loss or damage had the same consequences as the Commission of an act which resulted in loss or damage.

531. The Committee also considered a proposal that the exception to the general rule should operate only if the act or omission on the part of the seller amounted to a breach of contract. In opposition to this proposal it was pointed out that the seller might act in a manner which was not a breach of contract but might still cause damage, e.g. if in an f.o.b. contract the seller removed his containers after the goods had been unloaded and, in so doing, damaged the goods.

532. The Committee did not retain this proposal.

Decision

533. The Committee concludes that no change in substance is called for in respect of article 64. It therefore recommends that the Commission should adopt the following text:

"Article 64

"Loss or damage to the goods after the risk has passed to the buyer, does not discharge him from his obligation to pay the price, unless the loss or damage is due to an act or omission of the seller."

ARTICLE 65

534. The text of article 65, as adopted by the Working Group on the International Sale of Goods, is as follows:

"(1) If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer.

"(2) If at the time of the conclusion of the contract the goods are already in transit, the risk passes as from the time the goods were handed over to the first carrier. However, the risk of loss of goods sold in transit does not pass to the buyer if at the time of the conclusion of the contract, the seller knew or ought to have known that the goods had been lost or damaged, unless the seller had disclosed such fact to the buyer."

Exception to rule in paragraph (1)

535. The Committee considered a proposal that the following sentence be added to paragraph (1):

"However, if the seller is required to hand the goods over to the carrier at a particular place, the risk does not pass to the buyer before the goods are handed over to the carrier at this place."

536. In support of this proposal it was stated that paragraph (1) did not give a reasonable solution in cases where the seller undertook to ship the goods from a particular place at an inland point. In such a situation the risk should pass to the buyer only when the goods were handed over to a carrier at a seaport and not when they are handed over to a domestic carrier for transport to the seaport.

537. There was considerable support for this proposal and the Committee, after having accepted certain modifications which related to drafting, retained the proposal.

Control of documents

538. The Committee considered a proposal designed to make it clear that the seller’s retention of control of the goods by retaining the documents as security against payment until after the goods are shipped does not affect the passage of risk.

The proposal was as follows:

"The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk."

539. The Committee, after deliberation, adopted the proposal.

Paragraph (2)

540. The Committee considered a proposal under which the risk in respect of goods sold in transit would not pass on shipment if the shipment was of unascertained or unidentified goods for transmission to various consignees. This proposal was opposed on the ground that it would unnecessarily limit the scope of paragraph (2).

541. The Committee after deliberation retained the text of paragraph (2) as proposed by the Working Group on the International Sale of Goods.

542. The representative of the Philippines expressed a reservation in respect of the second sentence of paragraph (2) in that the provisions of that paragraph were not consistent with legal logic. It was stated that it was inconceivable that the buyer should bear the risk of loss or damage to the goods prior to the time that the contract was concluded. Although the view had been expressed in the Committee that the paragraph accorded with international commercial practice, such practice was one of the developed world. UNCITRAL should take into account the resolutions of the General Assembly which laid down the framework of a new international economic order. If UNCITRAL wished to carry out its mandate to make UNILS more acceptable to countries of widely different economic and social backgrounds it should not ignore these General Assembly resolutions.

543. However, the representative of Finland pointed out that the draft Convention contained non-mandatory rules. No buyer had to purchase goods afloat and if he did so the price paid for such goods would reflect the added risk. The view was also expressed that the rule set forth in paragraph (2) was the result of practical needs. If, in the case at issue, the goods had been damaged during the carriage it was not always possible to determine at what moment they had been damaged. If there was no indication on the bill of lading the buyer-consignee could claim damages from the carrier and would also be covered by the insurance policy in respect of the goods.

New paragraph (3)

544. The Committee considered a proposal that a new paragraph (3) be added to article 65 to read as follows:

"(3) If the goods are not identified for delivery to the buyer, by marking with an address or otherwise, they are not clearly identified to the contract unless the seller gives notice of the consignment and, if necessary, sends some documents specifying the goods."

545. The Committee retained this proposal.

Decision

546. The Committee, having regard to the decisions recorded in the previous paragraphs recommends that the Commission should adopt the following text: \(^b\)

"Article 65

"(1) If the contract of sale involves carriage of the goods and the seller is not required to hand them over at a particular destination, the risk passes to the buyer when the goods are handed over to the first carrier for transmission to the buyer. If the seller is required to hand the goods over to a carrier at a particular place other than the destination, the risk does not pass to the buyer until the goods are handed over to the carrier at that place. The fact that the seller is authorized to retain documents controlling the disposition of the goods does not affect the passage of risk."

\(^b\) The Drafting Group concluded that, for reasons of clarity, article 65 (2) be contained in a separate article and be renumbered as article 66.
“(2) Nevertheless, if the goods are not clearly marked with an address or otherwise identified to the contract, the risk does not pass to the buyer until the seller sends the buyer a notice of the consignment which specifies the goods.

"Article 66"

"The risk in respect of goods sold in transit is assumed by the buyer from the time the goods were handed over to the carrier who issued the documents controlling their disposition. However, if at the time of the conclusion of the contract the seller knew or ought to have known that the goods had been lost or damaged and he has not disclosed such fact to the buyer, such loss or damage is at the risk of the seller."

ARTICLE 66

547. The text of article 66, as adopted by the Working Group on the International Sale of Goods, is as follows:

“(1) In cases not covered by article 65 the risk passes to the buyer as from the time when the goods were placed at his disposal and taken over by him.

“(2) If the goods have been placed at the disposal of the buyer but they have not been taken over by him or have been taken over belatedly by him and this fact constitutes a breach of the contract, the risk passes to the buyer at the last moment he could have taken over the goods without committing a breach of the contract. If the contract relates to the sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have been clearly identified to the contract.”

Paragraph (1)

548. The Committee referred to the Drafting Group a proposal which had as its purpose to distinguish between the occasions on which the risk of loss would pass when the goods were taken over by the buyer and the occasions on which the risk of loss would pass as a consequence of the goods having been placed at his disposal.

549. The Committee did not retain a proposal designed to specify that, if the terms of delivery of a contract called for the seller to place the goods at the disposal of the buyer during a specified period of time, the risk of loss should pass at the time when the goods were placed at the buyer's disposal and not when they were actually taken over by him.

Paragraph (2)

550. The Committee considered a proposal that paragraph (2) read as follows:

“(2) If, however, the buyer is required to take over the goods at a place other than any place of business of the seller, the risk passes when the time for delivery has come and the buyer is aware, or has received notice, of the fact that the goods are placed at his disposal at such place.”

551. In support of this proposal it was stated that paragraph (2) would govern the time at which the risk passes when the goods are at a place other than a place of business of the seller, such as a public warehouse. In some legal systems the taking over of the goods from a public warehouse may be done by the handing over of a negotiable document of title or the acknowledgement by the third person that he holds the goods for the benefit of the buyer. However, this result did not necessarily follow from the present text. In addition, differences in national laws as to documents of title and warehouse receipts made unification in this area difficult. Accordingly the proposal would resolve the uncertainty by emphasizing physical delivery of the goods but in addition permitting risk to pass when the time for delivery had come and the buyer was aware, or had received notice, of the fact that the goods had been placed at his disposal at a place other than the place of the seller.

552. After deliberation, the Committee adopted this proposal in principle.

Decision

553. The Committee, in the light of the decisions discussed in the above paragraphs, recommends that the Commission should adopt the following text, now renumbered as article 67:

"Article 67"

“(1) In cases not covered by articles 65 and 66 the risk passes to the buyer when the goods are taken over by him or, if he does not do so in due time, from the time when the goods are placed at his disposal and he commits a breach of contract by failing to take delivery.

“(2) If, however, the buyer is required to take over the goods at a place other than any place of business of the seller, the risk passes when delivery is due and the buyer is aware of the fact that the goods are placed at his disposal at that place.

“(3) If the contract relates to a sale of goods not then identified, the goods are deemed not to be placed at the disposal of the buyer until they have been clearly identified to the contract.”

ARTICLE 67

554. The text of article 67, as adopted by the Working Group on the International Sale of Goods, is as follows:

“If the seller has committed a fundamental breach of contract, the provisions of articles 65 and 66 do not impair the remedies available to the buyer on account of such breach.”

555. The Committee adopted a proposal to extend the operation of article 67 to all cases where the buyer has a right to declare the contract avoided rather than restricting it to cases where there has been a fundamental breach of contract. In particular, article 67 will operate when the conditions of articles 30 (1) (b), 45 (1) (b) and article 49 are satisfied.

Decision

556. The Committee recommends that the Commission should adopt the following text, now renumbered as article 68:

"Article 68"

“If the seller has committed a fundamental breach of contract, the provisions of articles 65, 66 and 67 do not impair the remedies available to the buyer on account of such breach.”

FINAL CLAUSES

557. The Committee had before it a report of the Secretary-General on draft final clauses (A/CN.9/135) prepared by the secretariat in response to a request made to it by the Working Group on the International Sale of Goods.

558. The Committee was agreed that, with the exception of the declaration to article 11 (see para. 134 above), the final clauses were a matter for the conference of plenipotentiaries and that the Commission should not officially comment on the suitability or on the substance of the draft final clauses.

559. However, the Committee held a brief preliminary discussion of the final clauses so that the secretariat could take account of any views expressed by representatives or observers when submitting draft final clauses to the conference. In particular, the Committee requested the secretariat to take note of the following proposals:

(a) “This Convention shall not prevail over conventions already entered into or which may be entered into, and which contain provisions concerning the matters covered by this Convention, provided that the seller and buyer have their places of business in States parties to such a convention.”

(b) “(1) A Contracting State may at any time declare that contracts of sale between a seller having a place of business in that State and a buyer having a place of business in another State shall not be governed by this Convention, because
the two States apply to the matters governed by this Convention the same or closely related legal rules.

"(2) If that other State is a Contracting State, such declarations must be made jointly by the two Contracting States or by reciprocal unilateral declarations."  

560. The Committee therefore recommends that the Commission should request the Secretary-General to prepare draft final clauses for the consideration of the conference of plenipotentiaries which the General Assembly may wish to convene. The Committee also recommends that the Commission request the secretariat to invite federal and non-unitary States to indicate their views on the desirability of a federal State clause in the Convention on the International Sale of Goods. The representative of Australia indicated his reservation on this point.

Form of rules contained in the draft Convention

561. The Committee took note of the statement of a representative that he would recommend to the Commission that the rules contained in the draft Convention on the International Sale of Goods be formulated as uniform rules for optional use by the parties to a sales transaction rather than in the form of a Convention.1

1 See paras. 20-32 of the report of the Commission.

ANNEX II

Report of Committee of the Whole II

INTRODUCTION

1. The Committee of the Whole II was established by the Commission at its 180th meeting, on 23 May 1977. The Committee met on 6, 7 and 9 June 1977 and held five meetings. The Committee, at its first meeting on 6 June 1977, elected Mr. Roland Loewe (Austria) as Chairman and Mr. Clement O. Magreola (Nigeria) as Rapporteur.

2. The Committee, at its 180th meeting, referred to the Committee the following items on its agenda:

- Item 4 International sale of goods: general conditions of sale.
- Item 5 International payments:
  - (a) Security interests in goods;
  - (b) Negotiable instruments.
- Item 6 International commercial arbitration.
- Item 7 Liability for damage caused by products intended for or involved in international trade.
- Item 8 Training and assistance in the field of international trade law.
- Item 10 Other business: consistency of legal provisions drafted by the Commission and its Working Groups.

3. The Committee adopted this report at its fifth meeting, on 9 June 1977.

CHAPTER I

INTERNATIONAL SALE OF GOODS

General conditions of sale and standard contracts

4. At its eighth session, the Committee requested the Secretary-General to make inquiries about the practical need for "general" general conditions for use in a wide variety of trades and to report to the Commission at a future session on the progress made in respect of this project.2 The Committee had before it a report of the Secretary-General on "General conditions of sale and standard contracts" (A/CN.9/136). This report contains an account of the discussions of a meeting of experts which the Secretariat had arranged with the International Chamber of Commerce (ICC) on 16 December 1976.

5. The Committee took note of the report of the Secretary-General. The Committee was informed of the work programmes of the Council of the Asian-African Legal Consultative Committee in respect of this subject.

6. The observer of ICC stated that his organization was now carrying out work on standard terms and clauses rather than "general" general conditions. It had recently been decided to revise those standard clauses, like the Incoterms, which already provided a certain degree of uniform practice. Also, a working group had been established to elaborate new standard terms such as the force majeure clause. The observer expressed the interest of his organization to obtain views and suggestions on both projects, particularly by States not represented in ICC, and thus would welcome the co-operation of the Commission.

7. The Observer of the Asian-African Legal Consultative Committee stated that his organization had identified certain categories of goods for which uniform contract conditions seemed particularly useful. For these types of goods, it had elaborated several standard contracts, with the assistance of the secretariat of the Commission and of the Economic Commission for Europe.

Decision of the Committee

8. The Committee decided to recommend that the Commission should adopt the following decision:

"The text is not reproduced; for the decision as adopted by the Commission, see paragraph 36 of the Commission's report, above."

CHAPTER II

INTERNATIONAL PAYMENTS

A. Security interests in goods

9. The Committee had before it a study on security interests (A/CN.9/131), a note of the Secretariat in respect of article 9 of the Uniform Commercial Code of the United States of America (A/CN.9/132) and a report of the Secretary-General (A/CN.9/130), containing a general survey of the existing law on security interests, proposals for reform and the conclusions reached by a consultative group convened jointly by the secretariat of the Commission and the International Chamber of Commerce on 14 and 15 December 1976.

10. The Committee was generally agreed that, in view of the practical importance of security interests to international trade, the secretariat should be requested to continue work on the subject. The creation of security interests that would be recognized and enforceable outside the country where it was created would enlarge the pool of credit available for international trade. However, the view was also expressed that the difficulties that would be encountered in establishing a scheme of uniform rules would be too formidable and that the chances of a successful conclusion of the work would therefore be slight. In this connection, reference was made to the great differences in the law of security interests in the countries of the world and, in particular, to the impossibility of unifying national bankruptcy laws (of great relevance in the area of security interests) and the difficulty of establishing registration or filing systems. The question was also raised whether the alternatives of insurance and guarantee, in particular export finance insurance, would not provide an easier solution to the purported aim of enlarging the quantity of credit available for international trade.

11. The discussions in the Committee, after this exchange of views on the feasibility of establishing uniform rules, focused on three possible techniques of harmonization:

- (a) Preparation of rules on conflict of laws,
- (b) Creation of substantive rules that would apply only to international transactions;
- (c) Harmonization of uniform rules by domestic law.


*Reproduced in part two of this volume.
Unification of the national laws on security interests by means of a uniform law applicable both to national and to international transactions.

12. The technique of preparing rules on conflict of laws found little support in the Committee on the ground that it would not modernize the law so as to meet the needs of international commerce and would thus perpetuate the present inadequate situation.

13. There was some support for the creation of an additional security interest that would be used primarily in international transactions but could also be used domestically. According to another view, one or two specific widely known security interests should be selected, such as for instance the conditional sale, with a view to creating uniform rules applicable on universal level. Yet another view was that uniform rules should be confined, for the sake of simplicity of registration, to large items such as ships and aircraft.

14. There was considerable support in the Committee for further study of the third method, i.e. the creation of a new security interest, based on a functional approach, that would apply to domestic as well as international transactions. The view was expressed that work should not be directed towards the elaboration of draft rules, but that the Secretariat should instead attempt to determine whether a uniform scheme was needed in practice and would be in the interest of international trade, bearing in mind that such a scheme would imply a radical change in national laws, even as regards exclusively internal relations. It was further suggested that the work on security interests should be reconsidered in the context of the future programme of work of the Commission, to be discussed at the Commission's eleventh session.

15. The Committee was informed of the current programme of work of the European Economic Community and of the International Chamber of Commerce in respect of security interests. The observers of both organizations expressed their willingness to co-operate with the Commission in the work on this subject.

Decision of the Committee

16. The Committee, after deliberation, decided to recommend to the Commission that it adopt the following decision:

[The text is not reproduced; for the decision as adopted by the Commission, see paragraph 37 of the Commission's report, above.]

B. Negotiable instruments

17. The Committee was informed of the progress made by the Working Group on International Negotiable Instruments.

C. Contract guarantees

18. At its eighth session, the Commission took note of the work of the International Chamber of Commerce (ICC) in respect of the preparation of uniform rules on contract guarantees and invited this organization to submit progress reports to the Commission at further sessions.b

19. The Committee was informed of the work undertaken by ICC. The observer of ICC emphasized the importance of the contribution of the Commission and its secretariat to the work of ICC on this subject. He stated that draft rules had been worked out by a Study Group and examined by two commissions of his organization. He expressed the view that, taking into account the information provided by the Commission, merely one important problem remained to be solved, namely, that of guarantees payable on first demand which are not included in the draft rules.

20. The observer of ICC informed the Committee that a Study Group would consider, on 26 and 27 June 1977, the observations of Governments on the draft rules and prepare a final text that would take account of these observations.

Decision of the Committee

21. The Committee decided to recommend to the Commission to review the item of contract guarantees at its eleventh session when the work of the International Chamber of Commerce on uniform rules on contract guarantees will be completed.

Chapter III

INTERNATIONAL COMMERCIAL ARBITRATION

A. UNCITRAL Arbitration Rules


23. The Committee noted that the report of the Sixth Committee of the General Assembly on the report of the United Nations Commission on International Trade Law on the work of its ninth session recorded that "commenting on the UNCITRAL Arbitration Rules themselves, many delegates expressed satisfaction with their optional character. It was noted with approval that the Rules had been produced by the Commission, not in the usual form of a draft convention, but in the much simpler and less costly form of model rules for parties, requiring no international convention or national legislative enactment" and that it had been suggested that "this was a method which the Commission might possibly wish to employ with respect to its future projects, whenever appropriate."c

24. The Committee took note with satisfaction of the favourable reception of the UNCITRAL Arbitration Rules in various parts of the world. The Asian-African Legal Consultative Committee, at its seventeenth session at Kuala Lumpur, Malaysia, held in 1976, had recommended the use of the UNCITRAL Arbitration Rules in the settlement of disputes arising in the context of international commercial relations, and had included an arbitration clause referring to the UNCITRAL Arbitration Rules in certain of its standard form contracts, notably its "Standard Form FOB Contract".

25. It was also reported that it was barely a year since the UNCITRAL Arbitration Rules had been adopted by the Commission and less than six months since the General Assembly had recommended their use, yet in that short span of time the Rules had been accepted in a number of significant contexts. For example, a new model arbitration clause prepared by the USSR Chamber of Commerce and Industry and the American Arbitration Association for optional use in contracts between corporations in the United States of America and foreign trade organizations in the Soviet Union provided for proceedings to be conducted under the UNCITRAL Arbitration Rules. Also, the Inter-American Commercial Arbitration Commission, a body established by the Organization of American States, had amended its rules of procedure, effective 1 January 1978, so that those rules will substantially incorporate the UNCITRAL Arbitration Rules. The London Court of Arbitration, the Stockholm Chamber of Commerce and the American Arbitration Association were among the arbitration centres which had announced that they will act as appointing authorities and provide administrative services in cases conducted under the UNCITRAL Arbitration Rules.


26. The Committee recalled that the Commission, at its sixth session, had recommended that the General Assembly should include recommendations in its resolution to work towards the adoption of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958.


vite the States which had not ratified or acceded to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958 to consider the possibility of adhering thereto, and that the General Assembly, by resolution 3108 (XXVIII), had acted accordingly. The Committee noted therefore with satisfaction that the Asian-African Legal Consultative Committee, at its seventeenth session in Kuala Lumpur, had recommended to States of the Asian-African region which had not ratified or acceded to the 1958 Convention to consider the possibility of ratification or accession to the Convention.

C. Recommendations of the Asian-African Legal Consultative Committee

27. The Asian-African Legal Consultative Committee (AALCC), at its seventeenth session, also adopted a recommendation on international commercial arbitration by which it invited the Commission to consider the possibility of preparing a protocol to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, New York, 1958 (New York Convention of 1958), with a view to clarifying, inter alia, the following:

(a) Where the parties have adopted rules for the conduct of an arbitration between them, whether the rules are for ad hoc arbitration or for institutional arbitration, the arbitration proceedings should be conducted pursuant to those rules notwithstanding provisions to the contrary in municipal laws and the award rendered should be recognized and enforced by all Contracting States;

(b) Where an arbitral award has been rendered under procedures which operate unfairly against either party, the recognition and enforcement of the award should be refused;

(c) Where a governmental agency is a party to a commercial transaction in which it has entered into an arbitration agreement it should not be able to invoke sovereign immunity in respect of an arbitration pursuant to that agreement.

28. The Committee had before it a note by the Secretary-General containing the text of the recommendations of the AALCC (A/CN.9/127)* and a note by the Secretariat setting forth the Secretariat comments on the proposals made by the AALCC in its recommendations (A/CN.9/127/Add.1).

29. After hearing a statement by the Secretary-General of the AALCC, the Committee considered separately the matters referred to in subparagraphs (a) and (b) and in subparagraph (c) of paragraph 27 above.

30. There was agreement in the Committee that the matters which the AALCC had brought to the attention of the Committee raised important issues in the context of international commercial arbitration and justified further consideration by the Commission. It was noted that these matters might be important not only to the Asian and African regions but also to other regions of the world. The view was also generally held that the Committee was not, at this stage, in a position to ascertain all aspects and implications of the AALCC's proposals and could therefore not pronounce itself on their feasibility and means of their implementation until after further study of these aspects and implications had been made.

31. The predominant opinion in the Committee was that, if it were decided at a later stage to implement the proposals of the AALCC, the preparation of a protocol to the 1958 New York Convention was not an appropriate approach. In this connection, various suggestions were made. According to one suggestion, in considering the kind of legal means which might be used in establishing the relationship between, for example, the UNCITRAL Arbitration Rules and national laws on arbitral procedure, one method that might be studied could be a brief convention that would reverse the order of precedence established by article 1 (2) of those Rules. Such a convention might provide, in substance, that where the parties have agreed to arbitration under the UNCITRAL Arbitration Rules and where a provision of these Rules is in conflict with a provision of national law applicable to the arbitration from which the parties cannot derogate, the provision of the UNCITRAL Arbitration Rules shall prevail. It was noted that this might be a simpler approach than a convention in the form of a complete universal code of arbitration. According to another view, the possibility might be studied of preparing a new international convention of a uniform law on arbitration which would draw upon the 1961 European Convention on International Commercial Arbitration. Attention was also drawn in this connection to the 1966 European Convention providing a Uniform Law on Arbitration and the Inter-American Convention on Commercial Arbitration (Panama, 1975). Under yet another view, it was premature to consider means of implementation before the Commission had reached a conclusion on the substance of measures, if any, which might need implementation.

32. With respect to the proposal by the AALCC that the reliance on sovereign immunity should be excluded in international arbitration, the view was expressed that an optional model clause might be drafted which could be used in conjunction with the UNCITRAL Arbitration Rules. Under such an optional clause, States, state-owned agencies and entities of public law which entered into transactions with private firms would expressly agree not to invoke in connexion with arbitration and possible enforcement of the award. However, it was stressed that further study was needed of the feasibility and legal effect of such an approach.

33. With regard to the issue of jurisdictional and sovereign immunity in connexion with arbitration, reservations were expressed, as a matter of principle, that in so far as States or Governments were concerned, this issue was but a part of a more general and complex problem having an obviously political and public international law character. At the same time, it was pointed out that in so far as the foreign trade organizations in socialist countries, referred to in the note of the Secretariat, were concerned these organizations, being autonomous legal persons could not invoke and had never invoked such immunity.

34. The Committee had an exchange of views on the issues that should be further studied. The view was expressed that a study should be made of the relationship of arbitration rules to national laws and that, at least initially, attention should be focused on the UNCITRAL Arbitration Rules. Such a study, if so focused, might possibly eliminate the need to consider the problem of defining standards of fairness referred to in the AALCC's proposals. It was submitted, in this connection, that all arbitration rules were to be given precedence over contrary provisions of national law, there might then be a need to provide for exceptions so that such status would not be given to rules which operate unfairly. If, however, the focus was on the UNCITRAL Arbitration Rules, there would be no need to define standards of fairness. This was because these rules, having been drawn up under the aegis of the United Nations, and having been recommended by the General Assembly, may be universally accepted as providing fair procedures of arbitration. It was noted that reference to the action of the General Assembly in recommending the UNCITRAL Arbitration Rules was not meant to imply unfairness in other existing arbitration procedures. It was also noted that in no event should the matter of fairness be dealt with in such a way as to expand the potential grounds for non-recognition of arbitral awards. On the other hand, it was pointed out that public policy, which was a ground for non-recognition of arbitral awards under the New York Convention of 1958, should not be restricted. The view was expressed that the study to be undertaken should include consideration of the feasibility of various means which might be used so that arbitration proceedings could be conducted pursuant to such Rules notwithstanding contrary provisions of national law.

35. Note was also taken of the discussion in paragraph 8 of the note of the Secretariat (A/CN.9/127/Add.1) concerning the relationship of arbitration rules to national laws under the provisions of article V of the 1958 New York Convention. The view was expressed that further exploration of this important and complex matter might usefully be included in the studies to be undertaken.

*Reproduced in part two of this volume.
36. The Committee was of the view that the Secretariat should be requested to study the various aspects and implications of the matters raised by the AALCC, and that it should do so in consultation with the AALCC. The Secretariat, in carrying out its studies, should take into account the observations and suggestions made in the course of the discussions in the Committee, and should also seek information, if necessary, from Governments, regional international organizations and arbitration institutions, in particular from the International Council for Commercial Arbitration (ICCA).

Decision of the Committee

37. The Committee, after deliberation, decided to recommend to the Commission that it adopt the following decision:

[The text is not reproduced; for the decision as adopted by the Commission, see paragraph 39 of the Commission's report, above.]

CHAPTER IV

LIABILITY FOR DAMAGE CAUSED BY PRODUCTS INTENDED FOR OR INVOLVED IN INTERNATIONAL TRADE

38. The General Assembly, at its twenty-eighth session, adopted resolution 3108 (XXVIII) of 12 December 1973 on the report of the United Nations Commission on International Trade Law on the work of its sixth session. In paragraph 7 of the resolution, the General Assembly invited the Commission "To consider the advisability of preparing uniform rules on the civil liability of producers for damage caused by their products intended for or involved in international sale or distribution, taking into account the feasibility and most appropriate time therefor in view of other items on its programme of work." 

39. At its seventh session the Commission had before it a note by the Secretary-General (A/CN.9/93) setting forth background information relating to this paragraph of the resolution and suggesting possible action by the Commission in response thereto. At that session, the Commission decided to request the Secretary-General to prepare a report containing a survey of the work of other organizations in respect of civil liability for damage caused by products, a study of the main problems that may arise in this area and the solutions that are being contemplated therefor by international organizations, and suggestions with respect to the Commission's future course of action.

40. At its eighth session the Commission considered a report prepared in response to the decision taken at its seventh session entitled "Liability for damage caused by products intended for or involved in international trade" (A/CN.9/103), and requested the Secretary-General to prepare a further report examining a number of specific issues set forth in the decision adopted at that session. These issues were the following:

"(a) The extent to which the absence of unified rules on products liability affects international trade;

"(b) The practicability and advantages of unification at a global level, as opposed to unification at a regional level;

"(c) The relationship between this subject and schemes of insurance which have been or may be developed in relation thereto;

"(d) The extent to which the manner in which liability may be limited, and the possible effects of different techniques of limitation;

"(e) The types of product in regard to which liability should be imposed;

"(f) The classes of persons in whose favour liability may be imposed, with particular reference to the protection of consumers;"

"(g) The kinds of damage for which compensation may be recoverable;

"(h) The kinds of transaction falling within the scope of the proposed uniform rules;

"(i) The relationship between any proposed uniform rules and standards of safety in relation to products which are mandatory imposed in many States by national law." *

41. In addition, the Commission was of the view that the Secretariat should "consider the advisability of circulating, at an appropriate time, a questionnaire designed to elicit information on relevant legal rules and case law, and also on governmental attitudes to the issues involved." *

42. At the present session the Commission had before it two reports of the Secretary-General: (a) a report containing an analysis of the replies by Governments to a questionnaire prepared by the Secretariat (A/CN.9/139),* and (b) a report on "liability for damage caused by products involved in international trade" (A/CN.9/133).*

43. The first report (A/CN.9/139)* analyses 35 replies from Governments to the questionnaire on existing legislation, case law and law projects, in respect of contractual and extra-contractual liability. The other report (A/CN.9/133)* sets forth the special features of products liability law and evaluates general policy considerations, discusses various concepts of liability with a view to determining an appropriate basis of uniform products liability, sets out and evaluates the arguments pertaining to certain additional requirements and elements which relate to the scope and extent of liability, examines the insurance implications of such proposals concerning the basis or extent of liability, and contains suggestions as to a possible future course of action.

44. The Committee expressed its appreciation to the Secretariat for the thorough work it had carried out in respect of products liability.

45. The views expressed in the Committee led to the consensus that, in view of the different stages of development of the law on products liability, it was not now desirable to continue work on the subject and that, amongst the other matters on the Commission's agenda, it should not be retained with priority status. An attempt to unify the law in the field would burden the Commission's resources for a long time to come and this was not warranted under the circumstances. It was also pointed out that, in many countries, the subject of products liability had not yet fully been studied and that also the economic and insurance implications of a uniform scheme could, as yet, not be fully grasped.

Decision of the Committee

46. The Committee, after deliberation, decided to recommend to the Commission that it not pursue work on the subject of products liability at this time and that the matter be reviewed in the context of its future programme of work at a future session if one or more member States of the Commission should take an initiative to that effect.

CHAPTER V

TRAINING AND ASSISTANCE IN THE FIELD OF INTERNATIONAL TRADE LAW

47. The Committee had before it a note by the Secretary-General (A/CN.9/137)* setting forth the actions taken by the Secretariat to implement the Commission's decisions on train-

* Yearbook . . ., 1975, part two, V.
* Ibid., para. 102.
* Reproduced in part two of this volume.
ing and assistance in the field of international trade law taken at its ninth session.\textsuperscript{8}

A. Second UNCITRAL Symposium

48. The Committee noted with regret that the Second UNCITRAL Symposium on International Trade Law which was to have been held in connexion with the Commission’s tenth session had to be cancelled for lack of funds. Many representatives, while commending the Secretariat’s efforts in soliciting voluntary contributions towards the Symposium, expressed their disappointment at the response which such efforts had drawn.

49. The Committee expressed its appreciation to those Governments which had made or pledged voluntary contributions towards the Symposium and, noting the high number of candidates who had sought to participate in the Symposium, expressed its regrets to those candidates for the disappointment which cancellation of the Symposium may have caused them.

50. On the question whether the Commission should plan on holding future symposia on international trade law, there was general agreement within the Committee that the symposia were a most useful and desirable feature of the Commission's work and of its training and assistance programme in particular which should, therefore, be maintained. Not only, it was observed, did the symposia benefit young lawyers from both developing and developed countries, they also provided a forum for eminent specialists and other experts from different legal and economic systems to exchange views on the work of UNCITRAL, all of which served the additional purpose of publicizing the Commission’s work.

51. The view was expressed that the symposia should not be too theoretical in their conception and execution if they were to be useful training for young lawyers. Priority should perhaps therefore be given to securing more fellowships and internship opportunities for such lawyers to undergo training at commercial and financial institutions within the developed countries. It was, however, pointed out in response by several delegates that the two elements of the Commission's training and assistance programme served different functions and neither could truly replace the other: a symposium sought within a relatively short period of intensive discussion to promote understanding of and foster expertise in a specific topic or number of topics, whereas the fellowship and internship opportunities were more of a general post-graduate training in international trade law. It was further observed that fellowships by their very nature can benefit only a very limited number of individuals in contrast to the very large number of persons who can be reached through the symposia, and that there was, at any rate, nothing in the idea of a symposium to preclude concentration on a topic of practical value, as was revealed by the topics which the Commission had selected for the Second UNCITRAL Symposium: “Transport and financing documents used in international trade” and the “UNCITRAL Arbitration Rules”.

52. On the question of financing the symposia, the Committee was agreed on the need to find alternative means to the present system of total reliance on voluntary contributions from Governments and other sources, which system, as was attested to by the cancellation of the planned Second UNCITRAL Symposium for insufficiency of funds, had proven unreliable. Recalling the suggestion made in the Sixth Committee during that Committee's consideration of the report of the Commission on the work of its ninth session, namely, that consideration be given to financing this activity out of the regular budget of the United Nations, the Committee decided to make a recommendation to that effect to the Commission.

53. A number of representatives stated, however, that they were not in a position to commit their respective Governments to any particular line of action with respect to such budgetary matters. The view was also expressed that it would be preferable before a recommendation was addressed to the General Assembly, to request the Secretariat to explore, with the appropriate United Nations bodies, possibilities of obtaining such financing and to inform the Commission accordingly at its next session.

Decision of the Committee

54. The Committee decided to recommend to the Commission for adoption the following decision:

\textit{[The text is not reproduced; for the decision as adopted by the Commission, see paragraph of the Commission's report, above.]} 

B. Fellowships and internship arrangements for training in international trade law

55. The Committee noted with appreciation the decision of the Government of Belgium to reinstate for 1977 and, as had been announced by the representative of Belgium at the session, to award also for 1978, the two fellowships for academic and practical training in international trade law which that Government had generously made available in the past to suitable candidates from developing countries.

56. The Committee also expressed its appreciation to The Hague Conference on Private International Law for its offer of a fellowship to enable a candidate from a developing country to undertake an internship at the Permanent Bureau of the Conference for a period of one year.

CHAPTER VI

OTHER BUSINESS

Consistency of legal provisions drafted by the Commission or its Working Groups

57. The Committee had before it a note by the Secretariat on this item (A/CN.9/138).

58. Following a brief statement by the Chairman in which he observed that the problem of how to achieve and maintain consistency of legal provisions was a perennial one in the elaboration of international conventions and that perhaps no satisfactory solution to the problem existed, or was easily discoverable, the Committee took note of the issues raised in the Secretariat's note.

ANNEX III

List of documents before the Commission

\textit{[Annex not reproduced; see check list of UNCITRAL documents at the end of this volume.]}
### List of relevant documents not reproduced in the present volume

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<td>A/CN.9/130</td>
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