B. Working papers submitted to the Working Group on the International Sale of Goods at its ninth session

1. Draft commentary on Articles 1 to 13 of the draft Convention on the Formation of Contracts for the International Sale of Goods as approved or deferred for further consideration by the Working Group on the International Sale of Goods at its eighth session*

Introduction

1. At its eighth session the Working Group on the International Sale of Goods requested the Secretariat to prepare a draft commentary on the draft Convention on the Formation of Contracts for the International Sale of Goods as approved or deferred for further consideration by the Working Group.[1]

2. Article 14 of the draft Convention has been considered in the report of the Secretary-General dealing with unresolved matters in respect of formation and validity of contracts (A/CN.9/WG.2/WP.28).**

3. The draft commentary has been prepared on the text of the draft Convention as it appears in annex I to the report of the Working Group on the work of its eighth session (A/CN.9/128, annex I).*** Generally, the existence of square brackets has been ignored in the preparation of this draft commentary which seeks to explain the text as it currently exists.

2. Draft commentary on Articles 1 to 13 of the draft Convention on the Formation of Contracts for the International Sale of Goods as approved or deferred for further consideration by the Working Group on the International Sale of Goods at its eighth session[2]

Article 1

"[*Article 1 (alternative 1)*

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

* Originally issued as A/CN.9/WG.2/WP.27 on 16 August 1977.

** Reproduced in this volume, part two, I, B, 2 below.

[1] See report of the Working Group on the International Sale of Goods on the work of its eighth session, A/CN.9/128, para. 174 (Yearbook . . . 1977, part two, I, A).

*** Yearbook . . . 1977, part two, I, B.

[2] Those matters which have not been resolved by the Working Group are in square brackets.

[Article 1 (alternative 2)

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

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

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

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

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

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

"(*b*) By auction;

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

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

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

"(*f*) Of electricity.

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

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

"(6) For the purposes of this Convention:

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

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

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), article 1.

Convention on the Limitation Period in the International Sale of Goods (Limitation Convention), articles 2, 3, 4, 6.

Draft Convention on the International Sale of Goods (CISG), articles 1, 2, 3, 5.

Commentary

1. This article states the rules for determining whether this Convention is applicable to the formation of a contract of sale of goods and sets out those contracts the formation of which is excluded from the application of this Convention.

Text for use by those States which adopt CISG [alternative 1]

2. Alternative 1 is for use by those States which adopt the proposed Convention on the International Sale of Goods (CISG).

3. In order to be sure that the same criteria are employed to determine whether the present Convention and the Convention on the International Sale of Goods would apply to a transaction, alternative 1 provides that if a contract of sale would be governed by CISG, the present Convention applies to the formation of the contract. As a result, if both parties to the proposed transaction were from States which had adopted CISG but only one of them had adopted the present Convention, the present Convention would apply to the formation of the contract in the courts of the State which had adopted the present Convention, but it would not apply to the formation of the contract in the State which had not adopted the present Convention unless a Court in that State or in a third State selected the law of a Contracting State as the applicable law to govern the formation of the contract.

Text for use by those States which do not adopt CISG [alternative 2]

4. Alternative 2 is for use by those States which do not adopt CISG. It reproduces articles 1, 2, 3 and 5 of CISG, with such minor changes as are necessary for it to apply to the formation of contracts rather than to the contract itself.

Action by the Working Group

5. The Working Group decided that these draft provisions should be placed in square brackets to indicate that they would have to be reconsidered in the light of any changes which the Commission might make to the scope of application of the draft CISG established by the Working Group at its seventh session (A/CN.9/116, annex I).*

6. The Commission, at its tenth session in Vienna from 23 May to 17 June 1977, made no changes in substance to articles 1, 2, 3 and 5 of the draft CISG. It made two changes in presentation:

Article 6 (*c*) in the text as recommended by the Working Group on the International Sale of Goods (A/CN.9/116) became article 1 (3) of CISG. The equivalent text in the draft Convention on the Formation of Contracts for the International Sale of Goods is article 1 (6) (*c*).

The words "did not know and had no reason to know" in article 2(*a*) of the draft CISG (identical to article 1 (3) (*a*) of the draft Convention on the Formation of Contracts for the International Sale of Goods) were replaced by "neither knew nor ought to have known".

* Yearbook . . . 1976, part two, I, 2.

"ARTICLE 2

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

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

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 2.

Limitation Convention, article 3 (3).

Draft CISG, article 4.

Commentary

1. Article 2 states the extent to which the parties may exclude the application of this Convention and derogate from or vary the effect of any of its provisions.

Exclusion of the application of the Convention, paragraph (1).

2. Paragraph (1) states that the parties may exclude the application of the Convention as a whole. The most likely manner in which the parties would act to exclude the application of this Convention would be by the choice of a specific national law to govern the formation of the contract. It would be a matter of interpretation of the intention of the parties in a given case as to whether the choice of a specific national law to govern "the contract" was also a choice of that national law to govern the formation of the contract.

3. If the parties exclude the application of this Convention without specifying the national law to be applied, the rights and obligations of the parties in respect of the formation of the contract would be governed by the national law made applicable by the rules of private international law.

Derogations from the provisions of this Convention, paragraph (2)

4. Paragraph (2) enables the parties, unless the Convention otherwise provides, to derogate from or vary any of the individual provisions of the Convention. The paragraph indicates the sources from which this intention can be derived. The inclusion of practices which the parties have established between themselves would enable a Court to take account of the manner in which prior contracts between the parties have been formed.

5. Therefore, even though it may not be necessary for the parties to agree on such matters as the delivery date or the date of payment of the price for the offer to be sufficiently definite, if one of the parties insists on prior agreement on these points, no contract will be concluded until such agreement is reached.

6. Similarly, if the offeror specifies that the acceptance must be sent by air mail and that it must arrive by the end of the business day on 30 June, a purported acceptance which was delivered in person by the end of the business day on 30 June would not constitute an acceptance under the terms of paragraph (2), unless the terms of the offer were interpreted to mean only that the acceptance must arrive by the close of business on 30 June and that the term concerning air mail was used only to emphasize that a speedy reply was required.

Silence as acceptance, paragraph (3)

7. Paragraph (3) states that a term of the offer which stipulates that silence shall amount to acceptance is invalid. This is the only specific restriction on the right of the parties either to modify the substantive provisions of this Convention or to specify the act which will constitute an offer or an acceptance.

8. It should be noted that silence may constitute acceptance if that mode of acceptance was agreed to in the negotiations, as a practice which the parties have established between themselves or is a mode of acceptance sanctioned by usage.

Example 2A. For the past 10 years the buyer regularly ordered goods that were to be shipped throughout the period of six to nine months following each order. After the first few orders the seller never acknowledged the orders but always shipped the goods as ordered. On the occasion in question the seller neither shipped the goods nor notified the buyer that he would not do so. The buyer would be able to sue for breach of contract on the basis that a practice had been established between the parties that the seller did not need to acknowledge the order and, in such a case, the silence of the seller constituted acceptance of the offer.

Example 2B. One of the terms in a concession agreement was that the seller was required to respond to any orders placed by the buyer within 14 days of receipt. If he did not respond within 14 days, the order would be deemed to have been accepted by the seller. On 1 July the seller received an order for 100 units from the buyer. On 25 July the seller notified the buyer that he could not fill the order. In this case a contract had been concluded on 15 July for the sale of 100 units because the concession agreement, as part of the preliminary negotiations, provided that a non-response from the seller would be deemed to be acceptance.

ARTICLE 3

"[*Article 3 (alternative 1)*

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

"[*Article 3 (alternative 2)*

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 3.

Uniform Law on the International Sale of Goods (ULIS), article 15.

Draft CISG, article 11.

Actions of the Working Group and of the Commission

1. The Working Group decided to place both alternatives of article 3 in square brackets because the Commission would consider article 11 of the draft CISG (A/CN.9/116, annex I) at its tenth session.

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

"Article 11

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

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

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

"Article X

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

4. For the purposes of this commentary it has been assumed that the Working Group will adopt article 11 of CISG as article 3 of this Convention with the exception that paragraph (2) would read: "Paragraph (1) of this article does not apply to the formation of a contract of sale . . .".

Commentary

General rule as to a writing, paragraph (1)

5. Paragraph (1) states a general rule that a contract of sale subject to this Convention need not be concluded in or evidenced by writing. This general rule would displace any otherwise applicable rule of national law that contracts of sale of particular kinds of goods or for more than a given monetary value must either be concluded in or evidenced by writing in order to be valid or enforceable between the parties.

6. The parties could, however, in accordance with article 2, agree that no communication is to be regarded as an offer or an acceptance unless it is in writing. The same result might occur because of the practices which the parties have established between themselves or because of a usage.

7. Moreover, any administrative or criminal sanctions for breach of the rules of any State requiring that such contracts be in writing, whether for purposes of administrative control of the buyer or seller, for purposes of exchange control regulations or otherwise, would still be enforceable against a party who concluded the non-written contract even though the contract itself would be enforceable between the parties.

The requirement as to form, paragraph (1)

8. The provision that an offer or an acceptance is not subject to "any other requirement as to form" refers to requirements such as the placing of seals on a document, its witnessing or authentication by a notary or the use of other special forms.

Proof by means of witnesses, paragraph (1)

9. The provision which enables the existence and content of the offer and the acceptance to be proved by any means including witnesses is intended to apply especially to those countries in which the requirement that there be a record of the contract in writing goes to the proof of the existence of the contract rather than to the proper form of the offer and acceptance. Article 3 might otherwise be interpreted in the courts of those countries in such a manner so as not to achieve the result intended by the first sentence of the article.

10. Although article 3 of ULF text could be interpreted to mean only that the existence of the offer and acceptance may be proved by means other than by a writing, it must be understood to mean also that the terms of the offer and acceptance may be proved by means of witnesses or any other appropriate means.

Declaration of non-application, paragraph (2)

11. Some countries consider it an important matter of public policy that contracts of sale be concluded in or evidenced by writing. Paragraph (2), therefore, provides that the general rule in paragraph (1) does not apply where any party has his place of business in a Contracting State which has made a declaration under article (X) to the effect that paragraph (1) shall not apply.

"ARTICLE 3A

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

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

UNCITRAL Arbitration Rules, articles 1 and 30.

Commentary

1. This article governs the modification and rescission of a contract.

General rule, paragraph (1)

2. Paragraph (1), which states the general rule that a

contract may be modified or rescinded merely by agreement of the parties, is intended to eliminate an important difference between the civil law and the common law in respect of the modification of existing contracts. In the civil law an agreement between the parties to modify the contract is effective if there is sufficient *cause* even if the modification relates to the obligations of only one of the parties. In the common law a modification of the obligations of only one of the parties is in principle not effective because consideration is lacking.

3. The modifications envisaged by this provision are technical modifications in specifications, delivery dates, or the like which frequently arise in the course of performance of commercial contracts. Even if such modifications of the contract may increase the costs of one party, or decrease the value of the contract to the other, the parties may agree that there will be no change in the price. Such agreements according to article 3A (1) are effective, thereby overcoming the common law rule that consideration is required.

Modification or rescission of a written contract, paragraph (2)

4. Although the present text of article 3 of this draft and article 11 of CISG provide that a contract need not be in writing, the parties can reintroduce such a requirement. A similar problem is the extent to which a contract which specifically excludes modification or rescission unless in writing, can be modified or rescinded orally.

5. In some legal systems a contract can be modified orally in spite of a provision to the contrary in the contract itself. It is possible that such a result would follow from article 3 which provides that a contract governed by this Convention need not be evidenced by writing. However, article 3A (2) provides that a written contract which excludes any modification or rescission unless in writing cannot be otherwise modified or rescinded.

6. In some cases a party might act in such a way that it would not be appropriate to allow him to assert such a provision against the other party. Therefore, paragraph (2) goes on to state that to the extent the other party has relied to his detriment on such action, the first party cannot assert the provision.

7. It should be noted that the party who wishes to assert the provision in the contract which requires any modification or rescission to be in writing is precluded from doing so only to the extent that the other party has relied on actions of the first party and that, in so doing, he has suffered a detriment. If there has either been no reliance on the actions of the first party or no detriment in so relying, the first party would not be precluded from relying on the contract provision.

"ARTICLE 4

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

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 4.

Draft CISG, article 37.

Commentary

1. Article 4 states the conditions that are necessary in order that a proposal to conclude a contract constitutes an offer.

Addressee of an offer, paragraph (1)

2. Paragraph (1) provides that the proposal must be "addressed to one or more specific persons" in order to constitute an offer. These words are intended to exclude "public offers", in the sense of an offer to unnamed members of the general public, from the ambit of the Convention. This will reverse the law in some countries in which such "public offers" are considered as offers if they meet the other criteria of an offer.

3. It should be noted, however, that an offer can be made to a large number of persons simultaneously so long as those persons are "specific persons". Therefore, an advertisement or catalogue of goods available for sale sent in the mail directly to the addressees would be sent to "specified persons", whereas the same advertisement or catalogue distributed to the public at large would not. However, such an advertisement or catalogue would constitute an offer only if, in addition, it indicated an intention of the sender to be bound and if it was sufficiently definite.

Intention to be bound, paragraph (1)

4. In order for the proposal for concluding a contract to constitute an offer, it must indicate "the intention of the offeror to be bound in case of acceptance". Since there are no particular words which must be used to indicate such an intention, it may sometimes require a careful examination of the "offer" in order to determine whether such an intention existed. This is particularly true if one party claims that a contract was concluded during negotiations which were carried on over an extended period of time, and no single communication was labeled by the parties as an "offer" or as an "acceptance". The requisite intention to be bound in case of acceptance can be established also from the surrounding circumstances or from the preliminary negotiations or usage.[3]

[3] Article 4 (2) of ULF made this clear. It enabled a proposal for concluding a contract to be "interpreted by reference to and supplemented by the preliminary negotiations, any practices which the parties have established between themselves, usage and any applicable legal rules for contracts of sale". See also article 14 of the draft Convention prepared by the Working Group which is discussed in Report of the Secretary-General: analysis of unresolved matters in respect of the formation and validity of contracts for the international sale of goods, A/CN.9/WG.2/WP.28 (reproduced in the present volume, part two, I, B, 2 below).

5. The requirement that the offeror has manifested his intention to be bound refers to his intention to be bound to the eventual contract if there is an acceptance. It is not necessary that he intends to be bound by the offer, i.e. that he intends the offer to be irrevocable. As to the revocability of offers, see article 5.

An offer must be sufficiently definite, paragraphs (1) and (2)

6. Paragraph (1) states that a proposal for concluding a contract must be "sufficiently definite" in order to constitute an offer. Paragraph (2) states that an offer is sufficiently definite if expressly or impliedly it:

Indicates the kind of goods, and

Fixes or makes provision for determining the quantity, and

Fixes or makes provision for determining the price.

The fact that the proposal for concluding a contract is sufficiently definite may be established from the surrounding circumstances or from the preliminary negotiations or usage.[4]

Quantity of the goods, paragraph (2)

7. Although, according to article 4 (2), the proposal for concluding a contract will be sufficiently definite to constitute an offer if it fixes or makes provision for the quantity of goods, the means by which the quantity is to be determined is left to the entire discretion of the parties. It is even possible that the formula used by the parties may permit the parties to determine the exact quantity to be delivered under the contract only during the course of performance.

8. For example, an offer to sell to the buyer "all I have available" or an offer to buy from the seller "all my requirements" during a certain period would be sufficient to determine the quantity of goods to be delivered. Such a formula should be understood to mean the actual amount available to the seller or the actual amount required by the buyer in good faith.

9. It appears that most, if not all, legal systems recognize the legal effect of a contract by which one party agrees to purchase, for example, all of the ore produced from a mine or to supply, for example, all of the supplies of petroleum products which will be needed for resale by the owner of a service station. In some countries such contracts are considered to be contracts of sale. In other countries such contracts are denominated as concession agreements or otherwise, with the provisions in respect of the sale of the goods considered to be ancillary provisions. In either case, the contract would be recognized as legally valid.

Price, paragraph (2)

10. Although the first sentence of article 4 (2) provides that the proposal for concluding a contract must fix or make provision for determining the price in order for it to constitute an offer, the second sentence indicates that this is not necessary "if the offer indicates the intention to conclude the contract even without making provision for the determination of the price". In such a case, the last portion of the second sentence repeats the language of article 37 of the draft Convention on the International Sale of Goods which provides the formula for determining the price.

11. It should be noted that the formula to be used if the second sentence of article 4 (2) applies would determine the price on the basis of that prevailing at the time of the conclusion of the contract, i.e. "at the moment the indication of assent is communicated to the offeror". If at that moment there was no price generally charged by the seller or generally prevailing for such goods sold under comparable circumstances, the second sentence of article 4 (2) could have no effect and no legally effective offer would have been made.

"ARTICLE 5

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

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

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

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

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

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 5.

Commentary

1. Article 5 states the time at which an offer becomes effective and the conditions under which it can be revoked.

Time at which offer is effective, paragraph (1)

2. Article 5 (1) provides that an offer becomes effective when it has been communicated to the offeree. Until this time the offeree may not accept the offer and the offeror may withdraw it, even if it is irrevocable. Therefore, if the offeree, having learned of the dispatch of the offer by some means which did not constitute "communication"[5] of the offer to him, purported to accept the offer, the offeror could nevertheless withdraw it until there was "communication".

Revocation of an offer, paragraph (2)

3. Article 5 (2) states that offers are in general revocable. However, the remainder of article 5 (2) and article 5 (3) state several situations in which the offer is or becomes irrevocable.

4. The three situations set forth in article 5 (2) which

[4] *Ibid.*

[5] The concept of communication is defined in article 12.

render a revocable offer irrevocable should be read in conjunction with article 8 (1 *bis*) and (1 *ter*). Article 8 (1 *bis*) states the general rule that an acceptance becomes effective at the moment it is communicated to the offeror. As applied to the situation in which the offeree does not dispatch an acceptance but instead commences performance by shipping the goods or paying the price, article 8 (1 *ter*) provides that the acceptance is effective at the moment notice of that acceptance is communicated to the offeror.

5. Because the receipt theory of acceptance set out in article 8 can cause the offeree to suffer loss if the offeror revokes the offer after the offeree has dispatched his acceptance, shipped the goods or paid the price, article 5 (2) states that once any one of those three acts has occurred the offer becomes irrevocable. However, the contract is not concluded until the offer has been accepted in accordance with article 8.

Irrevocable offers, paragraph (3)

6. Article 5 (3) sets forth three situations in which the irrevocability of the offer is a result of the nature of the offer. The first two would not seem to call for comment, i.e. that the offer cannot be revoked if it expressly or impliedly indicates that it is firm or irrevocable or if it states a fixed time for [irrevocability].[6]

7. An alternative provision in article 5 (3) (*b*) provides that the offer cannot be revoked if the offer states a fixed time for [acceptance]. Therefore, if the offer states "you have until 1 June to accept this offer" or "if I have not received your acceptance by 1 June, I will send the goods to someone else", the offer is irrevocable until 1 June.

8. The third situation in which the offeror cannot revoke his offer under article 5 (3) is that it was reasonable for the offeree to rely upon the offer being held open and the offeree has altered his position in reliance on the offer. This would be of particular importance where the offeree would have to engage in extensive investigation to determine whether he should accept the offer. Even if the offer does not indicate that it is irrevocable, it should be irrevocable for the period of time necessary for the offeree to make his determination.

"ARTICLE 6

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

None.

Commentary

1. Article 6 specifically states that which would otherwise have undoubtedly been understood to be the rule, i.e. that the contract is concluded at the moment that an acceptance of an offer is effective in accordance with the provisions of this Convention. It was thought desirable to state this rule explicitly because of the large number of rules in this Convention and CISG which depend on the time of the conclusion of the contract.

2. On the other hand article 6 does not state a rule for the place at which the contract is concluded. Such a provision is unnecessary since no other provisions of this Convention or of the CISG depend upon the place at which the contract is concluded. Furthermore the consequences in regard to conflicts of law and judicial jurisdiction which might arise from fixing the place at which the contract is concluded are uncertain and might be unfortunate. Therefore, it was thought best to leave this matter to the applicable national law.

"ARTICLE 7

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

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

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 7.

Commentary

General rule, paragraph (1)

1. Article 7 (1) states that a purported acceptance which adds to, limits or otherwise modifies the offer to which it is directed is a rejection of the offer and constitutes a counter-offer.

2. This provision reflects traditional theory that contractual obligations arise out of expressions of mutual agreement. Accordingly, an acceptance must comply exactly with the offer. Should the purported acceptance not agree completely with the offer, there is no acceptance but the making of a counter-offer which requires acceptance by the other party for the formation of a contract.

3. Although the explanation for the rule in article 7 (1) lies in a widely held view of the nature of a contract, the rule also reflects the reality of the common factual situation in which the offeree is in general agreement with the terms of the offer but wishes to negotiate in regard to certain aspects of it. There are, however, other common factual situations in which the traditional rule, as expressed in article 7 (1), does not give desirable results. Articles 7 (2) and (3) create exceptions to article 7 (1) in regard to two of these situations.

[6] This statement is based, *inter alia*, on the second alternative text of article 5 (3) (*b*). The first alternative text is commented on in paragraph 7.

Non-material alterations, paragraph (2)

4. Article 7 (2) contains rules dealing with the situation where a reply to an offer is expressed and intended as an acceptance but contains additional or different terms which however do not materially alter the terms of the offer. For example, an offer stating that the offeror has 50 tractors available for sale at a certain price is accepted by a telegram which adds "ship immediately" or "ship draft against bill of lading inspection allowed".

5. In most cases in which a reply purports to be an acceptance any additional or different terms in the reply will not be material and, therefore, under article 7 (2) a contract will be concluded on the basis of the terms in the offer as modified by the terms in the acceptance. If the offeror objects to the terms in the acceptance, further negotiations will be necessary before a contract is concluded.

6. If the reply contains a material alteration, the reply would not constitute an acceptance but would constitute a counter-offer. If the original offeror responds to this reply by shipping the goods or paying the price, a contract may eventually be formed by virtue of article 8 (1 *ter*).[7] In such a case the terms of the contract would be those of the counter-offer.

Confirmation of the conclusion of a contract, paragraph (3)

7. Typically, after the conclusion of an oral contract or after the conclusion of a contract by telegram or telex, one or both of the parties will send to the other a confirmation of the contract. The purpose of the confirmation is not only to produce a paper record of the transaction, but also to inform the other party of the terms of the contract as those terms were understood by the party sending the confirmation. In addition, it is common for invoices sent by the seller to contain general conditions of sale which were not discussed by the parties prior to the conclusion of the contract. Article 7 (3) recognizes an obligation on the part of the party receiving the confirmation or the invoice to verify whether those terms are consistent with his understanding of the contract and to object if they are not.

8. Article 7 (3) distinguishes between the additional or different terms in the confirmation or invoices which are printed and those terms which are not printed. The employees of both parties will seldom, if ever, read and compare the printed terms. All that is of importance to them are the terms which have been filled in. If those terms are in accord with their understanding of the contract as made orally, by telegram or telex, or if those terms contain only such additions as "ship immediately" or "ship draft against bill of lading inspection allowed", no objection will usually be made even if the printed terms contain important additions or modifications.

9. As to the non-printed terms, article 7 (3) adopts the same solution as that in article 7 (2), i.e. they become part of the contract unless they materially alter it, or notification of objection is given without delay after receipt of the confirmation or invoice.

10. On the other hand the printed terms in the confirmation form become part of the contract only if they are expressly or impliedly accepted by the other party. Such implied acceptance might be evidenced by showing a past practice of contracting on those terms or by showing actions in respect of this contract in a manner consistent with those terms. In any case, it would be the burden of the party who had sent the confirmation form to show that the other party had in some manner accepted the printed terms.

11. It should be noted that article 7 (3), unlike article 7 (2), does not place in question the existence of the contract. The contract would have been concluded by the prior oral, telegraphic or telex acceptance. Article 7 (3) governs only the question of the extent to which the additional or different terms in the confirmation become part of the contract.

"*Article 8*

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

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

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

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

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, articles 6 and 8.

UNCITRAL Arbitration Rules, article 2 (2).

[7] Under article 5 (2) the offer, i.e. the counter-offer in this example, becomes irrevocable upon the shipment of the goods or the payment of the price.

Commentary

1. Article 8 sets out the conduct of the offeree which constitutes an acceptance and the moment at which the acceptance is effective.

Acts constituting an acceptance, paragraph (1)

2. Most acceptances are in the form of a declaration by the offeree indicating assent to an offer. However, article 8 (1) recognizes that other conduct by the offeree indicating assent to the offer also may constitute an acceptance. Articles 8 (1 *bis*) and 8 (1 *ter*) indicate that one particular form of other conduct which is envisaged is the communication to the offeree that the goods have been shipped or that payment has been made.

Time at which acceptance is effective, paragraph (1 bis)

3. Some legal systems consider the acceptance of an offer to be effective on dispatch of the notice of acceptance while other legal systems consider it to be effective only on receipt by the offeror. This Convention adopts the receipt theory by virtue of the definition of "communicated" in article 12.

4. Article 6 provides that the contract is concluded at the moment that an acceptance of an offer is effective in accordance with article 8 (1 *bis*) and article 8 (1 *ter*).

5. The offeree's indication of assent to an offer can be communicated by a third party, such as a bank through whom payment has been made; it need not be communicated by the offeree himself.

6. Article 8 (1 *bis*) states the traditional rule that an acceptance is effective only if it is communicated, i.e., if it arrives, within the time fixed by the offeror or, if no such time is fixed, within a reasonable time. It should be noted, however, that article 9 provides that an acceptance which arrives late is, or may be, considered to have been communicated in due time. However, the sender-offeree still bears the risk of non-arrival of the acceptance.

Acceptance of an offer made irrevocable by shipment of the goods or payment of the price, paragraph (1 ter)

7. Article 5 (2) provides, in part, that once the offeree ships the goods or pays the price, the offer becomes irrevocable even though the offeree has not sent a declaration of acceptance to the offeror. However, article 8 (1 *bis*) provides the acceptance is not effective, and therefore, the contract is not concluded, until the offeror receives a notice of the acceptance.

8. The notice of the acceptance may consist of a declaration of acceptance pursuant to article 8 (1). However, it may also consist of a notice to the offeror that the goods have been shipped or that the price has been paid, such acts constituting "other conduct" as referred to in article 8 (1). Such a notice may come directly from the offeree or it may come from a third party, such as the bank which has paid or received the payment of the price.

9. The second sentence of article 8 (1 *ter*) is intended to preclude the possibility that an offeror would not know for an appreciable period of time that his offer, which had been revocable at the time made, was irrevocable because of the shipment of the goods or payment of the price by the offeree. Therefore, where the offer becomes irrevocable in that manner, the acceptance is not effective unless notice of the shipment or payment is given promptly after that fact. Notice given later than "promptly" would constitute a late acceptance with the consequences described in article 9.

Commencement of period of time to accept, paragraph (2)

10. Article 8 (2) provides a mechanism for the calculation of the commencement of the period of time during which an offer can be accepted.

11. If a period of time for acceptance is of a fixed length, such as 10 days, it is important that the point of time at which the 10-day period commences be clear. Therefore, article 8 (2) provides that a period of time for acceptance fixed by an offeror in a telegram "begins to run from the hour of the day the telegram is handed in for despatch".

12. In the case of a letter the time runs "from the date shown on the letter" unless no such date is shown, in which case it runs "from the date shown on the envelope". This order of preference was chosen for two reasons: first, the offeree may discard the envelope but he will have available the letter as the basis for calculating the end of the period during which the offer can be accepted and second, the offeror will have a copy of the letter with its date but will generally have no record of the date on the envelope. Therefore, if the date on the envelope controlled, the offeror could not know the termination date of the period during which the offer could be accepted.

"Article 9

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

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 9.

Commentary

1. Article 9 deals with acceptances that arrive after the expiration of the time for acceptance.

Power of offeror to consider acceptance as having arrived in due time, paragraph (1)

2. If the acceptance is late, the offer lapses and no contract is concluded by the arrival of the acceptance. However, article 9 (1) provides that the late acceptance becomes an effective acceptance if the offeror promptly

informs the acceptor orally or by the dispatch of a notice that he considers the acceptance to have arrived in due time.

3. Article 9 (1) differs slightly from the theory found in many countries that a late acceptance functions as a counter-offer. Under this paragraph, as under the theory of counter-offer, a contract is concluded only if the original offeror informs the original offeree of his intention to be bound by the late acceptance. However, under this paragraph it is the late acceptance which becomes the effective acceptance at the moment the original offeror informs the original offeree of his intention either orally or by the dispatch of a notice whereas under the counter-offer theory it is the notice by the original offeror of his intention which becomes the acceptance and this acceptance is effective only upon its arrival.

Acceptances which are late because of a delay in transmission, paragraph (2)

4. A different rule prevails if the letter or document which contains the late acceptance shows that it was sent in such circumstances that if its transmission had been normal, it would have been communicated in due time. In such case the late acceptance is considered to have arrived in due time, and the contract is concluded as of the moment of the communication of the acceptance, unless the offeror promptly notifies the offeree that he considers the offer as having lapsed.

5. Therefore, if the letter or document which contains the late acceptance shows that it was sent in such circumstances that if its transmission had been normal, it would have been communicated in due time, the offeror must send a notice to the offeree to prevent a contract from being concluded. If the letter or document does not show such proper dispatch and the offeror wishes the contract to be concluded, he must send a notice to the offeree that he considers the acceptance to have arrived in due time.

"Article 10

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 10.

Commentary

Article 10 provides that an acceptance cannot be revoked after it has become effective. This provision is a consequence of the rule in article 6 that a contract of sale is concluded at the moment the acceptance becomes effective.[8]

"Article 11

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 11.

Commentary

1. Article 11 provides that the normal rule to be applied is that an offer can be accepted and a contract can be concluded even though the offeror or the offeree has died or has become physically or mentally incapable of contracting before the acceptance became effective. In such a case the contract is concluded with the legal representative or successor of the person who died or became incapable of contracting. This rule reverses the rule in some legal systems that an offer can be accepted only if both the offeror and offeree are personally able to conclude the contract at the moment the acceptance would become effective.

2. It would appear that article 11 does not affect the rule that the offeror must have been capable of contracting at the time the offer was made. It is less clear whether the offeree must have been capable of contracting at that time.

3. The last clause of article 11 makes it clear that the offer cannot be accepted if the parties intended that the contract could be concluded only between themselves and not between one of them and a legal representative or successor of the other or if this would result from usage or from the nature of the transaction.

4. Article 11 does not relate to all the events which might occur between the making of an offer and its acceptance which would prevent the acceptance from being effective. In particular, it gives no rule for the eventuality that one or the other of the two parties would become bankrupt or that, if it was a legal person, it would cease to exist. The rules on bankruptcy are so complex and differ so widely between legal systems that it was thought not to be desirable at this time to attempt a unification of the law in respect of this one issue. Similarly, the termination of existence of a legal person for reasons other than bankruptcy is often associated with a reorganization of the corporate structure of that party. The extent to which a successor corporation should be bound by offers made by its predecessor or the extent to which it should be able to accept offers made to its predecessor was a matter thought to be better handled by direct negotiation between the two parties and, failing agreement, by the applicable national law.

"Article 12

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 12.

[8] Articles 8 (1 *bis*) and 8 (1 *ter*) state when an acceptance becomes effective.

Commentary

1. Article 12 provides that any indication of intention is "communicated" when it is delivered, not when it is dispatched. Until the delivery has occurred, the indication of intention has no legal effect.

2. One consequence of this rule is that an irrevocable offer or an acceptance may be withdrawn until it is delivered. Furthermore, an offeree who learns of an offer from a third person prior to its delivery may not accept the offer until it has been delivered.

3. An offer, an acceptance or other indication of intention is "communicated" to the addressee when, among other possibilities, it is delivered to "his place of business, mailing address or habitual residence". In such a case it will have legal effect even though some time may pass before the addressee, if the addressee is an individual, or the person responsible, if the addressee is an organization, knows of it.

Article 13

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

PRIOR UNIFORM LAW AND PROPOSED UNCITRAL TEXTS

ULF, article 13.

Draft CISG, article 7.

Commentary

1. Article 13 is modeled on article 7 of the draft CISG. However, it differs from the draft CISG in several respects.

2. Article 7 of the draft CISG is a substantive provision which states that any "usage of which the parties knew or ought to have known[9] 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" is made applicable to the contract. In this Convention, however, a "usage" is made applicable to the transaction by virtue of articles 2 (2), 11 and 14 (4). The function of article 13 is to define what constitutes a "usage" within the context of this Convention.

2. Analysis of unresolved matters in respect of the formation and validity of contracts for the International Sale of Goods*

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Introduction

1. At its eighth session the Working Group on the International Sale of Goods requested the Secretariat to prepare a commentary on the text of the draft Convention on the Formation of Contracts for the International Sale of Goods as approved by the Working Group at that session.[1] A draft commentary on the first 13 articles appears in document A/CN.9/WG.2/WP.27.* A draft commentary on article 14 is set out in part I of this report.

2. The Working Group also requested the Secretariat to analyse the UNIDROIT text of a draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods "and to suggest, with draft texts as necessary, what matters covered by that text as well as what other matters of validity of contract should be included in the draft Convention".[1] This analysis is contained in part II of this report.

3. In addition, during the course of the session it was suggested that the Secretariat might consider whether there were any additional subjects which might profitably be added to the present draft Convention on the Formation of Contracts for the International Sale of Goods. Some suggestions along these lines are contained in part III of this report. Suggestions on these matters which were communicated to the Secretariat by the German Democratic Republic are contained in the annex to document A/CN.9/WG.2/WP.30.**

4. The Working Group also requested the Secretariat to suggest a reorganization of the provisions in a more logical order and to prepare titles for the individual articles.[1] This suggested reorganization is contained in part IV of the report.

I. Draft commentary on article 14 of the draft Convention on the Formation of Contracts for the International Sale of Goods as approved or deferred for further consideration by the Working Group on the International Sale of Goods at its eighth session

"Article 14

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

"(2) If the actual common intent of the parties cannot be established, [communications, statements and declarations by and acts of] the parties are to be

[9] The Commission at its tenth session replaced the words "had reason to know" by the words "ought to have known".

* Originally issued as A/CN.9/WG.2/WP.28 on 24 August 1977.

* Reproduced in this volume, part two, I, B, 1 above.

** Idem, part two, I, B, 4 below.

[1] Report of the Working Group on the International Sale of Goods on the work of its eighth session, A/CN.9/128, para. 174 (Yearbook . . . 1977, part two, I, A).

interpreted according to the intent of one of the parties, where such an intent can be established and the other party knew or ought to have known what that intent was.

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

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

PRIOR UNIFORM LAW

Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF), articles 4(2), 5(3).

UNIDROIT Draft of a Uniform Law for the Unification of Certain Rules relating to Validity of Contracts for the International Sale of Goods (draft Law on Validity), articles 3, 4 and 5.

Commentary

5. At its eighth session the Working Group on the International Sale of Goods decided to delete the two provisions on interpretation found in ULF and requested the Secretariat to prepare a draft text on interpretation based on articles 4(2) and 5(3) of ULF and articles 3, 4 and 5 of the draft Law on Validity.[2]

6. The Working Group, after considering a draft proposed by the Secretariat, agreed that a provision on interpretation was important and should be included in the draft text. However, in view of the lack of time to discuss fully all the important issues raised by this text, and because other important matters of interpretation had not been included in it, the Working Group decided to place the provision in square brackets and requested the Secretariat to prepare a commentary on this article that included practical examples.[3]

7. This commentary on article 14 has been written in response to that request. Because of the tentative nature of the current text of article 14, this commentary is not limited to the issues raised by that text.

8. In this discussion two general questions are raised:

Whether the text should be limited to the interpretation of the statements and acts of the parties in order to determine whether a contract has been concluded or whether the text should also apply to interpretation of the contract.

What rules of interpretation should be included in the text.

These two questions are interrelated. However, some preliminary remarks in respect of the scope of application of the rules of interpretation should first be made.

Scope of application

9. The text of article 14 standing by itself would seem to provide that the rules of interpretation contained therein apply to the various communications, statements, and declarations by and acts of the parties for the purpose of determining the content of the contract once concluded as well as for the purpose of determining whether those communications, statements, declarations and acts were sufficient to constitute a contract. However, article 1 of the present draft Convention in both its alternatives provides that "This Convention [including article 14] applies to the formation of contracts . . .". Therefore, unless an exception was made to the general rules on the scope of application of this draft Convention, it would appear that article 14 would by necessity be limited to the determination of whether a contract was concluded.

10. This restricted function of article 14 as currently drafted is consistent with the functions of articles 4(2) and 5(3) of ULF, which gave rules of interpretation for determining whether a particular communication constituted an offer and whether or not the offer was irrevocable. Article 14 is, however, more restricted in its functions than were articles 3, 4 and 5 of the draft Law on Validity.

11. Articles 3, 4 and 5 of the draft Law on Validity were intended "to describe . . . the steps (and thereby to exclude others) that must be taken in order to ascertain the existence of a contract and its precise content".[4] If the application of the rules of interpretation in articles 3 and 4 showed that no agreement between the parties could be established, "there is no contract".[5] However, if by application of those rules of interpretation a contract was found to exist, the same rules of interpretation were to be applied to determine its content.

12. Some of the difficulties in restricting the application of article 14 as it is currently drafted to the question as to whether a contract has been concluded arise out of the fact that its substantive rules of interpretation are taken directly from articles 3 and 4 of the draft Law on Validity. The Working Group may wish, therefore, to consider whether it should either replace article 14 with provisions similar to articles 4(2) and 5(3) of ULF which would be limited to certain narrow questions relating to the formation of the contract or expand the scope of application of the rules on interpretation so that they would apply to the interpretation of the contract.

Content of the rules in article 14

13. The rules of interpretation currently in article 14

[2] *Ibid.*, para. 155.

[3] *Ibid.*, paras. 156 and 158.

[4] Explanatory report of the Max-Planck Institut für Auslandisches und Internationales Privatrecht (hereafter referred to as the Max-Planck report) (UNIDROIT document: ETUDE XVI/B, Doc. 22 (English and French only), p. 23). All page references given in the foot-notes pertain to the English language version of the report.

[5] Article 5.

give primacy to the subjective actual common intent of the parties. If such an actual common intent cannot be determined, the subjective intent of one of the parties is to be followed if the other party knew or ought to have known what that intent was. Upon the failure of either of these two tests to produce a result, an objective standard of interpretation is to be applied, "the intent that reasonable persons would have had in the same circumstances".

14. A fourth possible rule, one which is not found in article 14, would be that the words and actions of the parties are to be interpreted as would a reasonable third person not in the same situation as the parties. Such a test is sometimes referred to as the "plain meaning rule". The principal difference between such a rule and the rule in article 14(3) is that the reasonable persons in 14(3) are to be treated as being "in the same circumstances" as the parties. In the context of a commercial sale, it would appear that the "reasonable persons" would be merchants who dealt in the trade concerned rather than intelligent non-merchants. Furthermore, according to article 14(4), they are reasonable persons who are aware of all the negotiations of this transaction, any practices these parties have established between themselves, any conduct of these parties subsequent to the conclusion of the contract and usages relevant in the trade.

15. Therefore, if it was an industry practice that a provision in the contract that the goods were to be "50 per cent pure" was met by goods that were 49.5 per cent pure, this industry practice would be used in the interpretation of the contract under article 14(3), as being indicative of the intent that reasonable persons in the same circumstances as the parties would have had. However, this industry practice would not be used under the "plain meaning" rule because it would not accord with the understanding that intelligent individuals who were not engaged in this particular trade would give to these words.

16. It would also seem to be the case that as a result of the rule in article 14(3) the substance of article 9(3) of the Uniform Law on the International Sale of Goods (ULIS) would be introduced into this Convention as a supplementary rule of interpretation. Article 9(3) of ULIS reads:

> "3. 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."

17. Where the contract is commercial, reasonable persons in the same circumstances as the parties, i.e. in the trade concerned, would have the intent to use the meaning usually given in that trade to an expression, provision or form of contract commonly used in that trade. However, in contrast to article 9(3) of ULIS, article 14(3) is clearly subordinate to rules of interpretation which put the primary emphasis on the subjective intent of the parties.[6]

18. To a certain degree the fact that the "reasonable person" rule of article 14(3) is phrased in terms of reasonable persons in the same situation as the parties, makes the order in which the three rules are to be applied of minor importance. What is important is that the "plain meaning" rule is not to be applied. This point is well illustrated by the example used in the Max-Planck report accompanying the draft Law of Validity.

> "[T]he seller may agree with the buyer to indicate a purchase price of 50,000 in his invoice in order to reduce the broker's fees, although they are agreed that the true price is to be 100,000. The true contract of the parties (which may or may not be void for other reasons) is for 100,000, while the feigned contract is for 50,000. The latter contract is void, according to the common intent of the parties. In these cases of 'simulated contracts' the common intent of the parties is to prevail."[7]

19. As stated in the Max-Planck report, the actual common intent of the parties, which is made the governing intent by article 14(1) (article 3(1) of the draft Law on Validity), was that there should be a contract and that the contract should be for 100,000. The same result is achieved under article 14(3) because reasonable persons in the same situation as the parties would have intended the contract to be for 100,000. In fact, it is difficult to imagine a situation in which reasonable persons in the same situation as the parties with full knowledge of the transaction would have had an intent different from the actual common intent of the parties, if such an intent existed. On the other hand, application of the "plain meaning" rule would lead to the conclusion that a contract existed and that that contract was for 50,000.

20. Normally, the function of rules of interpretation such as those in article 14 is to determine the meaning of a contract. There are, however, several situations in which their function is to aid in the determination as to whether a contract exists. The most obvious case is that in which the purported words of contract, such as an exchange of telegrams in which the first one reads "Will send 100" and the reply says simply "Agreed", do not by themselves state a contract. Usually such a cryptic exchange of messages can be given a clear meaning from the prior negotiations or prior conduct of the parties and would be held to be a contract to sell specific goods at a specific price. If the application of the rules in article 14 does not give adequate meaning to the exchange of telegrams, no contract would exist.

21. A second example in which the rules of interpretation must be used to determine whether a contract exists arises when the words used by the parties appear to express agreement but there is a latent ambiguity in the words which were used. This situation is illustrated by the famous English case of *Raffles* v. *Wichelhaus*.[8]

22. In that case the parties agreed upon the sale of cotton to arrive "ex Peerless" from Bombay without either party realizing that there were two ships named *Peerless* leaving Bombay several months apart. The buyer had in mind the ship that sailed in October, and the seller had in mind the ship that sailed in December.

23. Accordingly, there was no manner by which the

[6] Article 9(3) was deleted from the revision of ULIS by the Working Group at its sixth session (A/CN.9/100, para. 38; Yearbook . . . 1975, part two, I, 1). A proposal to reintroduce that provision, or one similar in content, was rejected by a narrow margin at the tenth session of the Commission (Report of the United Nations Commission on International Trade Law on the work of its tenth session, *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17* (A/32/17), para. 86; Yearbook . . . 1977, part one, II, A).

[7] Max-Planck report, p. 23.

[8] (1864) 2 H and C 906 (Hurlstome and Coltman's Reports—Exchequer).

contract could be interpreted to arrive at the intent of the parties. They had no common intent. Neither party knew or had any reason to know of the other party's intent. A reasonable person in the same circumstances would have fared no better than the parties and there was no plain meaning of the words to help determine which of the two ships was intended. In this situation the only question left was whether the identity of the ships on which the cotton was to be shipped was an essential point on which they had to agree in order to conclude a contract, a question answered in the affirmative by the court.

24. A third situation in which the rules of interpretation might be applied to determine whether a contract existed would be where the parties exchanged words which were, standing by themselves, sufficient to constitute a contract although the parties did not as yet intend to conclude a contract. For example, the parties might agree that 100 units would be sold by the seller to the buyer at 20 per unit. Such an agreement would be sufficient to constitute a contract. However, if it could be shown from prior conduct that the parties never considered a contract to have been concluded until they subsequently agreed on the time and place of delivery, the application of the rules of interpretation in article 14 would lead to the conclusion that there was as yet no contract.

25. A different result would appear to follow from a strict application of the "plain meaning" rule of interpretation since the words used would be sufficient to constitute a contract. Unless some exception to the rule was adopted, it would not be possible to show, under article 4(1) of the draft Convention, that the purported offer does not indicate "the intention of the offeror to be bound in case of acceptance".

Examples illustrating the application of the rule of interpretation

26. At its eighth session the Working Group requested the Secretariat to prepare practical examples that would illustrate the practical effect of the rules of interpretation in article 14. The following examples have been prepared in accordance with that request.

27. *Example 1.* A seller from the United States agreed to sell to a buyer from Egypt 1,000 "tons" of ore. This was the first contract between the two parties. The seller meant a ton as understood in the United States, i.e. 2,000 lbs. (or 907.2 kilograms). The buyer meant a ton as understood in Egypt, i.e. 1,000 kilograms (or 2,204.6 lbs.). Neither party knew nor had any reason to know the other party's intention.

28. In this case neither article 14(1) nor article 14(2) can be applied since there was no actual common intent and neither party knew nor ought to have known of the other party's intention. Therefore, it is necessary to determine what intent "reasonable persons would have had in the same circumstances" in the light of the circumstances of the case.

29. In making this determination the most significant matters could be expected to be the practices in the trade and the price. These factors may also be relevant in applying the test in article 14(2), i.e. one of the parties "knew or ought to have known" what the other party intended.

30. It is unlikely that a tribunal would rule that it could not determine whether reasonable persons in the circumstances would have intended a ton of 2,000 lbs. or a ton of 1,000 kilograms. However, even if it so ruled, it would have to conclude that there was no contract since the quantity of goods to be delivered is an essential part of the contract and there are no rules in CISG to determine the quantity if the parties have not reached agreement on the point (unless the case came within article 4(2) of the present text).

31. *Example 2.* The same facts as in example 1 except that it was an industry practice to sell the ore by units of metric tons. However, the seller was new to the trade and did not know of this industry practice.

32. In such a case, even though this seller could show that he did not know of the industry practice to sell ore by units of metric tons, he ought to have known of that practice. Since the buyer intended a metric ton and the seller ought to have known that the buyer intended a metric ton, the application of the rule in article 14(2) results in a contract for 1,000 metric tons of ore.

33. Alternatively, a tribunal might apply article 14(3). Thus, reasonable persons in the same circumstances would have intended a "ton" to mean a metric ton. Use of the "plain meaning" rule would lead to difficulties, since the word "ton" has more than one meaning (and particularly in an international context), unless the plain meaning was to be determined according to the specific meaning used in the trade.

34. *Example 3.* The facts are the same as in example 1 except that, while the seller meant a ton of 2,000 lbs., he knew that it was the industry practice to sell in units of metric tons. The buyer, on the other hand, did not know of the industry practice of selling in units of metric tons but, coming from a country which used the metric system, he assumed that the word ton meant a metric ton.

35. There was no actual common intent of the parties in this case. However, the buyer intended that the contract be for 1,000 metric tons. The seller ought to have known that the buyer intended the contract to be for 1,000 metric tons but the reason he ought to have known this was not the reason the buyer had such an intention. Nevertheless, a tribunal would probably hold on the basis of article 14(2) that there was a contract and that it was for 1,000 metric tons.

36. As in example 2, the tribunal might apply article 14(3), to the effect that reasonable persons in the same circumstances would have intended a "ton" to mean a metric ton.

37. *Example 4.* The buyer's printed purchase order form contained a clause providing for arbitration of any dispute arising out of the contract. The seller's printed confirmation form contained a clause providing that the commercial court where the seller had his place of business had exclusive jurisdiction over any dispute arising out of the contract. Neither party objected to the provision in the other party's form.

38. This case will not be settled according to the rules of interpretation in article 14 but by application of the provisions of article 7 of the draft Convention. If it is determined that the provision in the seller's confirmation form conferring jurisdiction of any dispute arising out of the contract on the commerical court at his place of business is a material alteration of the terms of the

offer, no contract would arise out of the exchange of purchase order and confirmation form. If it is determined not to be a material alteration, a contract is concluded which includes the term in the seller's form.

39. *Example 5.* There was an agreement for the sale of goods "FOB". As a consequence of this trade term the risk of loss would normally pass when the goods were handed over to the ocean carrier.[9] However, the negotiations between the parties show that the price was adjusted to compensate for the fact that the seller's blanket insurance policy was to cover the goods during shipment.

40. Notwithstanding the normal meaning of an FOB term, it may be found that the actual common intent of the parties was that the seller should bear the risk during transit.

II. Validity of contracts

41. In the report of the Secretary-General prepared for the eighth session of the Working Group it was "suggested that the draft Convention to be prepared not include any provisions in respect of validity of contracts based on the [draft Law on Validity]".[10] This conclusion was reached after an analysis of the practical need for a text on the validity of contracts of international sale of goods and of the text of the draft Law on Validity itself.

42. At its eighth session the Working Group decided to prepare a new provision on interpretation based upon articles 3, 4 and 5 of the draft Law on Validity as well as on articles 4(2) and 5(3) of ULF. As to the rest of the draft Law on Validity, the Working Group requested the Secretariat to analyse the remainder of the text in the light of the discussions which had taken place and to suggest, with draft texts as necessary, what matters covered by that text as well as what other matters of validity of contracts should be included in the draft Convention.[11]

43. In addition, the Working Group invited any representatives or observers to submit their views to the Secretariat on the matter.[11] Observations were submitted by the representative of the United Kingdom[12] and a suggestion in respect of the validity of contracts was received from the German Democratic Republic.[13]

Analysis of the draft Law on Validity

44. The Secretariat has reviewed the text of the draft Law on Validity in the light of the discussions at the eighth session of the Working Group and of the observations of the German Democratic Republic and of the representative of the United Kingdom. On the basis of this review the Secretariat would suggest that of the articles of the draft Law, other than those concerned with interpretation, the Working Group consider for inclusion in the draft Convention only articles 9 and 16.

45. Of the articles not recommended for inclusion, the most important is article 6 which states the main policy choices of UNIDROIT in respect of the law of mistake. In the report of the Secretary-General issued in preparation for the eighth session of the Working Group it was stated that it was doubtful if the text would lead to a uniform body of interpretation.[14] It is believed that that conclusion was accurate. Furthermore, it does not seem that the problems lie in any particular deficiencies in the text as prepared by UNIDROIT which could be rectified by a new and different text.[15]

46. A decision not to include article 6 of the draft Law in the draft Convention implies that articles 7, 8, 10 and 15, all of which depend on the existence of a definition of mistake in article 6, will not be included. It is suggested that article 11 is not suitable for the reasons given in the previous report of the Secretary-General[16] and in the observations of the representative of the United Kingdom.[17] Articles 12, 13 and 14 deal with the mechanics of the avoidance of the contract under articles 6, 10 or 11 and are not necessary if those articles have not been included in the draft Convention.

47. However, even though articles 9 and 16 assume the existence of the provisions on mistake, they do not depend on the existence of those articles and the Working Group may wish to consider their inclusion in the draft Convention. In each case the article specifies which of several possible remedies may be available to a party who has not received that which he expected in the transaction.

Limitation on rights to avoidance for mistake

48. Article 9 of the draft Law on Validity provides:

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

49. If the goods which are the subject-matter of the contract do not conform to the contract and this non-conformity existed at the time of the conclusion of the contract, it would be possible to hold that the seller has breached the contract in respect of the conformity of the goods. Accordingly, the buyer would have the rights under the substantive law of sale of goods which follow upon such a breach. It would also be possible to hold that the buyer was mistaken as to the quality of the goods at the time of contracting and that his rights were those which follow upon such a mistake.

50. Article 9 provides that where the substantive law of sales affords the buyer a remedy based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods, the

[9] Draft Convention on the International Sale of Goods, article 65(1), Report of the United Nations Commission on International Trade Law on the work of its tenth session, *Official Records of the General Assembly, Thirty-second Session, Supplement No. 17*, (A/32/17), para. 35 (Yearbook . . . 1977, part one, II, A). According to Incoterms, in an FOB contract the risk passes when the goods pass the ship's rail.

[10] A/CN.9/128, annex II, para. 27 (Yearbook . . . 1977, part two, I, C).

[11] A/CN.9/128, para. 174 (Yearbook . . . 1977, part two, I, A).

[12] See document A/CN.9/WG.2/WP.29, annex (reproduced in the present volume, part two, I, B, 3 below).

[13] See document A/CN.9/WG.2/WP.30, annex, para. 3 (reproduced in the present volume, part two, I, B, 4 below).

[14] A/CN.9/128, annex II, commentary on article 6.

[15] See also the detailed observations of the representative of the United Kingdom (A/CN.9/WG.2/WP.29, annex, paras. 3-13).

[16] A/CN.9/128, annex II, commentary on article 11.

[17] A/CN.9/WG.2/WP.30, annex, para. 15.

buyer may not avoid the contract on the ground of mistake.

51. This provision was originally seen as supplementing articles 34 and 53 of ULIS, which limited the buyer to the rights provided by ULIS and excluded all other remedies where there was a lack of conformity of the goods or where the goods were subject to a right or claim of a third person.[18] Even though these provisions have been deleted from the draft Convention on the International Sale of Goods, the Working Group may wish to conclude that it would be appropriate in a draft Convention on the formation and validity of contracts of international sale of goods to include a provision similar to article 9, whether or not the draft Convention includes substantive provisions on the law of mistake.

52. The current text of article 9 would seem to say that the right to avoid the contract on the ground of mistake is precluded only if there is in fact a remedy available to the buyer. However, the Max-Planck report which accompanies the text of the draft Law states that "article 9 is meant to cover also those cases in which the buyer might have relied on a remedy under ULIS if, in the circumstances, those remedies had not been barred (for example, because the lack of conformity is immaterial or the buyer has not given prompt notice, . . .)".[19]

53. In order to achieve the result suggested by the Max-Planck report, a result which would seem to be appropriate,[20] it may be sufficient to delete the words "if the circumstances on which he relies afford him a remedy". This would leave to the substantive law of sales all cases in which the buyer alleged that the seller had breached the contract because the goods did not conform to the contract or that third parties had rights in the goods. If the Working Group were to adopt this approach, the text would read as follows:

"The buyer may not avoid the contract on the ground of mistake based on the non-conformity of the goods with the contract or on the existence of rights of third parties in the goods."

54. Article 16 of the draft Law on Validity provides:

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

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

55. Article 16 is similar to article 9 in that it specifies that in two particular cases the party who alleges that the other party failed to perform the contract must rely on the substantive law of sales rather than avoid the contract for mistake. These two situations are:

The performance of the assumed obligation was impossible at the time of the conclusion of the contract, and

The goods sold did not belong to the seller.

56. The Max-Planck report points out that, "following judicial practice and advanced modern doctrines"

"[T]here appears to be no reason to make the validity of the contract depend upon the accidential fact that the object sold has perished before or after the conclusion of the contract. The impossibility of delivery of the perished goods should leave the door open, to determine the rights and obligations of the parties according to the flexible rules on non-performance."[21]

57. In the critical analysis of the draft Law prepared by the Secretary-General[22] it was suggested that the difficulty with article 16 was that it assumed that the doctrines of non-performance in the applicable substantive law of sales would apply to an impossibility of performance existing at the time of the conclusion of the contract. However, it was noted that according to the Max-Planck report "most legal systems declare a contract of sale to be void if the specific object sold had already perished at the time of the conclusion of the contract". Similarly, it was noted that article 50 of the draft CISG as the text then existed proceeded on the basis that the impediment to performance which exempts the non-performing party from liability in damages for his non-performance must have occurred after the conclusion of the contract.

58. The Working Group may wish to consider whether this conclusion remains valid. During the tenth session of the Commission article 50 of CISG (now article 51) was changed in a manner which no longer supports the prior conclusion that that text would not apply to an impossibility of performance which occurred prior to the conclusion of the contract.[23] Furthermore, the Working Group might conclude that a legal system which adopted this Convention, including a provision such as that in article 16, would adapt to its requirements by providing that the law in respect of impossibility of performance applied to those events which occurred prior to the conclusion of the contract as well as to those events which occurred after the conclusion of the contract.

59. The Max-Planck report explains the purpose of paragraph 2 of article 16 as follows:

"Paragraph 2 excludes the rule of certain countries that deem a contract of sale void if the seller did not own the sold object. While art. 9 of the draft excludes avoidance of the contract, in such a case, on the ground of mistake, a special provision is necessary to save the contract from nullity *per se*. The rights and duties of the parties are to be determined by the rules of the applicable law relating to a valid contract of sale, especially those on performance and non-performance."[24]

[18] Max-Planck report, p. 37.

[19] Pp. 31 and 39.

[20] This view is also expressed in the observations of the representative of the United Kingdom (A/CN.9/WG.2/WP.29, annex, para. 16, foot-note *f*).

[21] P. 49.

[22] A/CN.9/128, annex II, commentary on article 16.

[23] The text was changed in relevant part from "if he proves that it was due to an impediment which occurred without fault on his part" to "if he proves that the failure was due to an impediment beyond his control". Under the original wording the provision was open to the interpretation that the impediment must have occurred after the conclusion of the contract since the Convention generally concerned itself with the relationship of the buyer and seller after the contract of sale was concluded. The revised text removes this interpretation by concentrating on the failure to perform.

[24] P. 51.

Other proposals in respect of validity

60. During the eighth session of the Working Group the representative of Hungary submitted the following proposal,[25] the consideration of which was deferred by the Working Group to its ninth session:

"I

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

"II

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

61. The German Democratic Republic has suggested that the following paragraph be added to the proposal of the representative of Hungary:

"In case a party violates the duties of care customary in the preparation and formation of a contract of sale, the other party may claim compensation for the costs borne by it."[26]

III. Additional subjects which might be included in the draft Convention on the Formation of Contracts for the International Sale of Goods

62. During the eighth session of the Working Group it was suggested that the Secretariat consider whether there were any additional subjects within the general scope of the draft Convention which might profitably be added to the current text. One such subject is suggested. In addition, the German Democratic Republic has communicated a number of suggestions which are contained in the annex to document A/CN.9/WG.2/WP.30.

Termination of an offer by rejection

63. Article 7(1) provides that "A reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." Although not explicitly stated, the provision seems to assume that an offer can no longer be accepted by the offeree once it has been rejected by him.

64. Such a rule appears to exist in most, if not all, countries in respect of a revocable offer.

65. However, it appears that there are different rules in various countries as to whether the rejection of an irrevocable offer terminates the power of an offeree to accept the offer after such a rejection but prior to the date on which the offer would otherwise lapse. In many of the civil law systems an offer, even though irrevocable, is terminated by a rejection, although the time during which the offer could have been accepted has not yet expired. In most of the common law systems, on the other hand, an irrevocable offer is probably not terminated by rejection. However, if the offeror has materially changed his position in reliance upon such a rejection, the offeree may be precluded from subsequently accepting.[27]

66. The practical effect of these rules is not only determined by the formal rule itself but by the willingness of a tribunal to find that the offeree's reply to the offer was or was not a rejection of the offer. The problem arises most acutely when an offeree who is not willing simply to accept an offer as made inquires about possible changes in the terms or proposes different terms. In either case a tribunal might find that the reply constituted a rejection of the offer, as in article 7(1), or it might find that it was an independent communication which did not constitute a rejection of the offer.

67. It would probably not be possible to draft a rule more explicit than that already in article 7(1) to the effect that "A reply to an offer containing additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer." However, the Working Group may believe that it would be useful to have a rule as to whether, after the rejection of an offer, the offer can still be accepted by the offeree.

68. If the Working Group does wish to adopt such a rule, it would have a choice between several major possibilities, e.g.:

Rejection of an offer, whether revocable or irrevocable, terminates the offeree's power to accept the offer.

Explicit or implicit rejection of an offer terminates the offeree's power to accept unless the offer was irrevocable and the offeree paid the offeror to make the offer irrevocable or the offer was part of a larger transaction such as a concession agreement.

Rejection of an offer, whether revocable or irrevocable, terminates the offeree's power to accept the offer except that a rejection which arises out of the making of a counter-offer does not terminate the offeree's power to accept an irrevocable offer.

Rejection of an irrevocable offer does not terminate the offeree's power to accept the offer, unless there is a change in position by the offeror in reliance on the rejection.

Rejection of an irrevocable offer does not terminate the offeree's power to accept the offer.

69. There is nothing in the doctrinal structure of articles 1 to 13 of the draft Convention which leads to a clear choice among these alternatives. It could as easily be said that the power to accept has been terminated because a party can always act unilaterally to waive his unilateral rights as it could be said that the power to accept cannot be terminated unilaterally by the offeree because the irrevocable offer is—or is of the nature of—a contract which can be terminated only by mutual agreement.

70. It is also difficult to choose between the alternatives on the basis of policy. On the one hand the fact that the offer was made irrevocable by the offeror suggests that there were good reasons for doing so at the time and that those reasons may still exist. Certainly an offeree should not lightly lose the benefits of irrevocability because he wished to negotiate for better terms. On the other hand the offeror should be free to contract with someone else—or to reorder his affairs so that he has no need to contract with anyone—once he has a

[25] A/CN.9/WG.2/VIII/CRP.8

[26] A/CN.9/WG.2/WP.30, annex, para. 3.

[27] The discussion in this section relies upon Rudolf B. Schlesinger ed., *Formation of Contracts: A Study of the Common Core of Legal Systems* (Oceana Publications, Dobbs Ferry, N.Y., 1968) sect. B-3, which contains an analysis of the law of a number of countries throughout the world.

clear indication that the offeree does not wish to contract on the basis of the offer.

71. It may be that a reasonable rule in this situation would be the third alternative suggested above, i.e. a rejection of an offer, whether revocable or irrevocable, terminates the offeree's power to accept the offer except that a rejection which arises out of the making of a counter-offer does not terminate the offeree's power to accept an irrevocable offer. If the Working Group were to adopt such a rule, it may wish to consider whether any modification of article 7(1) of the draft Convention would be desirable.

IV. Reorganization of provisions of the draft Convention

72. The Working Group on the International Sale of Goods at its eighth session requested the Secretariat to suggest a reorganization of the provisions of the draft Convention on the Formation of Contracts for the International Sale of Goods and to prepare titles for each article.[28] This suggested reorganization has been prepared in response to that request.

Proposed numbering	*Current numbering*	*Proposed titles of each provision*
(Chapter I. Sphere of application)		
1	1	Scope
2	2	Autonomy of parties
(Chapter II. General provisions)		
3	3	Form
4	14	Interpretation
5	13	Usage
6	12	Communication
7	11	Death or incapacity of a party
(Chapter III. Formation of the contract		
8	4	Offer
9	5(1)	Time of effect of offer
10	5(2) + 5(3)	Revocability of offer
11	8(1), 8(1 *bis*) 8(1 *ter*)	Acceptance
12	7	Additions or modifications to the offer
13	8(2), 8(3)	Times fixed for acceptance
14	9	Late acceptance
15	10	Revocation of acceptance
16	6	Time of conclusion of contract
17	3A	Modification and rescission of contract

3. Observations of representatives on the draft of a Uniform Law for the Unification of Certain Rules relating to Validity of contracts for the International Sale of Goods*

Introduction

1. The Working Group on the International Sale of Goods, at its eighth session (New York, 4-14 January 1977), invited representatives of Member States and the observers who attended that session to submit to the Secretariat their observations on the text of the draft of a uniform law for the unification of certain rules relating to validity of contracts for the international sale of goods which has been prepared by the International Institute for the Unification of Private Law (UNIDROIT).[1]

2. At the time of issuing this note, observations had been received from the representative of the United Kingdom of Great Britain and Northern Ireland. The text of these observations is set out in the annex to this note.

[28] A/CN.9/128, para. 174.

* Originally issued as A/CN.9/WG.2/WP.29 on 12 August 1977.

ANNEX

Observations of the representative of the United Kingdom of Great Britain and Northern Ireland on the UNIDROIT draft on validity

1. These observations will be largely confined to articles 6, 10 and 11 of the draft because these are the key articles upon the acceptability of which everything else depends. For the difficulties which are presented by the other articles, reference may be made to the Secretariat's commentary (A/CN.9/WG.2/WP.26/Add.1).*

Article 6

2. This article lays down three sets of conditions which must be fulfilled at the time of the conclusion of the contract in order to enable a party to avoid a contract for mistake. Each set of conditions presents particular difficulties and therefore requires individual consideration.

Article 6 (a)

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

3. There are two difficulties in this clause. The first lies in determining the meaning to be given to the phrase "in accordance with the above principles of interpretation", and the second in reconciling the apparent meaning of the phrase "such importance that the contract would not have been concluded on the same terms . . ." with the meaning which the Max-Planck report shows that it was intended to bear.

4. In giving a meaning to the phrase "in accordance with the above principles of interpretation" (i.e. those in article 3 and article 4) one must distinguish between the mistake and the object of the mistake. The mistake is the mistake of one party, though it may (but need not) be shared by the other party; see article 6 (*c*) ("the other party has made the same mistake") and article 7 (2). The "above principles" can therefore play no part in determining whether there has been a mistake, because those principles are concerned only with the interpretation of a common intent. On the other hand they do play a part in relation to the object of the mistake. This object must have been "of such importance that the contract would not have been concluded on the same terms if the truth had been known", and in order to determine whether the contract would have been so concluded it is not sufficient to look simply to the probable attitude of the mistaken party, i.e. one must not ask whether he himself would have accepted (or offered) the same terms (in this respect the Secretariat's commentary is, according to the interpretation of the Max-Planck report, in error). One must look, in the first place, to the actual common intent of both parties (article 3 (1)). But this, as the Max-Planck report accepts, will rarely have existed, i.e. it is very unlikely that the parties will have asked themselves at the time of the conclusion of the contract which elements were of the necessary importance; and if they did ask themselves the question, it is very unlikely that they arrived at an agreed answer. (Indeed, if they did agree on the

[1] See report of the Working Group on the International Sale of Goods on the work of its eighth session, A/CN.9/128, para. 174 (Yearbook . . . 1977, part two, I, A).

* Yearbook . . . 1977, part two, I, C, appendix II.

answer, the question of mistake will presumably not arise, since the situation will be governed by that agreement). If there is no such common intent, one must look (article 3 (2)) to what the mistaken party thought, but only if the other party knew or ought to have known what that was. But, as the Max-Planck report once again accepts, this condition is very unlikely to be satisfied, and one is left with article 3 (3): "the statements by and the acts of the parties shall be interpreted according to the intent that reasonable persons would have had in the same situation as the parties".

5. The meaning of article 6 (*a*) is therefore that the mistaken party's mistake must be of such importance that reasonable persons in the same situation as the parties would not have concluded the contract on the same terms if they had known the truth. And it is here that the central difficulty of the clause lies. On the one hand the test thus formulated is very artificial: it presupposes that for any given set of circumstances there is an objectively ascertainable set of terms on which reasonable men would agree. And on the other hand the formulation is much too wide, as the Secretariat's commentary makes clear. Almost any difference between the circumstances as they were thought to be and the circumstances as they in fact were might have led reasonable men to make some modification, even if only a small one, of the terms on which the contract was concluded.

6. It is, however, evident from the Max-Planck report that this very wide interpretation was not intended. For the report takes it for granted that a mistake as to the value or the marketability of the goods will not normally be sufficient. And yet reasonable persons in the same situation as the parties would certainly not have expected the price to be the same if the value of the goods had been different. The key to the restrictive interpretation adopted by the Max-Planck report is the importation by the report of the additional requirement that the mistake must be "essential", or, to be more precise, the importation of the gloss that the only mistake which can be "of such importance that the contract would not have been concluded on the same terms if the truth had been known" is a mistake which, having regard to usage and commercial practice, reasonable persons would consider to be "essential". To this there are two objections. The first is that if this is the meaning intended, it should be expressed in the text; the second is that even if it were expressed it would introduce a new element of uncertainty. In this connexion it is worth noticing that the Italian Civil Code proceeds on somewhat similar lines in that there is a requirement that the mistake be essential and what is essential is defined in terms, *inter alia*, of what is "determinative of consent".[a] But even though the test is much more closely defined, being limited to mistakes as to a "determinative" quality of the thing or the other person, it has given rise to difficulties of interpretation. The meaning given to it is, according to a leading commentary, "not what a superficial reading suggests".[b] The qualities to which the courts have regard must, it has been said,[c] be "those which by the nature of the thing or by express agreement are to be considered essential to the social function or the economic purpose of the thing". In an international context a test of this kind would give rise to wide variations in application.

7. In short, the objection to article 6 (*a*) as it stands is that it is unacceptably wide, and the objection to it if it were to be reformulated to express what is contained in the Max-Planck report is that the criterion would be so variously construed that no uniform body of interpretation would develop.

8. An illustration of the scope for divergent interpretations is provided by cases of mistake as to value or as to marketability. As is remarked below (see para. 16), it is difficult to find realistic examples which would not be excluded by one or more of the other provisions of the draft, but one may instance two conceivable fact situations:

(*a*) A contract for the sale of a quantity of copper is concluded in ignorance of the fact that the Government of State X has just announced the release of a large amount of the metal from its strategic stocks. The market price falls in consequence.

(*b*) An importer in State A contracts to buy from a manufacturer in State B a quantity of souvenirs of the President of State B, who is about to celebrate his jubilee and who enjoys considerable popularity in State A. Unknown to both parties the President has died at the moment of conclusion of the contract. If one applies to these cases the test formulated in article 6 (*a*) as it stands, one must surely say that a reasonable buyer in case (*a*) would not have bought at the same price, and a reasonable seller would not have expected to sell at the same price. And similarly in case (*b*) a reasonable buyer would not have bought at all and a reasonable seller would not have expected to sell if it had been known that the President was dead. The Max-Planck report, as has been noted above, takes it for granted that both cases would be excluded, apparently on the ground that the mistake would not be regarded in commercial usage as "essential". But it is difficult to see that there can be a usage as to whether a mistake is essential or not. It is no doubt true that no system of law would allow these mistakes to vitiate the contract, but this is either because the definition of mistake is so restricted as to exclude such matters (as in the Italian Civil Code referred to above[d]) or because a specific remedy for lesion is taken to exclude any other remedy for mistake as to value.

Article 6 (b)

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

9. The difficulty here, as the Secretariat's commentary indicates, is that the concept of assumption of risk, without further elaboration, is very vague. The Max-Planck report suggests that the mistaken party assumes the risk if at the time of the conclusion of the contract "he does not fully know all the relevant facts", with the result that the contract is speculative. But this hardly helps. The most obvious examples of speculative contracts are those in which some of the relevant facts are not known because they lie in the future and each party therefore makes his own guess as to what they will be (e.g. future movements of prices). But mistakes about future facts are specifically excluded by article 8. The facts to which the Max-Planck report refers must therefore be present facts. But whenever a party is mistaken (unless the mistake is one of law) he necessarily "does not know all the relevant facts"; otherwise he would not be mistaken. What the Max-Planck report means presumably is that the mistaken party "does not fully know all the relevant (present) facts and is aware that he does not know them". But in that case he is not mistaken. An example is provided by a recent French case[e] in which the buyer, a firm which made ladies' clothes, bought some velvet furnishing material which it intended to make into trousers. The seller knew this, but gave no undertaking as to the cloth's suitability. The cloth proved unsuitable and the buyer sought to avoid the contract on the ground that he was mistaken as to a "substantial quality" in view of which he had entered into the contract, viz. the suitability of the cloth for trousers. It was decided (and the decision was upheld) that the buyer was not mistaken, since he was an expert and knew that the cloth was furnishing material and might not be suitable for trousers.

10. It would seem therefore that the test proposed by the Max-Planck report for determining whether the mistaken party has assumed the risk of his mistake is unhelpful. But unless the concept of assumption of risk is given some closer definition (which does not appear easy) it is likely to be used by courts indiscriminately and unpredictably to exclude plaintiffs who are considered to be in some way undeserving.

Article 6 (c)

(*c*) The other party has made the same mistake, or has caused

[a] Article 1429: Mistake is essential (1) when it relates to the nature or the object of the contract; (2) when it relates to the identity of the object of the performance required by the contract or to a quality of that object which, according to common understanding or in relation to the circumstances of the contract, should be considered to be determinative of consent; (3) when it relates to the identity or qualities of the person of the other party, provided that one or the other were determinative of consent; (4) when, in the case of mistake of law, it was the sole or principal reason for the contract.

[b] Mirabelli, *Commentario sul Codice Civile*, 2nd ed., IV. 2, *ad loc.*

[c] *Rassegna di Giurisprudenza sul Codice Civile, ad loc.*

[d] Neither value nor marketability are a "quality of the object". Similarly, the German Civil Code confines mistake (in this context) to "qualities of the thing which are regarded in ordinary dealing as essential" (BGB1., para. 119.2).

[e] Cass. com. 4 July 1973, D.1974.538.

the mistake, or knew or ought to have known of the mistake and it was contrary to reasonable commercial standards of fair dealing to leave the mistaken party in error.

11. Here, as the Secretariat's commentary points out, the questions whether (i) a mistake was "caused" by the other party, or (ii) the other party's failure to disabuse the mistaken party of his mistake was contrary to "reasonable commercial standards etc." seem certain to give rise to wide divergences of interpretation. In both cases the main problem is that of silence. In case (ii) the question whether the party "ought to have known" and, more particularly, the question whether his silence was contrary to "reasonable commercial standards etc." pose difficult questions because commerical standards in this sphere vary according to the strength given in a particular legal system to the maxim *caveat emptor*. But the difficulty is greater in case (i). Causation is a notoriously elusive concept. The Max-Planck report refers to the Anglo-American doctrine of innocent misrepresentation, and this would provide a workable rule, but it requires a positive representation, except in special circumstances which create a duty to disclose, i.e. a duty not to remain silent. The concept of causation may, however, embrace more than this. For the Max-Planck report says that "silence of the co-contractant may cause the mistake", and this is not confined to such special circumstances (or to cases of bad faith). For the report adds that "[e]ven though [the co-contractant] may have been totally free from blame, he caused the mistake if the course of events leading to the mistake originated in his sphere". It would seem therefore that, on the view taken by the Max-Planck report, if one party's failure to speak is misunderstood by the other party as a representation and the second party in consequence makes a mistake within the meaning of article 6 (*a*), he may avoid the contract even though the first party had no reason to foresee the misunderstanding.

12. It is not only in cases of silence, however, that the elasticity of the concept of causation may cause difficulties. For example, the Max-Planck report, in its discussion of article 7, says that if an offeror asks for the acceptance to be sent by telegram and, the offeree having complied with this request, there is a mistake in the transmission of the telegram, the offeror may be considered to have caused the mistake. Again, the Max-Planck report, in its discussion of the present clause, says that "[m]ere puff used in advertising or in negotiations in itself is nowhere considered to be a representation", and this is no doubt correct, but the test adopted in the draft text is not that of representation but that of causation, and if causation is given as wide an application as it is in the examples so far considered, it is difficult to see why a puff should not be said to have caused a mistake.

13. In short, this clause also is likely to give rise to a wide variety of interpretation according to the force given by different legal systems to the maxim *caveat emptor* and the concept of causation.

Article 10

1. A party who was induced to conclude a contract by a mistake which was intentionally caused by the other party may avoid the contract for fraud. The same shall apply where fraud is imputable to a third party for whom the other party is responsible.

2. Where fraud is imputable to a third party for whose acts the other contracting party is not responsible, the contract may be avoided for fraud if the other contracting party knew or ought to have known of the fraud.

14. The crucial difficulty lies in the first sentence of clause 1 and its relationship to article 6 (*a*). If article 6 (*a*) bears the restricted interpretation which is given to it by the Max-Planck report, the first sentence here is acceptable. For on this interpretation, if the mistake was not caused intentionally the mistaken party may only avoid the contract if he can show that the mistake was "essential", whereas if the mistake was caused intentionally, even an "inessential" mistake will be sufficient, provided that it did in fact induce the mistaken party to conclude the contract. But if article 6 (*a*) bears the meaning which a normal interpretation would give to it (see above, paras. 5 and 8), the formulation of the first sentence here will lead to obviously unsatisfactory results. For on this interpretation the mistaken party who invokes article 6 (*a*) need only show that some term of the contract would have been different if the mistake had not been made, whereas under article 10 he must show that the contract would not have been concluded at all. See the Secretariat's commentary on this point.

Article 11

A party may avoid the contract when he has been led to conclude the contract by an unjustifiable, imminent and serious threat.

15. As the Secretariat commentary points out, this very general formulation leaves many questions unanswered. The result will inevitably be that national courts will interpret the article according to the principles which their own systems have adopted in this area, and there will in effect be no uniform law. If this is to be so, it is surely better that there should not be even the appearance of such a law.

Conclusion

16. The observations made above have in common the criticism that the draft is cast in such general terms that no uniform interpretation is likely to emerge, and that, in the case of article 6 (*a*) in particular, it is capable of bearing an intolerably wide meaning. And yet, paradoxically, this potentially very wide rule is subjected to a number of restrictions (article 6 (*b*), (*c*); article 8, and especially article 9[f] and article 16[g]) which, at least if they are strictly interpreted, make it very difficult to conceive of circumstances likely to arise in international trade in which a plea of mistake could be successfully made.

4. Observations of the German Democratic Republic*

The German Democratic Republic submitted the observations contained in the annex to this note.

ANNEX

Observations of the German Democratic Republic

On the basis of the draft Convention on the Formation of Contracts for the International Sale of Goods considered or deferred for further consideration by the Working Group on the International Sale of Goods of UNCITRAL at its eighth session from 4 to 14 January 1977 in New York, the German Democratic Republic experts, in preparation for the ninth session of the Working Group, are submitting the following proposals for further improving the above-mentioned draft:

1. The present article 6 should be supplemented by a second and third paragraph of the following text:

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

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

2. It is recommended that the following new articles be inserted between articles 10 and 11:

"*Article 10* bis

"(1) If a contract of sale has been concluded under a suspen-

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

It is not suggested that this restriction is undesirable. On the contrary, whether or not the Uniform Law includes any provisions on mistake, it is surely essential that it should contain something on the lines of this article to prevent a buyer from escaping from the restrictions imposed on the remedy for non-conformity by having recourse to a plea of mistake.

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

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

* Originally issued as A/CN.9/WG.2/WP.30 on 12 August 1977.

sive condition, it will become effective at the moment the condition occurs.

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

"*Article 10* ter

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

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

"*Article 10* quater

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

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

"*Article 10* quinquies

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

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

3. The Hungarian proposal under A/CN.9/WG.2/VIII/CRP.8 should be supplemented by another principle and adopted into the draft Convention:

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