

**DRAFT CONVENTION PROVIDING A UNIFORM LAW  
ON THE ACQUISITION IN GOOD FAITH OF CORPOREAL  
MOVABLES (1)**

The States signatory to the present Convention,

Desiring to establish a uniform law on the acquisition in good faith of corporeal movables,

Have resolved to conclude a Convention for this purpose and have agreed upon the following provisions :

*Article I*

1. — Each Contracting Party undertakes that not later than six months after the date of entry into force of this Convention in respect of that Party it shall introduce into its law the rules on the acquisition in good faith of corporeal movables set out in the Annex to this Convention.

2. — Each Contracting Party may introduce the provisions of the Annex into its law either by reproducing the actual text, or by translating it into its official language or languages.

3. — Each Contracting Party may introduce into its law such further provisions as are necessary to give the provisions of the Annex full effect in its territory.

4. — Each Contracting Party shall submit to the Depositary Government the text of the rules introduced into its national law in order to implement the provisions of this Convention.

*Article II*

[No reservation shall be admitted to this Convention or to its Annex].

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(1) Text established by the Committee of Governmental Experts convened by UNIDROIT.

*Article III*

1. — The present Convention shall be open for signature at ...  
..... from ..... until .....
2. — The Convention shall be subject to ratification.
3. — Instruments of ratification shall be deposited with the Government of ....., which shall be the Depositary Government.

*Article IV*

1. — The Convention shall be open indefinitely for accession.
2. — Instruments of accession shall be deposited with the Depositary Government.

*Article V*

1. — The present Convention shall enter into force six months after the date of deposit of the fifth instrument of ratification or accession with the Depositary Government.
2. — In the case of each State which ratifies this Convention or accedes to it after the fifth instrument of ratification or accession has been deposited, this Convention shall enter into force six months after the deposit of its own instrument of ratification or accession.

*Article VI*

1. — Any Contracting Party may denounce this Convention by written notification to the Depositary Government.
2. — Such denunciation shall take effect twelve months from the date on which the Depositary Government has received the notification.

*Article VII*

1. — Two or more Contracting States may declare that they agree to consider themselves as the same State for the purpose of the requi-

rements as to place of business laid down in paragraphs 1 and 2 of Article 1 of the Uniform Law, because they apply to the situations, which in the absence of such a declaration would be governed by the Uniform Law, the same or closely related legal rules.

2. — Any Contracting State may declare that it does not consider one or more non-Contracting States as different States from itself for the purpose of the requirements of the Uniform Law which are referred to in paragraph 1 of this Article, because such States apply to situations, which in the absence of such a declaration would be governed by the Uniform Law, legal rules which are the same as or closely related to its own.

3. — If a State which is the object of a declaration made under paragraph 2 of this Article subsequently ratifies or accedes to the present Convention, the declaration shall remain in effect unless the ratifying or acceding State declares that it cannot accept it.

4. — Declarations under paragraphs 1, 2 or 3 of this Article may be made by the State concerned at the time of the deposit of its instrument of ratification or accession to the present Convention or at any time thereafter and shall be addressed to the Depository Government. The declaration shall take effect three months after the date of its receipt by the Depository Government or, if at the end of this period the present Convention has not yet entered into force in respect of the State concerned, at the date of such entry into force.

### *Article VIII*

[1. — Two or more Contracting States may agree that, for the application of Article 6 of the Uniform Law, a registration carried out in a single register shall be considered as having been carried out over the entirety of their territories.

2. — Two or more Contracting States may agree that, for the application of Article 6, the publication of bankruptcy or any similar proceedings carried out in a single official publication shall be considered as having been carried out over the entirety of their territories.

3. — The agreements provided for in paragraphs 1 and 2 of this Article shall be communicated to the Depository Government.]

*Article IX*

1. — Any State may, when it deposits its instrument of ratification or accession or at any time thereafter, declare, by a notice addressed to the Depositary Government, that this Convention shall apply to all or part of the territories for the international relations of which it is responsible.

2. — Such declaration shall have effect six months after the date on which the Depositary Government shall have received notice thereof or, if at the end of such period the Convention has not yet come into force, from the date of its entry into force.

3. — Each Contracting Party which has made a declaration in accordance with paragraph 1 of this Article may, in accordance with Article VI, denounce this Convention in relation to all or part of the territories concerned.

*Article X*

1. — If a State has two or more territorial units in which different systems of law apply in relation to matters respecting the acquisition in good faith of corporeal movables, it may at the time of signature, ratification, or accession, declare that this Convention shall extend to all its territorial units or only to one or more of them, and may modify its declaration by submitting another declaration at any time.

2. — These declarations shall be notified to the Depositary Government and shall state expressly the territorial units to which the Convention applies.

*Article XI*

If a Contracting Party has two or more territorial units in which different systems of law apply in relation to matters respecting the acquisition in good faith of corporeal movables, any reference to the law of the country where a public register for registration of rights is kept or to the country where the bankruptcy or any similar proceedings have been officially published shall be construed in accordance with the constitutional system of the Party concerned.

*Article XII*

1. — The original of the present Convention, in the ..... languages, each version being equally authentic, shall be deposited with the Government of ..... which shall transmit certified copies thereof to each of the signatory and acceding States and to the International Institute for the Unification of Private Law.

2. — The Depositary Government shall give notice to the signatory and acceding States, and to the International Institute for the Unification of Private Law, of:

- (a) any signature ;
- (b) the deposit of any instrument of ratification or accession ;
- (c) any date on which this Convention enters into force in accordance with Article V ;
- (d) any communication received in accordance with Article I, paragraph 4 of the present Convention ;
- (e) any declaration received in accordance with Article VII, paragraph 2, and the date on which such declaration takes effect ;
- (f) any communication received in accordance with Article VIII, paragraph 2 ;
- (g) any declaration received in accordance with Article IX, paragraph 2, and the date on which such declaration takes effect ;
- (h) any denunciation received in accordance with Article VI, paragraph 1, or Article IX, paragraph 3, and the date on which the denunciation takes effect ;
- (i) any declaration received in accordance with Article X, paragraph 2, and the date on which the declaration takes effect.

IN WITNESS WHEREOF, the undersigned Plenipotentiaries, being duly authorised to that effect, have signed the present Convention.

DONE at ..... the .....

## ANNEX

UNIFORM LAW ON THE ACQUISITION IN GOOD FAITH  
OF CORPOREAL MOVABLES*Article 1*

1. — The present law shall apply to the acquisition for value, by way of, for example, sale, exchange, pledge, of rights in rem over corporeal movables provided that the movables, or a document representing them, have been handed over to a person acquiring such rights (transferee) on the territory of a State Party to the Convention of . . . . . unless at the time of the handing over, the person disposing of the rights (transferor) and the transferee both had their place of business in that State.

2. — The places of business of the transferor and transferee are deemed to be situated in the same State when they are situated in two States in respect of which a valid declaration has been made, as provided for in Article VII of the Convention . . . . .

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

4. — The application of the present law shall not depend on the nationality of the parties.

*Article 2*

The present law shall not apply to the acquisition :

- (a) of stocks, shares, investment securities, negotiable instruments or money ;
- (b) of any vessel, ship, hovercraft or aircraft, which is registered or is required to be registered ;
- (c) of movables sold on execution or otherwise by authority of law.

*Article 3*

The present law shall not affect rights conferred on third parties by laws relating to industrial property or to literary and artistic property.

*Article 4*

The present law shall apply regardless of the commercial or civil character of the parties or of the contract.

*Article 5*

Subject to the provisions of Article 6,

(a) an acquisition of rights in movables shall be valid although the transferor had no right to dispose of them, provided that the transferee acted in good faith and that the movables have been handed over to him ;

(b) the limited rights of any third parties to the movables shall be extinguished on fulfilment of the same conditions.

*Article 6*

1. — Rights registered in a public register shall continue to be available against a transferee when the movables have been handed over in the country where the register is kept and when, according to the law of that country, their registration makes them available against the transferee.

2. — The bankruptcy of the transferor or any similar proceedings shall continue to affect the transferee when the movables have been handed over in a country where these proceedings have been officially published.

*Article 7*

1. — Good faith consists in the reasonable belief that the transferor has the right to dispose of the movables in conformity with the contract.

2. — The transferee must have taken the precautions normally taken in transactions of that kind according to the circumstances of the case.

3. — In determining whether the transferee acted in good faith, account shall, *inter alia*, be taken of the nature of the movables concerned, the qualities of the transferor or his trade, any special circumstances in respect of the transferor's acquisition of the movables known

to the transferee, the price, or provisions of the contract and other circumstances in which it was concluded.

*Article 8*

Good faith must exist either at the time the movables are handed over to the transferee or at the time the contract is concluded if it is concluded after the handing over of the movables.

*Article 9*

Good faith is also required in the negotiation or conclusion of the contract, on the part of any person who is acting in the name of or on the account of the transferee, provided he was authorised or ostensibly authorised to act or the contract was ratified by the transferee.

*Article 10*

1. — The movables shall be considered as having been handed over to the transferee when they or a document representing them are in his hands.

2. — They shall also be considered as having been handed over to the transferee when they are in the hands of a third party who unequivocally holds them on behalf of the transferee.

*Article 11*

The transferee of stolen movables cannot invoke his good faith.



## EXPLANATORY REPORT

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### INTRODUCTION

1. — UNIDROIT published the draft Uniform Law on the protection of the bona fide purchaser of corporeal movables in 1968. This draft was the result of work initiated in 1962 by a Working Committee constituted by UNIDROIT and entrusted with drawing up the draft. The draft, after its approval by UNIDROIT's Governing Council, was submitted to the Governments of the member States of UNIDROIT which were invited to make observations on it. In the light of these observations, a Committee of Governmental Experts convened by UNIDROIT re-examined the draft and revised it in several places. This revision of the original draft was completed in June 1974.

2. — The topic governed by the present draft is dealt with very differently in the law of the various countries. While the large majority of continental countries base themselves on the principle of the protection of the transferee in good faith, other legal systems, and in particular the Common Law systems, are, on the contrary, based on the opposing principle of the safeguarding of the rights of the dispossessed owner. However, in neither group is the basic principle rigorously applied. The systems which are based on the principle of the protection of the transferee lay down conditions for this protection which often seriously limit its efficacy. On the other hand, the systems which are based on the principle of maintaining the rights of the dispossessed owner also provide exceptions which considerably limit the scope of the principle. These conditions and exceptions vary from country to country. On the whole, the protection given to the transferee in good faith is sometimes extended to all acquisitions, whatever the reason for the owner's dispossession; apart, however, from a few exceptions, most civil law countries exclude the acquisition of movables of which the owner was dispossessed by loss or theft. As for the legal systems which protect the rights of the dispossessed owner, the transferee in good faith is nevertheless protected in certain well-defined cases. In Common Law countries most of these exceptions to the basic principle have been introduced by legislation. There is a tendency to extend the scope of these exceptions, especially as regards trade, and it has been remarked that the exceptions tend to become the general rule in this field.

3. — In view of the differences between the aforementioned legal systems, the UNIDROIT Working Committee did not try to draw up a uniform law which would apply to all legal relationships but it restricted unification to international relationships. Moreover, it closely linked the draft to the uniform law on the international sale of goods (ULIS). It considered that ULIS provided a favourable legal basis for unification in the field of the protection of the transferee in good faith and that unification would have a better chance of success if it appeared as a complementary

set of rules to ULIS. That is why the Committee restricted the field of application of its draft to acquisitions brought about by a sale within the meaning of ULIS. Moreover, it appeared to the Committee from a comparative study of legal systems, that there was a tendency to protect the transferee in good faith, especially as regards trade relationships. This finding and the argument that the unification of the law of sale and kindred matters aims at promoting international trade, led the Committee to accord extensive protection to the transferee in good faith, even in the case of the acquisition of movables which were stolen from their original owner. The Committee's first concern was therefore to protect the interests of international trade, the certainty of which requires the protection of the transferee.

4. — The Governments of the Member States of UNIDROIT reacted favourably to the draft in general. However, some criticisms were put forward. These mainly concerned the linking of the draft to ULIS. The experts agreed with these criticisms and therefore detached the draft from ULIS. Other criticisms concerned the over-emphasis given to the protection of the transferee. These were also considered as being well-founded by the majority of the experts who therefore tried to strike a balance between the interests of the transferee on the one hand and the interests of the dispossessed owner on the other. As a result, the draft received a new orientation which detaches it from the principles which formed the basis of the initial draft.

5. — This new orientation is particularly apparent as regards the following questions :

(a) The field of application of the draft is not dependent on that of ULIS. The detachment of the draft from ULIS allowed the experts to extend the application of the draft to acquisitions for value other than those made under an international sale. The acquisitions envisaged do not necessarily refer to the ownership of the movables but may also concern rights in rem acquired, for example, by a pledge. Detachment from ULIS led the experts to look for new connecting factors and a territorial connecting factor was chosen, that of the place of the handing over of the movables. However, the field of application of the draft is nevertheless determined by the international character of the relationship in question.

(b) The starting point of the draft is no longer to protect first and foremost the transferee in good faith with a view to promoting trade but rather to look for a fair balance between the interests of the parties concerned. This tendency is manifested in a more subtle régime than that of the initial draft concerning proof of the existence or absence of good faith. However, the desire to create a fair balance mainly appears in the rules on the acquisition of stolen movables. In the text drawn up by the experts, the transferee may in no case invoke his good faith when acquisition concerns movables of which the owner was dispossessed by theft.

6. — This new orientation led the experts to change the title of the draft. The title of the original draft emphasised the fact that it was concerned with the protection of the purchaser. One can no longer speak of the purchaser since the

draft has been detached from ULIS, as it now also envisages other transferees in good faith. The fact that the draft is no longer predominantly concerned with the protection of the transferee means that the original title gives an incorrect impression of the scope of the revised draft. This is why the experts gave their draft a more neutral title: Uniform Law on the Acquisition in Good Faith of Corporeal Movables.

## COMMENTARY ON THE ARTICLES OF THE DRAFT

### Article I

1. — This article outlines the field of application of the draft as regards the questions and relationships governed by it. The first paragraph lays down the conditions for the application of the draft, paragraphs 2 to 4 giving clarification on certain specific points.

As has already been explained in the introduction, the experts considered that the starting point for the initial draft, namely its close link with ULIS, should be abandoned. Consequently, they completely detached the draft from ULIS and they gave it its own field of application. The reasons put forward to justify this change are as follows:

(a) At the time when the original draft was elaborated, rapid ratification of ULIS by a fairly large number of States was expected. Circumstances have changed since then. ULIS received few ratifications and most of them were accompanied by important reservations. Moreover, the work undertaken by the United Nations Commission on International Trade Law (UNCITRAL) seems to be revealing a different conception of international trade.

(b) Acquisition in good faith implies a situation which refers not only to the relationship between the seller and the buyer, but also and principally to that between the transferee and the dispossessed owner. It is therefore not necessary that the rules on these relationships should constitute a complement to the uniform law on sale. The relationship between the transferee and the dispossessed owner can be regulated independently of that of the seller and the buyer. Moreover, the fact that there is no uniform law on pledges does not exclude the possibility of regulating the relationship between the transferee and the owner, as this relationship has nothing to do with that existing between the pledgor and pledgee. Moreover, the opinion of the Working Committee that in international relationships cases of pledge only rarely have an international character in the legal sense of the word, could not be supported. These considerations led the experts to extend the field of application *ratione materiae* of the Uniform Law to all acquisitions for value of rights in rem relating to corporeal movables. As an example, the first paragraph lists acquisitions by sale, exchange and pledge. The enumeration does not include acquisition by usufruct, this notion being unknown in Common Law countries. This does not exclude the possibility of a continental judge applying the Uniform Law to an acquisition by usufruct as the list is not exhaustive. However, the Law does not apply to acquisitions where no value is given; it only refers to international relationships which represent an interest from the point of view of trade and business.

The extension of the draft to all acquisitions for value has necessitated a modification in terminology. The words «seller» and «buyer» were replaced by the more general words «transferor» and «transferee».

2. — As for the territorial field of application of the Uniform Law, paragraph 1 refers to the connecting factor as being the territory of the Contracting State in which the movables are handed over to the transferee. Reference to the place of handing over of the movables was made mainly for the following reasons :

(a) The handing over of the movables constitutes a determining factor for the system of the Uniform Law. By linking the field of application of the Law to this element one is applying a fixed criterion which allows one to foresee which law will be applicable when a third party claims the movables.

(b) The place where the movables are situated plays an important part as a connecting factor in private international law. However, in private international law it is the situation of the movables at the time when they are claimed which determines the applicable law rather than their situation at the time of their handing over. In order to bring about complete harmony with the widely recognised solution in matters of conflicts of law, the territorial field of application of the Law should have been determined by considering the place in which the goods were situated at the time when the third party claimed them. However, a solution of this kind would have caused uncertainty as, at the moment of handing over, it could not be foreseen where the movables would be and therefore which law would be applicable when a third party brought his claim ; moreover, this system would give the transferee the possibility of choosing the applicable law by transferring the movables from the country of handing over to another country. This could allow him to choose a régime favourable to his interests and prejudicial to those of the third party. This is why the experts attached considerable importance to establishing that the applicable law be determined at the time of handing over and why they gave preference to the place of handing over as the territorial connecting factor.

The text specifies that the Law is also applicable when a document representing the movables, and not the movables themselves, has been handed over to the transferee on the territory of a Contracting State. This clarification accords with Article 10 which states that the handing over of such a document is equivalent to the handing over of the movables themselves.

3. — The application of the Law depends not only on the place of handing over of the movables but also on the places of business of the transferor and transferee. When, at the time of handing over, both these persons have their place of business in the State where the goods are handed over, the relationship is a purely national one and the Uniform Law does not apply. However, when either one or the other has his place of business in another State at the time of handing over, the Uniform Law applies. The other State can be either a Contracting State or a non-Contracting State. The handing over alone must take place in a State party to the Convention. The law therefore only applies to international relationships. The question of whether the field of application of the Law should be restricted to international relationships only was discussed at length. On the one hand, it was argued that a uniform law should logically receive as wide an application as possible. On the other, some experts

pointed out that previous experience showed that such an extensive application is not easily acceptable to a large number of States. It was improbable that States would agree to abandon their national law and submit national relationships to a uniform international set of rules, especially in respect of a subject which is dealt with so differently by the various countries. This practical argument prevailed.

A suggestion that a criterion of internationality should not be included in the Law but that, by providing in the Convention (1) the possibility to make a reservation on this matter, States should be allowed to restrict the application of the Law to situations presenting an international character, was rejected for the same reasons. A reservation of this kind would probably become the general rule.

The question of which criterion should be chosen to define the international relationships to which the Law should apply was the subject of even more discussion. Seeing that the conflict envisaged by the Uniform Law sets the dispossessed third party against the transferee and does not directly involve the transferor, it was argued that the international character of the situation should be evaluated mainly by reference to the places of business of the transferee and the third party. However, this solution was objected to because it deprived the transferee of the possibility of foreseeing which law would be applicable in the case of a claim by a dispossessed third party. The possibility of foreseeing the applicable law necessarily excludes consideration of the place of business of a third party who, at some time after the acquisition has taken place, might claim the movables. Some experts replied that if, at the time of the handing over of the movables, the transferee already considered the possibility of a claim, his good faith could be considered as not very well-founded. However, one could imagine a situation in which the transferee, while in perfectly good faith at the time of the handing over of the movables, afterwards discovered that the transferor did not have the right to dispose of them; the connecting factor mentioned above could in this case arouse doubts, especially if the residence of the real owner was not yet known. Nevertheless, it was considered that the transferee should be able to foresee, at the time of the handing over of the movables, which law would be applicable if a third party should at a later date present a claim based on ownership of the movables. The place of business of the third party is therefore not taken into account. On the contrary, the place of business of the transferor at the time of handing over of the movables must be taken into consideration as the latter could be known to the transferee: this is why the Law defines the international character of the relationship by reference to the places of business of these two persons.

Consequently, when movables are handed over on the territory of a Contracting State and either the transferor or the transferee or both have their places of business in another State, the judges of all the Contracting States will apply the Uniform Law. However, if at the time of handing over, both the transferor and the transferee have their places of business in the State where the movables are handed over, the

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(1) This commentary relates only to the text of the draft Uniform Law and does not cover the Convention accompanying it, which was prepared by the experts for the Diplomatic Conference of adoption. It will be for the Conference to determine the text of the Convention in the form which, according to custom, will be decided by an *ad hoc* Committee of the Conference itself.

judge will apply the applicable national law in accordance with his conflict rules. The same goes for the case in which the handing over takes place in a non-Contracting State. In view of this definition of the field of application of the Law, Article 4 of the original draft, which excluded the application of the rules of private international law, is no longer justified and was consequently deleted.

4. — Paragraph 2 of Article 1 reproduces Article 1, paragraph 5 of the original draft with a slight change in the text which was necessary as, in the new definition of the international field of application, the Law no longer speaks of « different States ». This paragraph was included as it could be useful for countries which apply identical or similar legal rules on the subject governed by the Uniform Law. Here it should be pointed out that the Scandinavian countries have envisaged the possibility of drawing up such rules.

5. — Paragraphs 3 and 4 reproduce word for word paragraphs 2 and 3 of Article 1 of the original draft. Paragraph 3 provides that, if one of the parties has no place of business in the legal sense of the word, his habitual residence constitutes the criterion for the application of the Uniform Law. Paragraph 4 specifies that the nationality of the parties shall not be taken into consideration for the application of the Uniform Law.

#### *Article 2*

1. — This Article corresponds to Article 2 of the original draft. The Working Committee had taken this article from ULIS (Article 5 (1)), adding a second paragraph which specified which rules were applicable to matters to which the Uniform Law did not apply. The experts deleted this paragraph which was considered superfluous.

The experts discussed the possibility of including stocks, shares, investment securities and negotiable instruments, mentioned under (a), in the scope of application of the Uniform Law. They finally decided to maintain the original text as it was, seeing that the above-mentioned goods, the character of which as corporeal movables is questionable, are of a special nature and that their handing over is subject to special rules. They are also governed by special procedures in the event of their transfer being contested. As for vessels, ships and aircraft, mentioned under (b), the experts discussed whether the acquisition of these should be excluded and whether Article 6 of the Uniform Law should apply to these movables. However, it was remarked that Article 6 is only concerned with safeguarding the rights of third parties over the movables, while Article 2 (b) completely rules out the application of the Uniform Law. This exclusion was based on the peculiar nature of the goods in question which has traditionally been considered as justifying a special régime. This is why it was decided to maintain sub-paragraph (b). However, the experts considered that this list should be completed in view of the development of a new type of vehicle which will probably be subject to registration. This is why hovercraft were expressly mentioned.

The initial draft also excluded the acquisition of electricity. The experts decided to delete this exclusion as, in reality, it is of no practical importance. Consequently,

sub-paragraph (d) of the original draft relating to sales by authority of law or on execution or distress has become sub-paragraph (c) which the experts also discussed and finally decided to maintain. The intervention of a public authority in a sale carried out in the above-mentioned conditions gives it a special character which justifies this exclusion. Nevertheless, the experts improved the text by using the wording adopted by UNCITRAL during its revision of ULIS.

2. — The question of whether other acquisitions apart from those mentioned in the existing article should be excluded was discussed. The Working Committee had already examined a proposal for the exclusion of the acquisition of confiscated goods from the field of application of the Law. It had, however, decided that it would be inadvisable to exclude such acquisitions from the field of application of the Law but that one could, when elaborating a convention providing the Uniform Law, allow States to make a reservation on this subject. The experts supported this opinion. The same goes for a proposal to exclude the acquisition of certain objects such as works of art from the field of application of the Law. The experts were therefore of the opinion that these questions be examined in relation to Article II of the Draft Convention providing a Uniform Law, which deals with reservations.

The experts rejected a proposal excluding the acquisition of a *universitas rerum* as they considered that the legal concept was an ambiguous one and unknown in many legal systems. Moreover, it also included incorporeal elements which did not fall within the scope of the Law. The same went for a proposal to exclude the acquisition of public property or property belonging to the State or other public bodies which may not be disposed of (*res extra commercium*), as it was considered too general and only admissible if restricted to specified articles such as works of art, already mentioned.

#### Article 3

This article corresponds to Article 6, paragraph 3 of the original draft. Rights relating to industrial property and to literary and artistic property do not exclusively concern the material possession of movables; in most countries these rights are subject to a special régime and there are international rules on the subject. During their meetings, the experts wondered whether it was necessary to maintain this provision. It was considered that questions relating to industrial and intellectual property could not affect rules governing the acquisition of corporeal movables. However, this point of view was rejected as it was pointed out that these rights could relate to certain items such as a patent on a machine or the copyright of a book and therefore give rise to proceedings as regards the objects themselves. This is why the exclusion of these rights from the field of application of the Uniform Law was maintained. However, the provision was moved as it was considered that the matter dealt with formed a whole and should constitute a separate article.

#### Article 4

This article corresponds word for word to Article 3 of the original draft. It is of interest to the legal systems which distinguish between civil and commercial law.

The Committee also wondered whether acquisitions by way of consumer sales should not also be excluded from the field of application of the Uniform Law. In particular, doubts were expressed as to the advisability of applying the Law to sales made to foreign tourists. On this subject, reference was made to Article 2, paragraph 1 (a) of the text proposed by UNCITRAL's Working Group which is attempting to define these sales so as to exclude them from the scope of the revised ULIS. However, the majority of the experts considered that this definition was too vague so as sufficiently to define the exclusion envisaged and that, in practice, the application of the Uniform Law would, on the one hand, only have a limited scope, whereas, on the other, it could be justified, for example, when the transferee does not take away with him the movables he has bought, but has them delivered by the seller to the country in which he lives.

#### *Article 5*

1. — This article, like that of the original draft, is the key article of the Law. It lays down the conditions on which the acquirer of rights in rem over a corporeal movable is protected against claims made by third parties and may dispose of the movables himself. It corresponds to the rule prevailing in the large majority of civil law systems and is similar to the rules contained in the Common Law systems which are exceptions to the principle of the protection of the dispossessed owner. The rule laid down can also be justified as favouring the certainty of international trade relationships.

The article stipulates two conditions for the transferee to be protected: he must be in good faith and the movables must have been handed over to him. These notions are enlarged on in the subsequent articles of the draft. Articles 7, 8 and 9 lay down the requirements which the notion of good faith must satisfy. These articles correspond to Articles 7, 8, 9 and 10, paragraph 1 of the original draft. The experts considered that these articles should be regrouped and placed in an order which was, in their opinion, both more logical and more coherent. The conditions which must be fulfilled so that the movables may be considered as having been handed over to the transferee are to be found in Article 10, which corresponds to Article 11 of the original draft.

2. — The draft does not expressly lay down the condition that the handing over of the movables should be based on a valid title of acquisition. In the system provided in the original draft this condition was implicit, inasmuch as it required the presence of a contract of sale in conformity with ULIS. If such a contract did not exist, either because it had never been made or because it had lapsed with retroactive effect, the Uniform Law could not apply. It may be wondered whether the detachment of the draft from ULIS will result in it no longer being possible for this condition to be considered implicit. However, the experts were unanimously of the opinion that the implicit condition requiring that the movables be acquired by virtue of a valid title should remain. Indeed, Article 1, paragraph 1 requires that there be an acquisition for value for the Law to be applicable. This implies that the goods were acquired by virtue of a valid title such as a contract of sale or pledge. The non-existence of such a title therefore deprives the transferee of the protection accorded him by the Law; his good faith cannot compensate for defects in title.



3. — During their work, the experts underlined the importance which should be attached to the fact that the transferor is in possession of the movables, and it was suggested that this should be made an additional condition. However, it was argued against this proposal that international trade relationships often involve persons who are a long way from one another and that, in this case, it is difficult if not impossible for the transferee to check whether the transferor is in possession of the movables. Moreover, the judge has extensive discretionary power when assessing good faith under the terms of Article 7, paragraph 3, and he has ample possibilities to take account of all the circumstances of the case, including whether the transferor was or was not in possession of the goods. It is for this reason that the experts rejected a proposal requiring that the transferor be in possession of the goods at the time of their handing over.

The importance of the condition of the payment of the price by the transferee was also stressed and it was suggested that the condition relating to the handing over of the movables to the transferee be replaced by that requiring the payment of the price agreed on with the transferor. This idea was also rejected, mainly in view of the fact that the payment of the price may be deferred and can assume various forms which could lead to difficulties in the case of credit sales. In the case of payment by instalments, the transferee who pays his instalments regularly would be unfairly disadvantaged if he were only protected from the time of the last payment, whereas, on the other hand, it would be arbitrary to fix the time of payment at a moment in time before the goods had been completely paid for.

4. — The experts criticised the original text, in particular on two points. First of all, it was pointed out that the phrase « transfer of property » gave the impression of an additional requirement for the protection of the transferee. If this were the case, the fact that the draft made no reference to the conditions of validity of a transfer of property and the fact that the various national laws differ greatly on this subject would create difficulties of interpretation. As the authors of the draft had not intended that the transfer of property be considered an additional condition, and in order to avoid any misunderstanding on the subject, the experts decided to replace this phrase by a more neutral one which does not prejudice questions relating to the transfer itself.

The word « power » was also criticised. In order to make it quite clear that the Uniform Law does not refer to the disposal of goods by persons without legal capacity, but refers to the transferor who, although not allowed to dispose of the movables in the particular case, has the capacity to act, the experts replaced this word by «right».

5. — Article 5 (b) reproduces the second paragraph of Article 5 of the original draft. However, seeing that the provisions of Article 6 also cover the situation referred to under Article 5 (a), the experts transferred the reference to this article, which figures in the second paragraph in the original draft, to the beginning of Article 5. Under the terms of Article 5 (b), the limited rights of third parties cannot be invoked against the transferee if the acquisition took place in the conditions laid down by Article 5 (a). The rights contemplated are limited property rights such as usufruct or pledge and also those rights running with the goods based on a contract, such as hire. They may therefore be extinguished by an acquisition in good faith.

*Article 6*

1. — Apart from a few changes, this article corresponds to Article 6 of the original draft. It lays an obligation on the transferee to consult certain registers which may contain rights encumbering the goods acquired. According to the authors, the transferee has not only the possibility but also the duty to consult the public registers in the country where the movables are handed over to him and where certain rights relating to the movables are registered, and he is not excused if he neglects to do so.

This provision aroused criticism. It was observed that it went too far and that it should be deleted so that the judge be left free to determine to what extent the failure to consult registers can affect the good faith of the transferee. Those supporting this opinion pointed out that in some countries the fact that rights are registered does not of itself prevent acquisition in good faith, notwithstanding such rights. On the other hand, others considered that the provision was too narrow and that the transferee should be required to consult these registers not only in the country where the movables are handed over to him but also in other countries, such as the country in which he has his main place of business. It was remarked that the transferee had the same possibilities of consulting the registers of such a country as he has of the country where the movables were handed over. The suggestion was also made that the transferee should be required to consult the registers of the country of origin of the movables as such a consultation would be more appropriate than that of the registers of the place where the movables are handed over in those cases, frequent in international trade, in which imported goods are involved. This reasoning was criticised on the ground that it does not take account of the fact that often the transferee is not in possession of sufficient information to be able to trace the origin of the movables in question. Most of the experts agreed with the opinion put forward by the Working Committee that one could not require the transferee to consult the registers of several countries without seriously hampering the interests of international trade. This is why it was finally decided to maintain the provision of the initial draft which requires the transferee to consult the registers of the country in which the movables were handed over to him. However, in order to meet the arguments of those who thought that this provision went too far, it was specified that the registration of a right is available against the transferee in accordance with the law of the country in which the register is kept. This means that, according to the Uniform Law, public registers must be kept with a view to revealing the existence of the rights registered therein, which excludes registration for purely administrative purposes. Moreover, according to the Law, registration should prevent an acquisition in good faith as regards the rights in question.

2. — The second paragraph corresponds to the second paragraph of Article 6 of the original draft. The same reasons put forward with a view to maintaining the availability of rights registered in public registers are valid in connection with the availability of bankruptcy or similar proceedings published officially in the country where the movables were handed over. As in some countries bankruptcy proceedings are initiated in exceptional circumstances only, recourse being made in general to other proceedings such as liquidation, the experts replaced the rather weak term of « similar measures » by that of « similar proceedings ». Moreover, as there were some

doubts as to the precise scope of the original text, the experts considered that it should be specified that the paragraph refers to the case in which the movables are handed over in a country where the bankruptcy was published and that it does not affect the consequences which bankruptcy could have on acts prior to its publication. Movables handed over before the publication of bankruptcy and in particular during the so-called «suspect» period are governed by the applicable national law.

The question arose as to which régime would apply when publication in one country produces effects in another. It was observed that draft conventions between closely linked countries, such as the member countries of the European Community, aim at rendering one publication effective in the territories of all the countries, and the possibility of starting a central register is being examined. In view of the uncertainties which still exist on the subject and in consideration of the fact that drafts in this field are still at a preliminary stage, the experts considered that it was premature to take account of these for the time being. Nevertheless, they were conscious of possible developments in this field and were of the opinion that the Convention should allow such groups of States to draw their own conclusions as regards the application of Article 6 of the Uniform Law.

It should be recalled here that the third paragraph of Article 6 has become Article 3.

#### *Article 7*

1. — This Article groups together the provisions on good faith dispersed in the original draft. It defines the notion of good faith and indicates the main factors which should be taken into consideration when determining whether or not it is present.

The first paragraph gives a definition of good faith which corresponds to that contained in Article 7 of the original draft. It is composed of two elements, namely a subjective and an objective one. The subjective element refers to the frame of mind of the person in question. The objective element refers to external circumstances which play a part in an evaluation of his behaviour. The Working Committee did not take a stand on the doctrinal question of whether good faith is of a subjective or of an objective nature. It was of the opinion that the problem was incorrectly stated in this way as it was more important to specify what were the external circumstances and to what extent they should be taken into consideration. It was therefore a case of considering to what extent it was reasonable to believe that the transferor had a right of disposal.

The initial draft specified that reasonable belief must exist at the moment of the handing over of the movables. This reference to the time at which good faith must exist was considered superfluous and deleted by the experts as Article 8 already specifies the time at which good faith must exist. Moreover, it was considered inexact as Article 8 does not only refer to the time of the handing over of the goods.

2. — Paragraphs 2 and 3 give indications as to the factors to be taken into consideration in the assessment of good faith. They correspond to Articles 9 and

10, paragraph 1 of the original draft. The Working Committee had provided for a division of the burden of proof in these articles. It had not established a presumption of good faith in favour of the transferee but had aimed at establishing a balance between the elements of proof to be adduced on the one hand by the transferee to justify his good faith and, on the other, those to be adduced by the dispossessed third party to show the groundlessness of such a justification. On this question, the experts considered that not only was it of no use to establish a presumption in favour of the transferee but that it was in fact undesirable to mention questions relating to the burden of proof in the text. The desire to balance fairly the interests of the parties involved led them to leave these questions to be assessed by the judge who can, in this way, take all the circumstances of the particular case into consideration. In connection with the obligation laid down in the second paragraph which requires the transferee to take the precautions normally taken, the experts considered that it was unfair to put the same burden of proof on a transferee involved in a consumer sale as on a businessman who has concluded a commercial sale. The case of a transferee who did not take the precautions normally taken in business but who, even if he had taken them, would not have discovered the defect in the transferor's right of disposal was also considered. In this case, it was suggested that the effects of good faith should nevertheless be recognised. In order that it should be quite clear that this provision is only supposed to serve as a guide to the judge and that it does not affect his freedom to assess good faith, it was specified that the extent of the transferee's obligation depends on the circumstances of the case.

3. — The third paragraph gives a list of the circumstances which must be taken into account in an assessment of good faith. Article 10, paragraph 1 of the original draft provided generally that the transferee should not be considered to be in good faith if the contract was suspect because of the circumstances in which it was concluded or the clauses it contained. The explanatory note on this provision gives examples of circumstances or clauses which could render the contract suspect.

While approving the tenor of this article, the experts considered that it would be useful to incorporate this list in the text itself. Moreover, they modified the beginning of the article and replaced the former phrase which implied that the burden of proof rested on the third party plaintiff by a phrase which makes it clear that the judge is free to divide the burden of proof and that he can require the transferee to prove certain specific facts, instead of always requiring the third party to prove them. It should also be underlined that this list is not complete and that the factors mentioned in it are not in themselves decisive. One should therefore be careful not to give these factors too great an importance in relation to other circumstances which do not appear in the list. The provision is only a guide for the judge who remains completely free in his evaluation of all the circumstances which he considers important in relation to the specific case.

In the initial draft, reference was made to the suspect character of the contract and, in the explanatory note, to a low price. The experts considered these notions to be too narrow and preferred replacing them by a more objective formula which they referred to simply as the circumstances, provisions of the contract and the price. Moreover, in addition to the factors taken from the initial draft, they included another factor to be taken into consideration, namely any special circumstances in respect

of the transferor's acquisition of the movables known to the transferee. This refers to the case in which the transferee knows about the illegal origins of the movables but is under the impression that the transferor has obtained the right to dispose of them. Such knowledge may cast doubts on the good faith of the transferee and in this case it is up to the judge to decide if the behaviour of the transferee has nevertheless been reasonable.

The question also arose as to whether or not reference should be made to the fact that the transferor is or is not in possession of the movables. The majority of the experts were against the inclusion of such a reference in the article. It was argued that as international sales often present the characteristics of a long distance sale, it would be difficult to require that the transferee check on the transferor's possession of the movables. However, this does not prevent the judge from taking this factor into account, should he consider it opportune in the circumstances of the particular case. Similarly, the suggestion to include a reference to the case in which the transferee refuses to give to a third party plaintiff, who does not know the identity of the transferor, sufficient information to permit him to identify the latter, was not followed. It was agreed that a clause of this kind would refer to behaviour after the handing over of the movables, whereas it is just the moment of handing over which is normally decisive for the assessment of good faith. However, this does not prevent the judge from asking the transferee for explanations and from drawing his own conclusions as to the existence of good faith during the preceding period.

#### *Article 8*

This article specifies the time at which the transferee must be in good faith; it corresponds to the second paragraph of Article 8 of the original draft. The latter required good faith to exist both at the time of the conclusion of the contract and at the time of the handing over of the goods. This double requirement is explained by the fact that at the time of the conclusion of the contract the transferee might know that the transferor had no right to dispose of the movables but he could reasonably think that the transferor would have this right at the time of the handing over; conversely, the movables could be hired out to a person and then sold to him so that the handing over preceded the conclusion of the contract. Nevertheless, the experts considered that this double requirement was excessive and could be a source of difficulty. Normally, good faith should exist at the time of the handing over of the goods and this covered the first hypothesis; in the second case, the decisive moment should be that of the conclusion of the contract. This point of view is expressed in the revised text. It follows that if the transferee discovers a defect in the transferor's right of disposal after the handing over or the conclusion of the contract, this discovery does not affect his good faith.

#### *Article 9*

This article corresponds to Article 8, paragraph 1 of the initial draft, which imputed the absence of good faith of the person representing the transferee to the

latter. The experts criticised this article as it introduced a system which was stricter than that existing in most legal systems. It was suggested that in order to determine whether and to what extent the absence of good faith as regards an agent should be imputed to the transferee, the part played by each in the drawing up of the contract and the determination of its contents should be taken into consideration. This suggestion was rejected by the experts as being too vague and too ambiguous; many of them proposed deleting the article as they considered that the question dealt with did not fall within the scope of the Uniform Law and should be left to the draft Uniform Law on agency in the sale and purchase of goods, also elaborated within the framework of UNIDROIT.

Finally, it was agreed that the agency relationships envisaged by this article should be limited to those concerning the negotiation or the conclusion of the contract. Such a limitation could, of course, give rise to difficulties as regards proof, especially if this proof were incumbent on third parties. This is why it may be supposed that the judge would be prepared to presume that the relationship in question existed until the transferee had proven the contrary.

Article 10, paragraph 2 carries on from Article 9, as it states that the goods can be considered as having been handed over when they are in the hands of a person who holds them on behalf of the transferee. In so far as this person is engaged in the negotiation or conclusion of the contract, his good faith, or lack of it, is imputed to the transferee. The revised text specifies that the agent of whom good faith is required is the person who is authorised to act and whose act has been validated. The agent who presents himself as such without satisfying the necessary requirements cannot affect the good faith of the transferee. Lastly, the article lays down that the good faith of the agent must exist independently of the good faith of the transferee and that the good faith of one cannot replace the good faith of the other. Therefore, if the movables are handed over directly to the transferee, the fact that the agent was not in good faith when the contract was concluded may still be invoked against him.

#### *Article 10*

This article reproduces the text of Article 11 of the initial draft. It sets out the conditions in which the movables are considered as having been handed over to the transferee. The article avoids using the terms « possession » or « delivery », the legal meanings of which differ in the various national legal systems, as their use could give rise to difficulties of interpretation; it employs a neutral and factual terminology. The movables are considered as having been handed over to the transferee once they are in his hands or once he is in possession, in the physical sense of the word, of a document which represents them. They are in the hands of the transferee when the latter is in physical possession of them or when they are in his warehouse. The goods are also considered as having been handed over to the transferee when they remain in the hands of the transferor by virtue of a *constitutum possessorum* or a similar title, as then they are not in the hands of a third party who is unequivocally holding them on behalf of the transferee. The judge when determining the circumstances of the handing over must take all the aspects of the case

into consideration. What has to be determined is whether the interested third parties were able to establish, by some outward sign, that the transferee had obtained the movables.

*Article II*

1. — This article corresponds to Article 10, paragraph 2 of the initial draft. The Working Committee had envisaged various possibilities as to the régime for lost or stolen movables. It had finally adopted a distinction which is to be found in many legal systems and which seemed to it to be appropriate in connection with international relationships. It distinguished between the purchase of movables from a dealer who does not normally trade in goods of that kind, and buying them from a dealer who sells goods of the same kind. In the first case, the buyer must run the risk of loss or theft; in the second case, he may invoke his acquisition in good faith of the goods. The Committee was of the opinion that in international trade the transferee who orders movables from a foreign dealer in normal business conditions should be shielded from any defect in the power of the seller to dispose of the goods in question. The motive behind this protection is the need to ensure security for international transactions.

A number of Governments criticised this point of view. The experts re-examined the problem of the régime to be adopted for the acquisition of lost or stolen goods. However, the opinions put forward were not unanimous. On the contrary, the experts adopted positions which differed greatly, varying from total protection of the transferee to a complete exclusion of any protection, at least as regards the acquisition of stolen goods. Intermediary tendencies emerged between these two extremes. Thus it was suggested that the damage be shared between the dispossessed third party and the transferee in good faith, whilst others were in favour of protecting the transferee in principle, but allowing the owner to buy the movables back. Others still favoured the distinction made in the initial draft. Finally, the majority of the experts decided not to protect an acquisition in good faith of stolen movables. The reasons which led the majority to adopt this solution are as follows :

(a) Most national legal systems protect the owner in cases of theft. If this protection were refused him at an international level, there would be a distinction between the national and international régimes and the balance between the opposed interests of the persons involved would be upset.

(b) In general, it is easier for the transferee to recover damages by going against his co-contractant than it is for the owner to search for the thief or receiver of stolen goods in order to bring an action against him for damages.

(c) An effective protection of the owner is necessary in view of the recent enormous upsurge in criminal trafficking in works of art and antiques. At a private law level, the draft can contribute towards giving the best possible guarantee of the restitution of stolen goods to their owners.

However, the experts agreed not to extend this régime to the acquisition of lost movables but to submit the acquisition of the latter to the rules protecting the transferee in good faith. They were of the opinion that the reasons favouring the protection of the dispossessed third party in cases of theft were not valid in the case

of a loss of the movables and that it was not necessary to provide a special régime for lost goods. No offence has been committed when goods are lost; moreover, one can generally suppose that the negligence of the owner played a part, so that, even in the case of breach of trust committed by the person to whom the owner had entrusted the movables, it is reasonable that the third party should run the risk of dispossession.

In connection with the notion of stolen goods, the experts looked for more precise terminology but finally this idea was abandoned and the initial expression was maintained. It is of course meant to be understood in a broad sense and, in addition to theft in the criminal law sense, it includes other removals which should be assimilated to theft.

2. — By providing that the transferee of stolen movables may not invoke his good faith, Article 11 refuses any protection to an acquisition in good faith of stolen movables, without laying down any conditions or permitting any derogation whatsoever from the rule. However, this does not mean that the transferee may not invoke rules on prescription or those relating to the reimbursement of expenses contained in the applicable national law. Neither the Working Committee nor the experts drew up rules on this subject. They were, in fact, seized of proposals for regulating these questions but did not adopt them. This was the case not only in connection with the restitution of stolen goods but also as regards the general regulation of the reciprocal rights of the transferee and third party in all cases in which the acquisition does not comply with the conditions laid down in the Uniform Law. Some experts considered that the Uniform Law would be incomplete if it remained silent on this matter and that it was for the authors of the Law to bridge this gap. They suggested drawing up rules on the duty of unprotected transferees to return the movables or to compensate the dispossessed third party and on the conditions under which restitution and compensation should be made. However, the other experts considered that these questions were too vast and too complex to be treated in an incidental way. They thought that if rules were to be drawn up on the subject they should be contained in a separate uniform law which should be drafted carefully on the basis of thorough preparatory studies. For this reason, all proposals for a partial or total regulation of these questions were rejected: they were thus left to be decided by the judges applying the relevant national law.

The question arose as to which provisions of national law would apply in the absence of international rules. Some experts considered that the fact that the Uniform Law remained silent on this subject meant that the judge would apply national law, including those provisions which protect the transferee, instead of the Uniform Law. Thus, in cases of stolen movables, the judge would find that the Uniform Law excluded the application of its own rules as regards the protection of good faith but that it did not exclude the application of the corresponding rules of his national law; consequently, supposing that the latter gave the transferee greater protection than the Uniform Law, the transferee would be able to invoke those provisions. If, for example, French law were the national law governing these questions, the transferee would be able to rely on Article 2280 of the Civil Code and be reimbursed the price of the stolen movables when the latter had been acquired in conformity with the



conditions provided for by the article. The majority of the experts were of a different opinion and expressed the view that the judge, when examining the intention of the authors of the Uniform Law and attempting to interpret the latter in conformity with its aims, would come to the conclusion that the Law, by not allowing the transferee of stolen goods to invoke his good faith, excludes the application of any other provisions which protect the transferee. Thus the judge will complete the régime laid down by the Uniform Law by applying the national rules relating to restitution and compensation and exclude the rules specifically aimed at protecting the transferee ; therefore, the judge who applies French law to these questions will exclude the application of Article 2280 and refuse the transferee reimbursement of the price. The experts considered that it was not up to them to solve this controversy but that the question fell within the sovereign power of the judge to interpret the Uniform Law.