



**DIPLOMATIC CONFERENCE
FOR THE ADOPTION OF THE UNIDROIT
DRAFT CONVENTION ON AGENCY
IN THE INTERNATIONAL SALE OF GOODS**

Geneva, 31 January - 17 February 1983

**ACTS AND PROCEEDINGS
OF THE CONFERENCE**

INSTITUT INTERNATIONAL POUR L'UNIFICATION
DU DROIT PRIVE
INTERNATIONAL INSTITUTE FOR THE UNIFICATION
OF PRIVATE LAW

REVUE DE DROIT UNIFORME
UNIFORM LAW REVIEW

1983
I-II

UNIDROIT
28, Via Panisperna - Rome

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UNIDROIT

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OFFICERS OF THE CONFERENCE AND ITS COMMITTEES

President of the Conference

Mr K. Grönfors (Sweden)

Vice-Presidents of the Conference

**Mr M.J. Bonell (Italy), Mr A. Fajardo-Maldonado (Guatemala),
Mr D. Kimbembé (Congo), Mr O.V. Koschevnikov (U.S.S.R.), Mr C.
Liu (China).**

Committee of the Whole

Chairman: **Mr P. Widmer (Switzerland)**

First Vice-Chairman: **Mr M. Cuker (Czechoslovakia)**

Second Vice-Chairman: **Mr F. H. Hafez (Egypt)**

Rapporteur: **Mr M. Evans (Unidroit)**

Final Clauses Committee

Chairman: **Mr L. Sevón (Finland)**

Drafting Committee

Chairman: **Mr E.A. Farnsworth (USA)**

Vice-Chairman: **Mr A. Duchek (Austria)**

Members: **Austria, Chile, Congo, Czechoslovakia, France, Ghana, Japan, Netherlands, Norway, U.S.S.R., United Kingdom, U.S.A.**

Credentials Committee

Chairman: Mr H. Hausheer (Switzerland)

Members: Angola, Bulgaria, Japan, Switzerland, U.S.A.

Steering Committee

Chairman: The President of the Conference

Members: The Vice-Presidents of the Conference, the Chairman of the Committee of the Whole and the Chairman of the Final Clauses Committee; on the invitation of the Chairman, the Chairman and the Vice-Chairman of the Drafting Committee, the Secretary-General of the Conference and the Commissary-General of the Conference also participated in the work of the Steering Committee.

SECRETARIAT OF THE CONFERENCE

Mr M. Matteucci, President of Unidroit.

Mr R. Monaco, Secretary-General of Unidroit.

Mr M. Evans, Deputy Secretary-General of Unidroit, Secretary-General of the Conference and Secretary of the Committee of the Whole and of the Drafting Committee.

Mr F. Bärlocher, Commissary-General of the Conference.

Mr M. Stanford, Research Officer, Unidroit, Secretary of the Final Clauses Committee and of the Credentials Committee.

Mr F. Mengin, Research Officer, Unidroit.

AGENDA *

Opening of the Conference

Election of the President of the Conference

- 1. Adoption of the Agenda**
- 2. Adoption of the Rules of Procedure**
- 3. Election of the Vice-Presidents of the Conference**
- 4. Election of the Secretary-General and of the Rapporteur**
- 5. Appointment of the Credentials Committee**
- 6. Organisation of the work of the Conference, including the establishment of Committees, as necessary**
- 7. Election of the Chairman of the Committee of the Whole and of the Drafting Committee**
- 8. Examination of the draft Convention on Agency in the International Sale of Goods**
- 9. Adoption of the Final Act of the Conference and any instruments, recommendations and resolutions resulting from its work**
- 10. Signature of the Final Act and of any instruments adopted by the Conference**

* As adopted by the Conference at its 1st plenary meeting.

RULES OF PROCEDURE *

CHAPTER I – REPRESENTATION AND CREDENTIALS

Composition of Delegations

Rule 1

The delegation of each State participating in the Conference shall consist of a representative and such alternate representatives and advisers as may be required.

Alternates or Advisers

Rule 2

An alternate representative or an adviser may act as a representative upon designation by the head of the delegation.

Submission of Credentials

Rule 3

The credentials of representatives and alternate representatives, if any, and the names of advisers and other members of delegations, shall be transmitted to the Secretary-General of the Conference, if possible not later than twenty-four hours after the opening of the Conference. Credentials shall be issued either by the Head of the State or Government, or by the Minister for Foreign Affairs, or by an appropriate authority properly designated by one of them for this purpose.

Any change in the composition of delegations shall as soon as possible be submitted to the Secretary-General of the Conference.

* As adopted by the Conference at its 1st plenary meeting.

*Credentials Committee**Rule 4*

A Credentials Committee shall be appointed at the beginning of the Conference. It shall consist of five members who shall be appointed by the Conference. It shall examine the credentials of delegations and report to the Conference without delay.

*Provisional Participation in the Conference**Rule 5*

Pending a decision of the Conference upon their credentials, representatives shall be entitled to participate provisionally in the Conference.

CHAPTER II — PRESIDENT, VICE-PRESIDENTS, etc.

*Election**Rule 6*

The Conference shall elect a President and five Vice-Presidents, as well as the Chairman of the Committee of the Whole established under Rule 46 and the Chairman of the Drafting Committee established under Rule 47. The Conference may also elect such other officers as it deems necessary for the performance of its functions.

*President**Rule 7*

The President shall preside at the plenary meetings of the Conference.

Rule 8

The President shall, in the exercise of his functions, remain under the authority of the Conference.

Acting President

Rule 9

If the President is absent for a meeting or any part thereof, he shall appoint one of the Vice-Presidents to take his place.

Rule 10

A Vice-President acting as President shall have the same powers and duties as the President.

Replacement of the President

Rule 11

If at any time the President is unable to perform his functions for the remaining period of the Conference a new President shall be elected.

The President shall not vote

Rule 12

The President, or a Vice-President acting as President, shall not vote but may appoint another member of his delegation to vote in his place.

CHAPTER III

STEERING COMMITTEE

Composition

Rule 13

There shall be a Steering Committee which shall comprise the President and Vice-Presidents of the Conference as well as the Chairman of the Committee of the Whole and the Chairman of the Final Clauses Committee. The President of the Conference or, in his absence, a Vice-President designated by him shall serve as Chairman

of the Steering Committee. The Secretary-General of the Conference, the Commissary-General and the Chairman of the Drafting Committee may be invited by the President to participate, without the right to vote, in the work of the Steering Committee.

Functions

Rule 14

The Steering Committee shall assist the President in the general conduct of the business of the Conference and, subject to the decisions of the Conference, shall ensure the coordination of its work.

CHAPTER IV SECRETARIAT

Duties of the Secretary-General and the Secretariat

Rule 15

1. The Secretary-General of the Conference shall be designated by it; he shall act in that capacity in all meetings of the Conference, its Steering Committee and its other Committees.

2. The Commissary-General of the Conference shall be designated by it: he shall be responsible for the technical organisation of the Conference.

3. The Secretariat shall receive, translate, reproduce and distribute documents, reports and resolutions of the Conference; interpret speeches made at the meetings; prepare and circulate records of public meetings; have the custody and preservation of the documents in the archives; distribute all documents of the Conference to the participating Governments, and generally perform all other work which the Conference may require.

Statements by the Secretariat

Rule 16

The Secretary-General or any member of the Secretariat desig-

nated for that purpose may make oral or written statements concerning any question under consideration by the Conference.

CHAPTER V CONDUCT OF BUSINESS

Quorum

Rule 17

A quorum shall be constituted by the representatives of a majority of the States participating in the Conference.

General Powers of the President

Rule 18

In addition to exercising the powers conferred upon him elsewhere by these Rules, the President shall declare the opening and closing of each plenary meeting of the Conference; direct the discussions at such meetings; accord the right to speak; put questions to the vote, and announce decisions. He shall give an opinion on points of order and, subject to these Rules of procedure, have complete control of the proceedings and over the maintenance of order thereat. The President may propose to the Conference the limitation of time to be allowed to speakers, the limitation of the number of times each representative may speak on any question, the closure of the list of speakers or the closure of the debate. He may also propose the suspension or the adjournment of the debate on the question under discussion.

Speeches

Rule 19

Subject to Rules 20 and 21, the President shall call upon speakers in the order in which they signify their desire to speak. The President may call a speaker to order if his remarks are not relevant to the subject under discussion.

*Precedence**Rule 20*

The Chairman or Rapporteur of a Committee, or the representative of a sub-committee or working group, may be accorded precedence for the purpose of explaining the conclusions arrived at by his Committee, sub-committee or working group.

*Points of Order**Rule 21*

During the discussion of any matter, a representative may rise to a point of order, and the President shall immediately give an opinion thereon in accordance with the Rules of procedure. A representative may appeal against the opinion of the President. The appeal shall immediately be put to the vote and the President's opinion shall stand unless the appeal is approved by a majority of the representatives present and voting. A representative rising to a point of order may not speak on the substance of the matter under discussion.

*Time Limit on Speeches**Rule 22*

The Conference may limit the time to be allowed to each speaker and the number of times each representative may speak on any question. When the debate is limited and a representative has spoken his allotted time, the President shall call him to order without delay.

*Closing of List of Speakers**Rule 23*

During the course of a debate the President may announce the list of speakers and, with the consent of the Conference, declare the list closed. He may, however, accord the right of reply to any representative in connection with a speech delivered after he has declared

the list closed.

Adjournment of Debate

Rule 24

During the discussion of any matter, a representative may move the adjournment of the debate on the question under discussion. In addition to the proposer of the motion, two representatives may speak in favour of, and two against, the motion, after which the motion shall immediately be put to the vote. The President may propose that the time to be allowed to representatives under this rule be limited.

Closure of Debate

Rule 25

A representative may at any time move the closure of the debate on the question under discussion, whether or not any other representative has signified his wish to speak. Permission to speak on the closure of the debate shall be accorded only to two speakers opposing the closure, after which the motion shall be immediately put to the vote. If the Conference is in favour of the closure, the President shall declare the closure of the debate. The President may propose that the time to be allowed to representatives under this rule be limited.

Suspension or Adjournment of the Meeting

Rule 26

During the discussion of any matter, a representative may move the suspension or the adjournment of the meeting. Such motions shall not be debated, but shall immediately be put to the vote. The President may propose that the time to be allowed to the representative moving the suspension or adjournment be limited.

Order of Procedural Motions

Rule 27

Subject to Rule 21, the following motions shall have precedence in the following order over all other proposals or motions before the meeting:

- a) To suspend the meeting;
- b) To adjourn the meeting;
- c) To adjourn the debate on the question under discussion;
- d) For the closure of the debate on the question under discussion.

Basic Proposal

Rule 28

The draft Convention on Agency in the International Sale of Goods, prepared by the International Institute for the Unification of Private Law, shall constitute the basis for discussion by the Conference.

Other Proposals and Amendments

Rule 29

Proposals and amendments thereto shall normally be introduced in writing and handed to the Secretary-General of the Conference, who shall circulate copies to the delegations. As a general rule, no proposal or amendment shall be discussed or put to the vote at any meeting of the Conference unless copies of it have been circulated to all delegations not later than the day preceding the meeting. The President may, however, permit the discussion and consideration of proposals, amendments, or motions which have not been circulated or have only been circulated the same day.

Decisions on Competence

Rule 30

Subject to Rule 21, any motion calling for a decision on the

competence of the Conference to discuss any matter or to adopt a proposal or an amendment submitted to it shall be put to the vote before the matter is discussed or a vote is taken on the proposal or amendment in question.

Withdrawal of Motions

Rule 31

A motion may be withdrawn by its proposer at any time before voting on it has commenced, provided that the motion has not been amended or that an amendment to it is not under discussion. A motion which has thus been withdrawn may be reintroduced by any representative.

Reconsideration of Proposals

Rule 32

When a proposal has been adopted or rejected it may not be reconsidered unless the Conference, by a two-thirds majority of the representatives present and voting, so decides. Permission to speak on a motion to reconsider shall be seconded only to the mover and one other supporter and to two speakers opposing the motion, after which it shall immediately be put to the vote.

Invitation to Technical Advisers

Rule 33

The Conference may invite or admit to one or more of its meetings any person whose technical advice it may consider useful in its work.

CHAPTER VI – VOTING

Voting Rights

Rule 34

Each State represented at the Conference shall have one vote.

Required Majority

Rule 35

1. The final adoption of the Convention on Agency in the International Sale of Goods, both as a whole and article by article, shall be by a two-thirds majority of the representatives present and voting.

2. Other decisions of the Conference, in particular those relating to the adoption of the articles of the Convention on first reading, shall be taken by a simple majority of the representatives present and voting unless otherwise stated in these Rules.

3. If a vote is equally divided on a question requiring a decision to be taken by a simple majority of the representatives present and voting, the proposal shall be regarded as rejected.

Meaning of the expression "Representatives present and voting"

Rule 36

For the purpose of these Rules the phrase "representatives present and voting" means representatives casting an affirmative or negative vote. Representatives abstaining from voting shall be considered as not voting.

Method of Voting

Rule 37

The Conference shall normally vote by show of hands. Any representative may however request a roll call. The roll call shall be taken in the French alphabetical order of the names of the States participating in the Conference, beginning with the delegation whose name is drawn by lot by the President.

Conduct during voting

Rule 38

After the President has announced the beginning of voting, no

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representative shall interrupt the voting except on a point of order in connection with the actual conduct of the voting. The President may permit representatives to explain their votes after voting, except when the vote is taken by secret ballot. The President may limit the time to be allowed for such explanations.

Division of Proposals and Amendments

Rule 39

1. Parts of a proposal or amendment thereto shall be voted on separately if the President so proposes or if a representative requests that the proposal or amendment thereto be divided.

2. Where parts of a proposal or amendment thereto have been voted on separately, those parts of a proposal which have been approved shall then be put to the vote as a whole.

3. If all the operative parts of the proposal or amendment have been rejected, the proposal or amendment shall be considered to have been rejected as a whole.

Voting on Amendments

Rule 40

1. A motion is considered to be an amendment to a proposal if it adds to, deletes from or revises part of that proposal. An amendment shall be voted on before the proposal to which it relates is put to the vote. For the purpose of this Rule, a motion to delete a proposal or part thereof shall be considered to be an amendment to that proposal.

2. If two or more amendments are moved to a proposal, the Conference shall first vote on the amendment furthest removed in substance from the original proposal and then on the amendment next furthest removed therefrom and so on until all amendments have been put to the vote. Where, however, the adoption of one amendment necessarily implies the rejection of another amendment, the latter amendment shall not be put to the vote.

3. The President shall, in all cases, determine which amend-

ment is furthest removed in substance from a proposal or whether the adoption of an amendment necessarily implies the rejection of another amendment. An appeal against the President's ruling shall immediately be put to the vote and the President's ruling shall stand unless the appeal is approved by a majority of the representatives present and voting.

4. If one or more amendments are adopted, the amended proposal shall then be voted upon.

Voting on Proposals

Rule 41

If two or more proposals relate to the same question, the Conference shall, unless it decides otherwise, vote on the proposals in the order in which they have been submitted.

Elections

Rule 42

All elections shall be held in accordance with the procedure provided for in Rule 37 unless the Conference decides that they shall be held by secret ballot.

Rule 43

In the event of a secret ballot being held, two scrutineers shall be appointed by the Conference, on the proposal of the President, from the delegations present. The scrutineers shall scrutinise the votes cast and report the result to the President indicating the number of votes cast including invalid votes, if any.

Rule 44

1. If, when one person or one delegation is to be elected, no candidate obtains on the first ballot a majority of the representatives present and voting, a second ballot restricted to the two candidates obtaining the largest numbers of votes shall be taken. If on the second ballot the votes are equally divided the President shall decide between the candidates by drawing lots.

2. In the case of a tie on the first ballot among three or more candidates obtaining the largest numbers of votes, a second ballot shall be held. If on such a second ballot a tie results among more than two candidates, the number shall be reduced to two by lot and the balloting, restricted to those two, shall continue in accordance with the preceding paragraph of this Rule.

Rule 45

When two or more elective places are to be filled at one time under the same conditions, those candidates obtaining on the first ballot a majority of the representatives present and voting shall be elected. If the number of candidates obtaining such majority is less than the number of persons or delegations to be elected, there shall be additional ballots to fill the remaining places, the voting being restricted to the candidates obtaining the greatest number of votes in the previous ballot, to a number not more than twice the places remaining to be filled; provided that, after a third inconclusive ballot, votes may be cast for any eligible person or delegation. If three such unrestricted ballots are inconclusive, the next three ballots shall be restricted to the candidates who obtained the greatest number of votes on the third of the unrestricted ballots, to a number not more than twice the places remaining to be filled, and the following three ballots thereafter shall be unrestricted, and so on until the places have been filled.

CHAPTER VII COMMITTEES AND OTHER SUBSIDIARY BODIES

Committee of the Whole

Rule 46

The Conference may at any time establish a Committee of the Whole, if necessary. The Conference or the Committee of the Whole may set up subsidiary committees or working groups.

*Drafting Committee**Rule 47*

A Drafting Committee, composed of not more than twelve members, shall be appointed by the Conference. The Drafting Committee shall prepare drafts and give advice on drafting as requested by the Conference or by any of the Committees or subsidiary bodies. It shall also prepare the Final Act of the Conference. The Drafting Committee shall not alter the substance of texts submitted to it, but shall have the power to review and co-ordinate the drafting of all such texts. The Committee shall report, as appropriate, to the Conference or to any Committee or subsidiary body.

*Representation on Committees and other
subsidiary bodies**Rule 48*

Each State participating in the Conference which may be appointed to a Committee or other subsidiary body shall be represented by one person on that Committee or other subsidiary body. It may assign to these Committees or other subsidiary bodies such alternate representatives and advisers as may be required.

*Coordination by the Steering Committee**Rule 49*

1. The Steering Committee may meet from time to time to review the progress of the Conference and its Committees and other subsidiary bodies and to make recommendations for furthering such progress. It shall also meet at such other times as the Chairman deems necessary or upon the request of any other of its members.

2. Questions affecting the coordination of their work may be referred by other Committees and subsidiary bodies to the Steering Committee, which may make such arrangements as it thinks fit, including the holding of joint meetings of Committees or subcommittees and the establishment of joint working groups. The Steering Committee shall appoint, or arrange for the appointment of, the

Chairman of any such joint body.

Officers

Rule 50

Except in the case of the Chairman of the Committee of the Whole and the Chairman of the Drafting Committee, each Committee, sub-committee, or working group shall elect its own officers. The Committee of the Whole shall elect two Vice-Chairmen who shall be designated as first and second Vice-Chairmen and take precedence in that order. The Committee of the Whole shall elect a Rapporteur who will introduce the basic draft and give any necessary explanation to the delegations during the debates.

Quorum

Rule 51

A majority of the representatives on a Committee or other subsidiary body shall constitute a quorum.

*Conduct of business and voting in Committees
and other subsidiary bodies*

Rule 52

The rules contained in Chapters II, IV, V, VI, VIII et X shall be applicable *mutatis mutandis* to the proceedings of Committees and other subsidiary bodies.

CHAPTER VIII – LANGUAGES AND RECORDS

Official and Working Languages

Rule 53

1. The official languages of the Conference shall be English and French.
2. The official languages shall also be the working languages.

*Interpretation from Official Languages**Rule 54*

Speeches made at the Conference, its Committees and other subsidiary bodies in one of the official languages shall be interpreted into the other.

*Interpretation from other Languages**Rule 55*

Any representative may make a speech in a language other than an official language. In this case, he shall himself provide for interpretation into one of the official languages. Interpretation into the other official language by the interpreters of the Secretariat may be based on the interpretation given in the first official language.

*Summary Records**Rule 56*

1. The Secretariat shall prepare summary records of the plenary meetings of the Conference and meetings of the Committee of the Whole. These summary records shall be distributed to the participants as soon as possible after the closing of the meetings to which they relate.

2. The participants shall, within three days after the circulation of the summary record, inform the Secretariat in writing of any changes to their own statements that they wish to have made.

*Languages of Documents and Summary Records**Rule 57*

Conference documents and summary records shall be made available in the official languages.

CHAPTER IX
PUBLIC AND PRIVATE MEETINGS

Meetings of the Conference and its Committees

Rule 58

Except as provided in Rule 59, meetings of the Conference and of its Committees shall be held in public unless it is otherwise decided.

Other Meetings

Rule 59

Meetings of the Steering Committee, the Credentials Committee, the Drafting Committee, and as a general rule meetings of subsidiary bodies, shall be held in private.

Press Communiqués

Rule 60

At the close of any meeting, a communiqué may be issued to the press through the Secretary-General of the Conference.

CHAPTER X – OBSERVERS FROM INTERGOVERNMENTAL
AND NON-GOVERNMENTAL ORGANISATIONS

Rule 61

1. Observers from intergovernmental and non-governmental Organisations invited to the Conference may participate, without the right to vote, in the deliberations of the Conference, its Committees and other subsidiary bodies upon the invitation of the President of the Conference or of the Committee, as the case may be, on questions within the scope of their activities.

2. Technical advisers invited or admitted to any meeting of the Conference, its Committees or other subsidiary bodies in ac-

cordance with Rule 33 may take part, without the right to vote, in the deliberations of the Conference, its Committees or other subsidiary bodies upon the invitation of the President or Chairman as the case may be.

3. Written statements of intergovernmental and non-governmental Organisations invited to the Conference shall be distributed by the Secretariat to the delegations at the Conference.

4. Observers from intergovernmental and non-governmental Organisations participating in the Conference shall register with the Secretariat.

CHAPTER XI – AMENDMENTS TO THE RULES OF PROCEDURE

Rule 62

These Rules of procedure may be amended by a decision of the Conference taken by a majority of the representatives present and voting.

CHAPTER XII – SIGNATURE OF INSTRUMENTS

Rule 63

1. The Final Act resulting from the deliberations of the Conference shall be submitted for signature by the delegations.

2. Full Powers shall be required of each Representative or Alternate Representative who signs any Convention or other international instrument which may be drawn up and opened for signature by the Conference.

3. Full Powers shall be issued either by the Head of State, or Head of Government, or the Minister for Foreign Affairs.

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EUROPEAN FREE TRADE ASSOCIATION (EFTA)

Mr S. NORBERG, Director of Legal Affairs, Geneva.

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

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INTERNATIONAL TRADE CENTRE /UNCTAD-GATT

Mr G. LANGER, Geneva.

UNITED NATIONS COMMISSION
ON INTERNATIONAL TRADE LAW (UNCITRAL)

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UNITED NATIONS CONFERENCE
ON TRADE AND DEVELOPMENT (UNCTAD)

Ms M. MASHAYEKHI, Geneva.

UNITED NATIONS / ECONOMIC COMMISSION
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Part One

DOCUMENTS OF THE CONFERENCE

MARKIN

DRAFT CONVENTION ON AGENCY
IN THE INTERNATIONAL
SALE OF GOODS (1)

CHAPTER I – SPHERE OF APPLICATION AND
GENERAL PROVISIONS

Article 1

(1) This Convention applies where one person, the agent, has authority or purports to have authority on behalf of another person, the principal, to conclude a contract of international sale of goods with a third party.

(2) It governs not only the conclusion of such a contract by the agent but also any act undertaken by him for the purpose of concluding that contract or in relation to its performance.

(3) It is concerned only with relations between the principal or agent on the one hand, and the third party on the other.

(4) It applies irrespective of whether the agent acts in his own name or in that of the principal.

Article 2

(1) The Convention applies where the principal and the third party have their places of business in different States and:

(a) the agent has his place of business in a Contracting State, or

(1) Text established by a UNIDROIT Committee of Governmental Experts which met in Rome from 2 to 13 November 1981.

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

(2) However, those provisions of the Convention governing the case where, at the time of contracting, the third party neither knew nor ought to have known that the agent was acting as an agent shall not apply unless the agent and the third party have their places of business in different States and the Convention would otherwise be applicable under paragraph 1.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract of sale is to be taken into consideration in determining the application of this Convention.

Article 3

This Convention does not apply to:

- (a) the agency of a dealer on a stock, commodity or other exchange;
- (b) the agency of an auctioneer;
- (c) agency by operation of law in family law, in the law of matrimonial property, or in the law of succession;
- (d) agency arising from statutory or judicial authorisation to act on behalf of a person without capacity to act;
- (e) agency by virtue of a decision of a judicial or quasi-judicial authority or subject to the direct control of such an authority.

Article 4

For the purposes of this Convention:

- (a) an organ, officer or partner of a corporation, association, partnership or other entity, whether or not possessing legal personality, shall not be regarded as the agent of that entity in so

far as, in the exercise of his functions as such, he acts by virtue of an authority conferred by law or by the constitutive documents of that entity;

(b) a trustee shall not be regarded as an agent of the trust, of the person who has created the trust, or of the beneficiaries.

Article 5

(1) The parties may exclude the application of this Convention or [, subject to Article 11,] derogate from or vary the effect of any of its provisions.

(2) However, any such exclusion or derogation agreed upon by only two of the parties shall not affect the rights of the other party under this Convention.

Article 6

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application as well as to ensure the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 7

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

(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their relations any usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to agency relations of the type involved in the particular trade concerned.

Article 8

For the purposes of this Convention:

- (a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract of sale which the agent has concluded or purported to conclude, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of that contract;
- (b) if a party does not have a place of business, reference is to be made to his habitual residence.

CHAPTER II – ESTABLISHMENT AND SCOPE OF THE
AUTHORITY OF THE AGENT

Article 9

- (1) The authorisation of the agent by the principal may be express or implied.
- (2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authorisation was given.

Article 10

The authorisation need not be given in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

[Article 11]

- (1) Any provision of Article 10, Article 16 or Chapter IV of this Convention that allows an authorisation, a ratification, or a termination of authority to be made in any form other than in writing does not apply where the principal or the agent has his place of business in a Contracting State which has made a declaration under Article X of this Convention. The parties may not

derogate from or vary the effect of this paragraph.

(2) Any provision of Article 9 or Article 16 of this Convention that allows an authorisation or a ratification to be otherwise than express does not apply where the principal has his place of business in a Contracting State which has made a declaration under Article Y of this Convention.

(3) With regard to authorisation, the provisions of the preceding paragraphs shall only apply where the third party knew or ought to have known that the agent was acting as an agent.]

[Article 12]

For the purposes of this Convention "writing" includes telegram and telex.]

CHAPTER III – LEGAL EFFECTS OF ACTS
CARRIED OUT BY THE AGENT

Article 13

When an agent acts on behalf of a principal within the scope of his authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly bind the principal and the third party to each other, unless it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent undertakes to bind himself only.

Article 14

(1) When an agent acts without authority or acts outside the scope of his authority, his acts do not bind the principal and the third party to each other.

(2) Nevertheless, where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent

has authority to act on behalf of the principal and that he is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

Article 15

(1) When the agent acts on behalf of a principal within the scope of his authority, his acts shall bind only the agent and the third party:

(a) if at the time of contracting the third party neither knew nor ought to have known that the agent was acting as an agent, or

(b) if it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent undertakes to bind only himself.

(2) Nevertheless:

(a) the principal may exercise the rights acquired on his behalf by the agent against the third party, subject to all the defences which the third party may set up against the agent, where the agent has not fulfilled or is not in a position to fulfil his obligations to the principal;

(b) the third party may exercise against the principal the rights which he has against the agent, subject to all the defences which the agent may set up against the third party and which the principal may set up against the agent, where the agent has not fulfilled or is not in a position to fulfil his obligations to the third party.

(3) Notice of intention to exercise these rights shall be given to the agent and to the third party or principal, as the case may be. As soon as the third party or principal has received such notice, he may no longer free himself from his obligations by dealing with the agent.

(4) Where the agent is precluded from fulfilling his obligations to the third party by reason of a breach of duty on the part of the principal, the agent shall communicate the name of the principal to the third party.

(5) Where the third party fails to fulfil his obligations under the contract to the agent, the latter shall communicate the name of

the third party to the principal.

(6) The principal may not exercise the rights of the agent against the third party if it appears from the circumstances of the case that, if he had been aware of the identity of the principal at the time of contracting, the third party would not have entered into the contract.

(7) An agent, in accordance with the express or implied instructions of the principal, may agree with the third party that the provisions of paragraph 2 of this article shall not apply.

Article 16

(1) An act by an agent who acts without authority or who acts outside the scope of his authority may be ratified by the principal unless under the provisions of Article 15, paragraph 1 the agent binds only himself. On ratification the act produces the same effects as if it had been initially carried out with authority.

(2) If, at the time of the act by the agent, the third party neither knew nor ought to have known of the lack of authority, he shall not be bound to the principal if, at any time before ratification, he gives notice of his refusal to become bound by a ratification. If, however, the third party knew or ought to have known of the lack of authority of the agent, he may not refuse to become bound to the principal before the expiration of the time agreed for ratification or, failing such agreement, such reasonable time as the third party may specify.

(3) The third party may refuse to accept a partial ratification.

(4) Ratification shall take effect when it comes to the attention of the third party and, once effective, may not be revoked.

(5) Ratification is effective notwithstanding that the act itself could not have been effectively carried out at the time of ratification.

(6) If the act has been carried out on behalf of a corporation before its creation, ratification is effective only if allowed by the law of the State governing its creation.

(7) Ratification is subject to no requirements as to form. It

may be express or may be inferred from the conduct of the principal.

Article 17

(1) An agent who acts without authority or who acts outside the scope of his authority shall, failing ratification, be liable to pay the third party such compensation as will place the third party in the same position as he would have been in if the agent had acted with authority and within the scope of his authority.

(2) The agent shall not be liable, however, if the third party knew or ought to have known that the agent had no authority or was acting outside the scope of his authority.

CHAPTER IV – TERMINATION OF THE AUTHORITY OF THE AGENT

Article 18

For the purposes of this Convention, the authority of the agent is terminated:

(a) when this follows from any agreement between the principal and the agent;

(b) on completion of the transaction or transactions for which the authority was created;

(c) on revocation by the principal or renunciation by the agent, whether or not this is consistent with the terms of their agreement; or

[(d) when the principal or the agent dies or, under the applicable law, ceases to exist or loses his capacity to act.]

Article 19

The authority of the agent is also terminated when the applicable law so provides.

Article 20

The termination of the authority shall not affect the third party unless he knew or ought to have known of the termination or the facts which caused it.

Article 21

Where the third party knows of the authority of the agent only from the agent, without any confirmation by the conduct of the principal, termination of the authority has effect upon the third party as soon as the agent has notice of it, even if the third party has no notice of it.

Article 22

Notwithstanding the termination of the authority, the agent remains authorised to perform on behalf of the principal or his successors the acts which are necessary to prevent damage to their interests.

CHAPTER V – FINAL PROVISIONS (2)

[Article X]

A Contracting State whose legislation requires authorisation, ratification, or termination of authority to be made in or evidenced by writing may at any time make a declaration in accordance with Article 11 that any provision of Article 10, Article 16 or Chapter

(2) As requested by the Committee of Governmental Experts, the Secretariat will prepare for a Diplomatic Conference a set of final clauses modelled on those of the 1980 United Nations Convention on Contracts for the International Sale of Goods. Articles X and Y would, if adopted, be inserted at the appropriate place among these clauses.

IV of this Convention that allows an authorisation, a ratification, or a termination of authority to be other than in writing, does not apply where the principal or the agent has his place of business in that State.]

[Article Y

A Contracting State may at any time make a declaration in accordance with Article 11 that any provision of Article 9 or Article 16 that allows an authorisation or a ratification to be other than express, does not apply where the principal has his place of business in that State.]

EXPLANATORY REPORT

prepared by the UNIDROIT Secretariat

I

BACKGROUND TO THE DRAFT CONVENTION

1. — The origins of the draft Convention date back to studies initiated by UNIDROIT in 1935 which led to the publishing in 1961 of two draft Uniform laws relating respectively to agency in private law relations of an international character and to the contract of commission in the international sale or purchase of goods. In view of the difficulties which this distinction entailed for Common Law countries, where it is unknown, a Committee of Governmental Experts convened by UNIDROIT to end the deadlock suggested narrowing the field in which unification should be attempted and undertook the drafting of a new Uniform law dealing with the practical aspects of agency contracts of an international character for the sale and purchase of goods. This Committee met between 1970 and 1972 and adopted the text of the draft Uniform law at its fourth and final session. The draft, together with an explanatory report prepared by the Secretariat (1), was circulated among the member States of UNIDROIT in October 1973 and in December 1976 the Romanian Government announced its decision to host a Diplomatic Conference for the adoption of the draft Convention. This Conference was held in Bucharest from 28 May to 13 June 1979.

2. — Regrettably, the complexity of the subject-matter did not permit all of the articles to be considered within the time allowed and the text of those articles which were approved was appended to a Final Resolution (2), adopted by the Conference at its closing session. This Resolution also called on UNIDROIT to take the necessary steps to ensure that the work begun at Bucharest be completed as soon as possible.

(1) Study XIX — Doc. 55.

(2) For the text of the Final Resolution and of the articles adopted by the Conference, see the ANNEX hereto.

3. — Following consultations with a number of experts who had been present at the Bucharest Conference, with a view to ascertaining the principal difficulties which would be encountered at a second Conference, the Governing Council of UNIDROIT decided at its 59th session, held in May 1980, that it would be premature to hold a second Conference on the agency draft in 1981, given the existence of a certain number of problems which called for further consideration. In consequence it was agreed to convene a restricted group composed of three experts, representing respectively the Common Law, Civil Law and Socialist systems, to examine the existing texts. The findings of the group were brought to the attention of the Council at its 60th session in April 1981.

4. — The principal conclusion of the Group was that the main need in this field is for an attempt to unify the law of agency as it affects international contracts of sale since the existing international Conventions regulating such contracts do not cover the situation where they are concluded through agents. It also considered that if any progress were to be made, it would be vital to concentrate on aspects of the law of agency affecting the position of the third party to a contract of international sale of goods vis-à-vis both the principal and the agent. While such a task would be relatively easy, the Group considered that if an attempt were to be made to unify the whole law of agency, including the relations between the principal and the agent, the work would get bogged down. Given these difficulties, there would be no future in such an ambitious project and it was agreed that the draft should be simplified so as to deal only with the relations between the principal and the third party, and between the agent and the third party. Chapter III of the 1972 draft, governing relations between the principal and the agent, should therefore be deleted and left possibly for incorporation in a future international Convention if this was thought necessary.

5. — Although some members of the Governing Council were reluctant to agree to the proposed deletion of Chapter III of the 1972 draft, they were nevertheless prepared to follow the majority in endorsing the recommendation of the restricted group, on condition that the Secretariat would at some time in the future proceed to a detailed study of the internal relations between the principal and the agent with a view to the possible drawing up of uniform rules in this connection. The undertaking of such a study was however subject to the proviso that a Diplomatic Conference would actually be held for the adoption of the agency draft and, for the purpose of determining the prospects of success of such a Conference, the Council agreed to the convening of a Committee of Governmental Experts for the revision of the agency draft on the basis of a new text to be prepared by the Secretariat which would take account of the various recommendations made by the restricted group of experts (3).

(3) The text is contained in Study XIX — Doc. 58.

6. — The Committee of Governmental Experts met in Rome from 2 to 13 November 1981. It endorsed the general approach set out in the report of the restricted group of experts and thoroughly revised the text prepared by the Secretariat. There was also a general feeling within the Committee that the new draft approved by it and reproduced above provided a valid basis for discussion at a Diplomatic Conference for the adoption of the prospective Convention on Agency in the International Sale of Goods.

II

GENERAL CONSIDERATIONS

7. — Given the decision of the Committee of Governmental Experts convened by UNIDROIT in November 1981 (hereinafter referred to as "the Committee") to endorse the deletion from the draft Convention of the provisions dealing with the internal relations between the principal and the agent, the draft can no longer be seen as an attempt to codify the law relating to international agency; rather it seeks to supplement the existing Conventions dealing with the international sale of goods which do not directly cover the situation where contracts for such sales are concluded through an agent. Unification in this field is, however, considerably more difficult to achieve than in relation to contracts of sale, not only because the agency relationship is of a trilateral character but also because of the distinctions drawn in the various legal systems with regard to the buying and selling of goods through agents. These distinctions are based on two main criteria.

8. — The first concerns the relationship which exists between the person who effects the sale or purchase and the person on behalf of whom the transaction is concluded. The distinction here is between the agent acting on behalf of an employer to whom he is bound by a relationship of subordination or dependence, generally by a contract of employment, and the independent agent who acts with complete freedom. In Common Law countries this category of agent includes those referred to as "factors", "mercantile agents", etc., who are subject to the same legal regime. In continental legal systems, however, a further distinction is made.

9. — According to this second criterion, a distinction is generally drawn in Civil Law countries between, on the one hand, agents acting in someone else's name (French *agents commerciaux*, Italian *agenti*, German *Handelsvertreter*, Swiss *agent*, Belgian *représentant de commerce*, Dutch *Handels-agent*), usually described as being in charge of promoting and concluding con-

tracts (4) in the name and on behalf of someone else, and, on the other hand, agents acting in their own name (French *commissionnaires*, Italian *commissionari*, German *Kommissionäre*, Belgian *commissionnaires*), generally described as agents who purchase and sell goods in their own name but on behalf of a principal. The logical consequence of this distinction is that, in theory, agents belonging to the former category remain personally outside the contracts in the conclusion of which they have participated, whilst agents belonging to the second category, namely "commission agents", become themselves parties to the contract.

10. — A more careful examination of legal reality will, however, show that in spite of these extremely clear-cut general principles certain departures have been made from them. On the one hand, there are cases where, even within the structure of the Civil Law *représentation*, the indication of the principal's name is not considered necessary for its normal effect to be produced (5); on the other hand, there are cases where certain normal effects of *représentation* are even produced by the intervention of an agent of the *commissionnaire* type, necessarily acting in his own name (6).

11. — It would hence appear that, in spite of the clear differences existing in principle between *commissionnaire* and *représentant*, certain considerations of a practical nature tend, particularly in matters of sale, to draw these two categories of agent closer together. Nor is there a wide gulf between the rules governing the activities of the continental *représentant* and *commissionnaire*, on the one hand, and the Common Law agent, on the other, at least in connection with the sale and purchase of goods. It seems feasible, therefore, to elaborate a set of rules, intended to represent a compromise between the Civil Law and the Common Law systems, governing the more important aspects of the law of agency as it affects the relations between the parties to a contract of international sale of goods concluded through an agent, and the relations between the agent and the party with whom he has concluded the contract of sale.

(4) The question of whether the agent has the power to conclude the contract of sale or merely to negotiate on behalf of the principal is critical for the application of the Convention (see below, paragraph 15) and this distinction depends to a certain extent on the character of the agency relationship, in that commercial agents in many countries are not as a rule empowered to conclude contracts on behalf of the principal, although this is not invariably the case.

(5) e.g. Swiss *Code des Obligations*, Art. 32; German theory of *Handeln für den, den es angeht*.

(6) e.g. German *HGB*, § 392, II; Swiss *Code des Obligations*, Art. 401; Italian *Codice Civile*, Arts. 1705 II, 1706, I and 1707.

12. — The draft Convention rests on certain basic principles which may be summarised as follows:

(1) Agency is intended to cover any relationship in which one person (the agent) has authority or purports to have authority on behalf of another person (the principal) to conclude a contract of international sale of goods with a third party, irrespective of whether the agent acts in his own name or in that of the principal (Article 1, paragraphs 1 and 4).

(2) The agent's authority to bind the principal and the third party may derive from express or implied authorisation by the principal (Article 9, paragraph 1).

(3) Any act carried out by the agent on behalf of the principal will directly bind the principal and the third party, provided that the agent has acted within the scope of his authority and that the third party knew or ought to have known that the agent was acting as an agent; thus it is not essential that the agent should act specifically in the principal's name (Article 13); however, if the third party and agent have agreed that the latter is committing himself only (for example, when the agent holds himself out to be a *commissionnaire* in the meaning of continental law), the situation of the parties is assimilated to that in which the third party neither knew nor ought to have known that the agent was acting as an agent.

(4) If the third party neither knew nor ought to have known that the agent was acting as an agent or if the third party and agent have agreed that the latter is committing himself only, the contract will as a general rule bind only the agent and the third party; however, if the agent has not fulfilled his obligations to one of the parties (principal or third party), that party may exercise his rights directly against the other party who, in turn, may raise the defences which the agent could have put forward against the claimant (Article 15).

(5) When an agent acts without authority or acts outside the scope of his authority, his acts do not, in the absence of ratification by the principal under Article 16, bind the principal and the third party to each other, although in those cases where the doctrine of "apparent authority" applies, the principal may not invoke against the third party the lack of authority of the agent (Article 14).

(6) The authority of the agent is terminated when the applicable law so provides and in a certain number of cases specified by the draft Convention itself (Articles 18 and 19).

III

COMMENTARY ON THE PROVISIONS OF THE DRAFT CONVENTION

CHAPTER I — SPHERE OF APPLICATION AND GENERAL PROVISIONS

13. — The principal concerns of the Committee with respect to this chapter were twofold. The first was to make as few changes as possible to the texts adopted at the Diplomatic Conference in 1979, subject of course to the need to delete those provisions such as Articles 2 and 6 of the Bucharest text which were concerned solely with the internal relations between the principal and the agent. The second was to follow as closely as possible the structure of the first two chapters of the Vienna Convention of 1980 on Contracts for the International Sale of Goods (hereinafter referred to as "the Vienna Convention") and to employ wherever possible and desirable the same language as that used in the relevant provisions of the Vienna Convention.

Article 1

14. — This article sets out the basic rules regarding the substantive sphere of application of the draft Convention. As mentioned above, the draft confines itself to agency relationships in the international sale of goods and to a large extent it is therefore complementary to the Vienna Convention. The majority of members of the Committee did not however consider it necessary to introduce any definition of the term "international sale of goods" as employed in the draft Convention for in their view its meaning was clear (see paragraphs 19 and 20 below). Some members would have preferred the use of language in the English text clearly indicating that the draft applies to both the sale and the purchase of goods, so as to avoid the implication that acts of buying agents are excluded. It was however agreed that the use in paragraph 1 of the words "contracts of international sale of goods" based on the language of the Vienna Convention should be sufficient to remove any uncertainty on this point.

15. — The principal difference between the text of Article 1 and the corresponding provision adopted at Bucharest lies in the restriction of the scope of application of the draft to those cases where the agent has authority or purports to have authority on behalf of the principal actually to conclude a contract for the international sale of goods with a third party. It is indeed clear that with the removal of the chapter governing the internal relations between the principal and the agent and the focusing of attention on the new Chapter III, "Legal effects of acts carried out by the agent", there is scarcely any justification for dealing in the draft with those cases where the agent

simply has power to negotiate on behalf of the principal, although the effects of acts performed by such an agent who purports to have authority to conclude a contract are of course governed by the draft by virtue of paragraph 1 of Article 1.

16. — It is, moreover, clear from the language of the new paragraph 2 that the draft is intended to govern not only the conclusion of the contract by the agent but also any acts undertaken by him for the purpose of concluding it or in relation to its performance. In this connection it should however be stressed that the draft is not concerned with the validity of the sales contract as such but rather with the effects of the acts of an agent concluding or purporting to conclude such a contract on behalf of the principal with a third party, with the consequence that the applicability of the draft is dependent not on whether the contract of sale itself is valid but on whether the agent has authority to conclude or purports to have authority to conclude the contract, irrespective of its validity. Furthermore, it should be noted that the reference to performance in paragraph 2 contemplates only acts in relation to performance of a contract of sale undertaken by an agent who has concluded the contract in question.

17. — Paragraph 3 affirms the principle that the draft Convention is concerned only with relations between the principal or agent on the one hand, and the third party on the other, and by implication therefore it does not deal with the internal relations between the principal and the agent. It became apparent to the Committee however that in respect of certain provisions of the draft it was not possible totally to ignore the relations between the agent and the principal and the view was expressed that it might be necessary in connection with those provisions to specify that insofar as such relations are dealt with, it is only to the extent that they are of relevance to the relations between the principal and the third party or between the agent and the third party.

18. — As regards paragraph 4, it is sufficient to recall that from the outset it has been the intention of the various committees which have worked on the draft Convention to cover cases where the agent acts in his own name, for example a *commissionnaire*, or in that of the principal and in this connection attention may be drawn to a question of terminology. The three parties involved in the agency relationship governed by the draft Convention are referred to in English from paragraph 1 onwards by the terms "principal", "agent" and "third party", all of which belong to the legal vocabulary of the English language. There is, however, a difficulty in French as the relationship governed by the draft covers both agency (*la représentation*) and the contract of commission (*le contrat de commission*). In order to underline the widening of this notion and to avoid a possible restrictive interpretation of these terms, the person in the centre of the relationship considered, who acts on behalf of another, is referred to throughout in the French version by the term *intermédiaire*. He may be either a *représentant* or a *commissionnaire* in the French sense. The fact that the term *intermédiaire* has no precise legal meaning makes it suitable to indicate the party charac-

terising the whole legal category considered. This single terminological innovation seems sufficient to rule out all risk of confusion; it has however been decided to retain the French terms *représenté* and *représentation* which could be subjected to the same criticism but for which no suitable substitute has been found.

Article 2

19. — The provisions of this article lay down further conditions for the applicability of the future Convention. In the first place, the principal and the third party, that is to say the two parties with the direct interest in the contract of sale, must under paragraph 1 have their places of business in different States, a requirement similar to that to be found in respect of the buyer and seller in Article 1, paragraph 1 of the Vienna Convention.

20. — What must be international in character is not therefore the agency contract, since the principal and the agent may have their places of business in the same State, but the contract of sale, the intention of the Committee being that the future Convention on agency should, as a general rule, be applicable to cases falling under the Vienna Convention; it should however be noted in this connection that situations could arise, for example where a commission agent concludes a contract for the sale of goods in a State where both he and the third party have their places of business, which would not be regarded as an international sale of goods under the Vienna Convention, but where the necessary international element for the application of the agency Convention would be present, provided that the principal had his place of business in a State different from that of the commission agent and the third party. This is however an inescapable consequence of the concept that the places of business of the principal and the third party should be critical in determining the international character of the relationship and the solution would not seem to create any conflict with existing Conventions regulating the international sale of goods.

21. — Sub-paragraphs (a) and (b) further restrict the scope of application of the draft Convention. The additional alternative requirements laid down are that either the agent must have his place of business in a Contracting State, or that the rules of private international law lead to the application of the law of a Contracting State, this latter provision corresponding to Article 1(b) of the Vienna Convention.

22. — Strenuous criticism has been levelled at sub-paragraph (a), on the one hand on the ground that it unduly restricts the scope of application of the draft which, it has been suggested, should apply whenever any one of the three parties has his place of business in a Contracting State, and on the other because it permits too broad an application. In this regard, it has in particular been pointed out that paragraph 1(a) is in conflict with the provisions

of Article 11 of the Hague Convention of 1978 on the Law Applicable to Agency (hereinafter referred to as "the Hague Convention") and a proposal has been made to the effect that paragraph 1(a) should refer not only to the agent but also to the third party.

23. — A number of arguments have however been advanced in favour of the solution contained in Article 2, paragraph 1(a). In the first place, the text corresponds to that adopted at Bucharest where the need for some objective connecting factor was recognised; moreover the applicability of the Convention's depending upon the agent's place of business being situated in a Contracting State was already justified in the commentary on the 1972 text on the ground of the foreseeability of its application as the agent is the only person necessarily known to both the principal and the third party, both of whom can be presumed to be aware of his place of business. It has furthermore been suggested that it must be borne in mind that Article 2, paragraph 1(a) is a rule determining the scope of application of a Convention aimed at the unification of substantive law rather than a provision unifying choice of law rules in a Convention on private international law and that it is not therefore necessary to follow in every detail the rules relating to choice of law established by the Hague Convention. In addition, the suggested conflict of Conventions may be more apparent than real as, in the first place, problems could only arise if the court seized of the case were in a Contracting State to the future Convention for otherwise that court would not be obliged to apply it, while secondly, if it is contended that sub-paragraph (a) does indeed lay down a rule of private international law, then a State party to both Conventions could invoke Article 22 of the Hague Convention which provides that "the Convention shall not affect any other international instrument containing provisions on matters governed by this Convention to which a Contracting State is, or becomes a party".

24. — Paragraph 2 of Article 2 was considered necessary by a majority of the Committee which was of the opinion that the third party should, in those cases where he believed that he was entering into a purely domestic transaction, be protected from the surprise constituted by the application of the Convention under paragraph 1 by virtue of the fact that the principal has his place of business in another State. It was not however considered enough for the third party to demonstrate that the fact that the principal had his place of business in a State different from the third party "did not appear from the contract of sale or from any dealings between the parties or from information disclosed by the principal or agent at any time before or at the conclusion of the contract", a form of words modelled on Article 1, paragraph 2 of the Vienna Convention: in those cases where the third party knows that the agent is acting as an agent, he is not entitled to believe that the transaction is a purely domestic one when he also knows that the agent has his place of business in a different State from his own and it would seem improbable in international

transactions that he would be unaware of the agent's place of business. Moreover in those cases where the third party does not know of the principal's place of business, he can always request information from the agent on this point.

25. — This situation is, however, different when the third party neither knew nor ought to have known that the agent was acting as an agent, for there the third party is unaware of the very existence of the undisclosed principal. In these circumstances therefore, the Committee decided that the provisions of the Convention governing the case where, at the time of contracting, the third party neither knew nor ought to have known that the agent was acting as an agent will not apply unless (a) the agent and the third party have their places of business in different States, a fact of which the third party is presumed to be aware and which would already put him on notice that the transaction possesses international characteristics, and (b) the requirements for the draft Convention to be applicable under paragraph 1 have also been met.

26. — Paragraph 3 is modelled closely on Article 1, paragraph 3 of the Vienna Convention. Indeed the only difference is the addition of the words "of sale" after "contract" in line 2, evidently unnecessary in Article 1, paragraph 3 of the Vienna Convention, which serve to emphasize the close link between that instrument and the draft agency Convention. The effect of the provision is to disregard the distinction drawn in a number of legal systems between contracts of a civil character and those of a commercial character depending on the nature of the transaction considered or the character of the parties.

Article 3

27. — This article excludes certain agency relationships from the scope of application of the draft Convention because of their special character. It is not however concerned with agency relations in respect of the sale of certain kinds of property and a proposal to introduce such a provision so as to secure conformity with Article 2 of the Vienna Convention was rejected on the ground that the reasons for excluding certain kinds of property or contracts of sale from the Vienna Convention were not necessarily decisive in a Convention on agency where different considerations applied.

28. — Paragraph (a) excludes "the agency of a dealer on a stock, commodity or other exchange" on account of the special rules which exist in most countries in regard to such transactions and which often vary according to the market concerned.

29. — In connection with the exclusion of agency of an auctioneer under paragraph (b) it is to be noted that sales by auction are also excluded from the scope of application of the Vienna Convention (Article 2(b)). The authors

of the agency draft wished to avoid including auction sales principally because the auctioneer is considered as being the agent between the buyer and the seller.

30. — Paragraph (c) is modelled on Article 2(c) of the Hague Convention, the only difference being the substitution of the words "in the law of matrimonial property" for the phrase "in matrimonial property regimes" in the English text. Since however it was not the wish of the drafters in any way to alter the meaning of the provision it would seem in order to refer to the Explanatory report on the Hague Convention where it is stated that "the intention of Article 2(c) is to exclude cases of non-consensual agency in the fields of family law, matrimonial property and succession. These kinds of agency belong more to the law governing personal status and property rights than to the law of contract" (7). The author of the report further notes that the cases of agency falling within the provision are those which in Civil Law systems would be regarded as *représentation légale* as opposed to *représentation volontaire* and that it is the concept of *représentation légale* which it is sought to convey in English by the expression "agency by operation of law". Finally, it should be pointed out that the report calls for a liberal interpretation of the provision so as to cover some cases of non-consensual agency which the Common Law might not consider as falling within the notion of agency by operation of law, for example a wife's authority to pledge her husband's credit for necessities.

31. — The purpose of Article 3(d) is to prevent the draft Convention affecting national rules regarding the possibility to act on behalf of a person without capacity and extends to cases such as those of tutors or guardians who hold their power by law or through a judicial authorisation and not by virtue of a contract of agency. The term "capacity to act" was chosen by the Committee in preference to the words "full legal capacity" which had been adopted at Bucharest, as what is here at issue is not legal capacity in the sense of capacity to have rights and duties, which is enjoyed by all natural and legal persons, but rather contractual capacity.

32. — Like paragraph (c), paragraph (e) is taken over from the Hague Convention (Article 2(d)), this time however without any change in the wording. As is pointed out in the Explanatory report on the Hague Convention, the cases falling under this provision, like those mentioned in Article 3(c) of the agency draft, have little relevance to a Convention concerned with commercial law (8). It is also indicated that the judicial or quasi-judicial authority which has created the agency or has it under its direct control will normally apply its

(7) Hague Conference on Private International Law: *Actes et documents de la Troisième session*, Tome IV, page 411, paragraph 130 et seq.

(8) *Ibid.*, page 409, paragraph 121.

own rules to regulate the operation of the agency"⁽⁹⁾ and that there will often be an overlap between agency falling under those paragraphs of the Hague Convention which are reproduced as paragraphs (c) and (e) of Article 3 of the UNIDROIT draft. Finally, it should be borne in mind that the "reference to agency subject to the 'direct control' of a judicial or quasi-judicial authority is designed to limit the kind of agency covered by these words to agency under the direction of the court, as, for example, where the agent cannot take any steps in the course of his agency without first referring to the court".⁽¹⁰⁾

33. — There was lengthy discussion within the Committee as to whether a provision should be added to Article 3 with a view to excluding agency in respect of goods bought for personal, family or household use, so as to ensure a degree of parallelism with Article 2(a) of the Vienna Convention. Although little support was forthcoming for a proposal to add a new subparagraph (f) to Article 3 which would have excluded the Convention's application to all cases of agency in relation to consumer sales, a significant number of delegations were of the opinion that problems might arise in connection with agency relations relating to such sales. It was therefore proposed that a new paragraph 2 be added to Article 3 to the effect that "Nothing in this Convention affects any provision of national law relating to the protection of consumers". Other delegations however saw no practical need for the provision and it was suggested that if problems did arise in such cases they were concerned not with the agency relationship itself but rather with the substantive provisions of the law concerning consumer protection. It was further objected that it would be invidious in this context to speak of rules of national law but not in the many other cases which could be contemplated, and that in any event the courts could be relied upon to ensure the application of national rules of law relating to consumer protection. The proposed new paragraph 2 was rejected by the casting vote of the Chairman.

Article 4

34. — Apart from two minor drafting amendments to the French text, Article 4 reproduces the corresponding provision of the Hague Convention (Article 3). Paragraph (a) is concerned with the representation of a company (11) by its organs, acting as such, which in many Civil Law systems is not

(9) *Ibid.*, page 411, paragraph 133.

(10) *Ibid.*, page 412, paragraph 135 and for a discussion of the concordance of the English expression "quasi-judicial" and the French term *administrative*, see page 412, paragraph 134.

(11) The word "company" is used to embrace the terms "corporation, association, partnership or other entity" to be found in Article 4(a) and the word "organ" to designate the "organ, officer or partner" mentioned in that provision.

regarded as a case of agency at all. For this reason, the draft Convention does not apply when such an organ acts within the authority conferred on it by law or by its constituent documents. If however, such an organ acts outside the authority conferred on it, it is no longer acting as an organ and, as pointed out in the Explanatory report on the Hague Convention, is in the same position as any other agent of the company. In these circumstances the provisions of the draft Convention will apply to determine the legal effects of the acts carried out by the organ. Similarly, they will apply in those cases where the organ acts not by virtue of the actual authority conferred upon it in its capacity as such but rather on the basis of a special authorisation conferred in relation to a particular transaction.

35. — Paragraph (b) of Article 4 provides that "the trustee shall not be regarded as an agent of the trust, of the person who has created the trust or of the beneficiaries", so as to avoid the possibility of courts in countries unfamiliar with the concept of the trust treating the trustee as an agent for the purposes of this Convention. As pointed out however in the Explanatory report on the Hague Convention, a trustee may act as a principal, as for example when he appoints an agent to sell trust property, or even as an agent of persons unconnected with the trust, for example by managing a travel agency forming part of the assets of the trust (12).

Article 5

36. — This article, the wording of which is taken over from Article 6 of the Vienna Convention, endorses the widely accepted view that international trade law Conventions should not as a rule deprive the parties of their freedom to choose alternative rules to govern their transactions. In consequence, paragraph 1 of the article provides that the parties may exclude the application of the Convention or derogate from or vary the effect of any of its provisions. The one exception would be if the Convention were, in its final form, to contain a provision corresponding to the present Article 11 which permits States to make reservations regarding the necessity for written form or for authorisations or ratifications to be express. Pending a final decision on this point by the Diplomatic Conference the reference to Article 11 in Article 5, paragraph 1 has been placed in square brackets.

(12) Hague Conference on Private International Law: *op. cit.*, page 415, paragraph 148.

37. — Paragraph 2 recognises that agency is a tripartite situation and that it is not possible for an exclusion of, or derogation from, the provisions of the future Convention agreed upon by two of the parties to affect any rights that the other party may have thereunder. However, paragraph 2 does not prevent the principal from instructing the agent to stipulate derogations to the Convention in the contract with the third party (see for example Article 15, paragraph 7). These then have full effect for all parties as they are considered as being an agreement between the principal and the third party made through the agent.

Article 6

38. — This provision, which corresponds word for word to Article 7 of the Vienna Convention, is directed principally to judges. Paragraph 1 encourages them on the one hand to have regard to the international character of the Convention and thus to avoid interpreting it simply in the light of their own legal principles and traditions, and on the other hand to ensure the observance of good faith, which is of crucial importance for the development of international trade.

39. — Paragraph 2 for its part deals with the problem of gaps in the draft Convention and provides that, where possible, matters not expressly dealt with in it should be settled in conformity with the general principles on which it is based. In the absence of such principles, the judge should not automatically have recourse to the law of the forum but rather to the law applicable by virtue of the rules of private international law.

Article 7

40. — This article, the language of which follows very closely that of Article 9 of the Vienna Convention, describes the extent to which usages and practices are binding on the parties; by the combined effect of paragraphs 1 and 2 usages to which the parties have agreed, whether expressly or impliedly, are binding on them.

41. — In order for there to be an implied agreement that a usage will be binding on the parties, the usage must meet two conditions: it must be one "of which the parties knew or ought to have known" and it must be one "which in international trade is widely known to, and regularly observed by, parties to agency relations of the type involved in the particular trade concerned." The expression "parties to agency relations of the type involved in the particular trade concerned" is intended to emphasize the link between the usage and the agency relation and at the same time the relevance of that usage to the particular trade with which the underlying contract of sale is concerned. The trade may for example be restricted to a certain product, region or set

of trading partners.

42. — Usages which become binding on the parties will, in the event of conflict with any provision of the future Convention, prevail according to the principle of the autonomy of the parties stated in Article 5.

43. — Although there was full agreement in the Committee as to the substance of the text, there were misgivings in some quarters as to the ambiguity of the term "parties", given the tripartite relations involved. It was however pointed out that the statements in paragraph 1 that the parties are bound "by any usage to which they have agreed" and "by any practices which they have established between themselves" clearly imply that the reference to those usages or practices cannot be interpreted as affecting the person not a party to such agreement, usages or practices.

44. — Admittedly, however, no such guidance is provided in paragraph 2 and the introduction in paragraph 1 of some such language as "the principal and the agent on the one side and the third party on the other are bound" would certainly clarify the situation. In such a case, paragraph 2 could begin with the words "they" rather than "the parties".

Article 8

45. — This article is based on Article 10 of the Vienna Convention. Paragraph (a) deals with the situation in which one of the parties has more than one place of business. This is a matter of crucial importance for the determination of whether the future Convention will apply in a given case since, under Article 2, it is necessary that the places of business of the principal and the third party be in different States and, unless Article 2, paragraph 1(b) applies, that the agent's place of business be in a Contracting State. It becomes therefore necessary to determine which place of business is relevant for the purpose of Article 2.

46. — According to paragraph (a) of Article 8, the relevant place of business is that which has "the closest relationship to the contract of sale which the agent has concluded or purported to conclude" since it is through the contract of sale that the relations between the principal or the agent on the one hand, and the third party on the other, have been created. It should be noted in this connection that although a proposal was made to follow Article 10 of the Vienna Convention more closely by referring to the contract of sale "or its performance" on the ground that the contemplation of the performance of the contract might be of the greatest importance at the time of its conclusion, the Committee did not consider such a reference to be appropriate in a Convention concerned with agency.

47. — In determining the place of business which has the "closest rela-

relationship", paragraph (a) states that regard is to be given to "the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract." This formula is taken from Article 10(a) of the Vienna Convention although once again concern was expressed at the ambiguity of the word "parties" and it was suggested that, given the general rule laid down in Article 5, paragraph 2, the absence of clarification could permit an *contrario* interpretation that one party could be affected by circumstances known to or contemplated by the other two parties but not by himself. To this, however, it was replied that there was a significant difference between Article 8 and Article 5 in that the former article is concerned not with deciding the possible effects on one party of an agreement between the other two parties, but rather with laying down a rule of construction for the determination of whether or not a place of business should be taken into account. It was also suggested that the difficulty in interpretation could be overcome if it were recognised that the parties mentioned in paragraph (a) could only be those to whose contemplation reference was made.

48. - Paragraph (b) deals with the case where one of the parties does not have a place of business. Most international contracts are entered into by businessmen who have recognised places of business. Occasionally, however, a person who does not have an established "place of business" may enter into a contract of international sale of goods or act as an agent in connection with such a contract. The present provision provides that in this situation reference is to be made to his habitual residence.

CHAPTER II - ESTABLISHMENT AND SCOPE OF THE AUTHORITY OF THE AGENT

49. - Chapter II of the 1972 draft contained four articles. At the Bucharest Conference it was decided to delete the article dealing with written form (Article 11), to dismember Article 12 (source of the agent's authority) and to place its provisions elsewhere in the Convention, and to retain in a modified form Articles 13 and 14 which were concerned with sub-agency and substitute agency respectively. Virtually all of these decisions were reversed by the Committee. The questions of authorisation and of written form will be discussed below (Articles 9 and 10) but some reference must be made here to the former articles dealing with sub-agency and substitute agency. The Committee took the view that they were principally of relevance to the internal relationship between the principal and the agent and in view of the new concept of the draft Convention as well as the fact that only one delegation spoke in favour of the retention of the former Article 13 and none for the retention of Article 14, it was decided to delete both articles.

Article 9

50. — This article corresponds to, and follows closely the language of, Article 24 *bis* as approved at Bucharest. Paragraph 1 is concerned with the authorisation of the agent, which may be express or implied. Implied authorisation may, for example, be inferred from the consent of the principal to certain acts by the agent, suggesting that the agent is authorised to act on behalf of the principal. What is however important is that the principal intends to be bound by the acts of the agent, which distinguishes the case from "apparent authority" (see below, paragraph 51). It will be noted that the principle set out in paragraph 1 is stated in an objective manner. Attempts have been made to formulate it from the viewpoint of the third party so as to reflect the new conception of the draft Convention as excluding the internal relations between the principal and the agent but this proved to be extremely difficult from the drafting angle. Such an approach was moreover the subject of considerable criticism in the Committee, particularly on the ground that the future Convention should lay down an objective rule of law rather than refer simply to what the third party assumes the law to be. This is, indeed, one of those occasions in the draft Convention where it is clear that reference to the internal relations between the principal and the agent cannot be avoided, in order to enable the relations between the principal and the third party to be regulated.

51. — Some delegations were also of the opinion that Article 9 should deal with, or at least mention, "apparent authority", that is to say the case where, although it is not possible to speak of implied authorisation, the conduct of the principal and the circumstances of the case are such that it is possible to construe a holding out or a representation by him that the person with whom the third party is dealing is in fact to be regarded as the duly authorised agent of the principal. This is a concept that bears a close kinship to both the Common Law doctrine of agency by estoppel or "holding out" and the Civil Law doctrines of *Scheinvollmacht*, *Procurat apparente* and *mandat apparent* as these are found in the German, Italian and French legal systems respectively.

52. — A majority of delegations however were strongly opposed to any mention of "apparent authority" in Article 9. In the opinion of some of them, "apparent authority" is no authority at all and it would be misleading as well as irrational and illogical to deal with it in the same manner as actual authority deriving from an express or implied authorisation by the principal. Moreover, it was recalled that Articles 9 and 14, paragraph 2 (Articles 24 *bis* and 26, paragraph 2 as provisionally adopted at Bucharest) had been the subject of lengthy debate at the Diplomatic Conference, and that one of the principal reasons for the insistence of the Common Law countries on the need for splitting up the former Article 12 of the 1972 draft had been to make it quite clear that in cases of "apparent authority" the principal should not be debarred from the possibility of bringing an action against an agent by the agent's claiming that he had

indeed had authority to act on the principal's behalf. It was, therefore, considered essential to maintain the distinction established at Bucharest under which paragraph 2 of Article 14 was seen as a qualification of paragraph 1 of that article and to avoid the fundamental reshaping of Article 14, paragraph 2 which would be the consequence of any reference to "apparent authority" in Article 9. In these circumstances the Committee finally decided to leave the question of "apparent authority" to be dealt with in Article 14, paragraph 2 (see below, paragraph 66 *et seq.*).

53. — The second paragraph of Article 9 extends the agent's authority to perform all of the acts which could prove to be necessary to achieve the purposes of the contract of agency but which were not foreseeable at the time of authorisation and had therefore not been the subject of special authorisation. The Committee considered however that the wording adopted at Bucharest was too absolute and it was therefore decided to return to the formulation to be found in the corresponding provision of the 1972 draft by adding the words "in the circumstances" after the word "necessary".

Article 10

54. — This provision follows closely the wording of Article 11 of the Vienna Convention. The corresponding article of the 1972 draft had been deleted at the Bucharest Conference by a narrow majority but it was agreed by the Committee to reinstate the provision, given the widespread feeling that it would be regrettable for such an important question as the need for written form not to be dealt with by the future Convention and thus determined either by the law applicable according to the rules of private international law or by the law of the forum in the event of that law viewing the matter as one of public policy.

Article 11

55. — As is well known, the legislation of certain States requires all acts relating to foreign trade concluded by their economic organisations to be made in writing and at the request of a number of these States a formula along the lines of Articles 11, 12 and 96 of the Vienna Convention has been introduced in Articles 11, 12 and X of the draft Convention. The effect of paragraph 1 of Article 11 is, on the one hand, to permit a State to make a declaration under Article X to the effect that any provision of Articles 10 or 16 or of Chapter IV of the Convention which allows an authorisation, ratification or termination of authority to be made in any form other than in writing does not apply where the principal or the agent has his place of business in that State and, on the other, to prohibit the parties derogating from or varying the effect of that paragraph. Although Article 11 was not the subject of lengthy discussion by the Committee, one delegation which had requested the insertion of paragraph 1 expressed concern at the vagueness

of the term "authorisation". In its opinion, specific reference should be made to the agency contract and to the authority itself or, failing that, the term "authorisation" should be the subject of a common understanding that it covered both the contract of agency and the authority. Some delegations however were opposed to a specific reference to the agency contract, given the new conception of the draft which had systematically excluded all references to it, while doubts were also expressed as to whether it was necessary for the exclusion of the application of the Convention to operate when the agent had his place of business in a State making a declaration under Article X.

56. — Paragraph 2 of Article 11, as well as Article Y⁽¹³⁾, were inserted at the request of one delegation which stated that its authorities might wish to insist on authorisation or ratification being express and not merely implied when the principal had his place of business in a State making that reservation. The reason for this, it was pointed out, was not that its country's legislation required express authorisation or ratification but that certain trading enterprises had had unfortunate experiences in the past in this connection.

57. — The purpose of paragraph 3 is to prevent a principal whose existence was not known by the third party or of whose existence the third party ought not to have known from subsequently invoking the lack of a written or express authorisation to exclude the application of the Convention and to stop the third party exercising against him the rights which he had against the agent.

58. — As mentioned above, Article 11 was not discussed at length by the Committee, as was also the case with Articles 12, X and Y, partly for the reason that some delegations recalled that it was customary for such provisions to be considered in detail only at a Diplomatic Conference once the full text of the substantive provisions was established. They were not therefore convinced that the precedent of the Vienna Conference of 1980 should necessarily be followed in this connection. Other delegations were reluctant to take a stand on proposals in respect of which they had no instructions and it was ultimately decided to place Articles 11, 12, X and Y in square brackets for consideration by the Diplomatic Conference.

[Article 12]

59. — Article 12 corresponds word for word to Article 13 of the Vienna Convention and indicates that for the purpose of the draft Convention tele-

(13) For Articles X and Y, see below, paragraphs 109 and 110.

gram and telex are to be considered as equivalent to writing. There was some disagreement within the Committee as to whether Article 12 would be of relevance if Article 11, paragraph 1 were to be deleted but it was ultimately decided to retain it as an independent article in square brackets pending the Diplomatic Conference.

CHAPTER III – LEGAL EFFECTS OF ACTS CARRIED OUT BY THE AGENT

60. – This chapter constitutes the most original part of the draft Convention and with the deletion of the provisions governing the internal relations between the principal and the agent it now indisputably constitutes the core of the future instrument. It represents in particular a serious attempt to bridge the gap between the Common Law and Civil Law systems, especially in Article 15, and only minor changes have been made to the compromise achieved in 1972. The basic structure of the chapter has already been outlined in paragraph 12 of this report and need not be repeated here.

Article 13

61. – This article lays down the general principle covering the most common and frequent situation. It is sufficient that the agent acts within the limits of his authority and that the third party knows or ought to have known that he was acting as an agent for there to be a direct contractual relationship between the third party and the principal. Whether or not the agent declares that he is acting in the name of the principal and whether or not he names him is irrelevant. Thus, in certain cases, it is possible that the third party will not know to whom he is bound at the time of the conclusion of the contract.

62. – There are, however, two exceptions to this general principle. In the first place, the agent may, in agreement with the principal, stipulate with the third party that there shall be no direct exercise of rights between the principal and the third party (Article 5). The fact that the agent intends to bind himself only may however be implied by the circumstances. This is, for example, the case where he acts as a commission agent. This provision is very important from a practical point of view as it submits to the regime laid down in Article 15, and not to that of Article 13, the relationships arising from the activities of those agents – such as commission agents – who are deemed to be acting in such a way as to accept sole liability.

63. – In other words, two situations may arise when a sales contract is concluded:

(a) nothing suggests that the agent is binding himself alone, in which case the contract binds only the third party and the principal unless it

has been agreed or the circumstances indicate that the agent shall incur concurrent liability with the principal; or

(b) it appears that the agent intends to bind himself alone to the third party: in this case only the direct right of action provided for in Article 15 is available between the third party and the principal.

64. — Finally, it should be noted that the Committee saw what was at least an apparent discrepancy between the English and French versions of the concluding words of Article 13. Whereas the French text reads “*que l'intermédiaire a entendu n'engager que lui-même*”, the English text states “that the agent *undertakes* to bind himself”. A proposal to align the English version on the French by substituting the word “intends” for “undertakes” was however rejected as a number of delegations expressed a preference for the more objective term “undertakes”, all the more so since it was clear that it contained the element of intention.

Article 14

65. — Paragraph 1 of this article states the precise converse of Article 13 by providing that, when an agent acts without authority or outside the scope of his authority, his acts do not bind the principal and the third party to each other.

66. — Paragraph 2, however, lays down a partial exception to this general rule which is of the utmost importance and which reflects the strict distinction between “authorisation” referred to in Chapter II of the draft Convention and “authority”, which term is employed throughout Chapter III. Paragraph 2 is, in fact, concerned with so-called “apparent authority” which in the view of a large majority of delegations is no authority at all and certainly cannot be regarded as deriving from an authorisation by the principal. In effect, the reference to the term “authority” in paragraph 2 does not imply that authority exists; rather the provision describes the state of mind of the third party and establishes the legal effects of his *bona fide* belief, induced by the conduct of the principal, that the agent has authority to act on behalf of the principal and that he is acting within the scope of that authority. Some doubts were expressed in the Committee as to whether this provision would also cover the case where the agent actually has authority to act on behalf of the principal but exceeds it so that the third party's belief would be of relevance only to the excess of authority and not its existence. It was recognised that from the standpoint of strict logic this objection might have some force but it seemed nevertheless that the case did fall within the wording of Article 14, paragraph 2 and that it would not therefore be necessary to include an additional provision dealing with it specifically.

67. — The practical effect of Article 14, paragraph 2 is to introduce into the draft Convention the Common Law notion of estoppel. Where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that he is acting within the scope of that authority, the principal may not set up against the third party the lack of authority. What was important in the view of the majority of the delegations was to indicate that, whilst in the situation contemplated by paragraph 2 the third party has a choice whether or not to proceed against the principal, the principal has no such choice. He may not bring an action against the third party on the basis of the contract concluded between the latter and the agent, although he may of course treat the contract as having been concluded between the third party and himself should the third party choose to bring proceedings against him.

Article 15

68. — This is perhaps the single most important article of the draft Convention and deals with the relationship established in cases which have not been provided for in Article 13. These cases are of two types:

(a) the agent acts on behalf of a principal but the third party neither knows nor ought to have known that he was acting as an agent (14) at the time of the conclusion of the contract with the third party; or

(b) it has been agreed or simply understood that the agent is binding himself only vis-à-vis the third party even though he is acting on behalf of another person. This is generally the case in particular when the agent is a commission agent (see comments on Article 13 above, paragraph 62).

69. — In these situations Civil Law systems generally hold that the contract binds only the agent and the third party; some of them, however, are in certain circumstances moving towards the concession of allowing direct links to be established between the principal and the third party (15). The Common Law systems, on the other hand, concede that a direct relationship between the principal and the third party may arise when it is disclosed or becomes apparent that the agent is, in fact, acting as an intermediary (16).

(14) In this connection, the Committee noted that it was extremely difficult in French to convert the positive formulation contained in Article 13 into a negative one as was required in Article 15, paragraph 1 and although some doubts were expressed as to the exact concordance between the two versions it was decided to state in the English text that "the third party neither knew nor ought to have known that the agent was acting as an agent" and in the French version that "le tiers ne connaissait pas ou n'était pas en mesure de connaître la qualité de l'intermédiaire".

(15) See the provisions of the Swiss *Code des Obligations*, the German *BGB* and the Italian *Code Civile* referred to in the Introduction.

(16) The Common Law rule of the undisclosed principal.

70. — The solution adopted by the draft is situated half way between these two positions. It reflects the idea that, in general, in a situation of this kind, the agent binds only himself but that, when their interests clearly so require, the principal and the third party may act directly one against the other. Such direct exercise of rights may however be excluded if it has been so decided by the agent and the third party in agreement with the principal (paragraph 7).

71. — The first paragraph of Article 15 states the basic principle according to which the contract of sale binds only the agent and the third party. In the normal situation, the agent fulfils his obligations on both sides and no relationship is established between the third party and the principal.

72. — Paragraph 2 (a) is concerned with the case where the agent does not fulfil or is not in a position to fulfil his obligations to the principal and provides that in such cases the principal may exercise the rights acquired on his behalf by the agent against the third party, subject to all the defences which the third party may set up against the agent. In this connection, the Committee was seized of a proposal to amend the 1972 text and to limit the principal's right of exercise of the agent's rights against the third party to those rights which the agent had acquired against the third party on behalf of the principal. Thus the principal would not be able to enforce against the third party an agent's right to the payment of commission or to damages against the third party. While it was recognised that such a provision might not be of great relevance to Common Law systems where the agent's rights were always deemed to be the principal's rights, it was seen as being of value to a number of continental systems of law and it was accordingly adopted.

73. — The Committee also noted that, whereas the third party can only set up against the principal the defences which he can himself raise against the agent, the principal can, on the other hand, under sub-paragraph (b) invoke not only the defences which the agent can raise against the third party but also those which he, the principal, can set up against the agent. It was therefore suggested that the third party should also be entitled to raise against the principal any defences which the agent may set up against the principal. This proposal was rejected as laying down too broad a rule as the agent could in theory set up any rights against the principal. It was also stressed that the suggested imbalance between the position of the principal and that of the third party, in that the third party would be in a worse position in an action brought by him against the principal than if he had proceeded against the agent, as the principal could raise against him defences which he had against the agent, was more apparent than real. In the first place, the important point was to ensure that the defendant, whether principal or third party, would not be placed in a worse position than he would otherwise have been in, while the very nature of the relationship where a contract of sale was concluded through an agent was one in which one person, the third party,

stood on one side and the agent and the principal on the other. Furthermore, the solution contained in paragraph 2 was seen as an essential part of the 1972 compromise in that it would permit a principal to exercise against a third party a right of set-off which he might have against a commission agent. For this reason in particular the Committee did not accept a proposal to limit the principal's right to set up against the third party defences which he could invoke against the agent to those defences relating to the specific transaction in question.

74. — Finally, in connection with paragraph 2, it should be noted that it is the intention of the drafters that neither the principal nor the third party may intervene before the performance of the obligations has become due and then only when it is manifest that the agent will not perform.

75. — Paragraphs 3, 4 and 5 aim at facilitating the practical application of the direct exercise of rights provided for by paragraph 2. They oblige the party who intends to exercise the rights to notify his intention, on the one hand, to the agent and, on the other, to the third party or principal, as the case may be. From the time of this notification neither the principal nor the third party may fulfil his obligations by dealing with the agent: the only rights which can still be exercised are those belonging to the third party and to the principal in application of paragraph 2.

76. — Paragraphs 4 and 5 oblige an agent who is unable to fulfil his obligations to the third party by reason of a breach of duty on the part of the principal to communicate the name of the principal to the third party and, in the event of the third party failing to fulfil his obligations, to communicate the name of the third party to the principal.

77. — A marked difference of opinion emerged in the Committee with regard to these provisions. On the one hand, it was suggested that their effect would in practice seriously restrict the possibility of the direct exercise of rights contemplated by paragraph 2, as the agent's duty to disclose the name of the principal or the third party to the other did not extend to situations where the agent was himself responsible for the failure to perform the obligations, and that in many cases this would prevent any direct exercise of rights. It was therefore suggested that the only restriction on the duty of disclosure in the cases dealt with in paragraph 2 should be where the agent himself fulfilled the obligations in lieu of the third party or the principal when the nature of those obligations so permitted.

78. — Although some support was expressed for this proposal, a majority of delegations was opposed to it. In particular, it was argued that it was unclear why, in the case of paragraph 4, the agent acting in his own name should communicate the principal's name to the third party when the agent was himself at fault, although there could be valid reasons in the converse situation dealt with in paragraph 5 for the agent's communicating the name of the

third party to the principal. This was however a question touching on the internal relationship between principal and agent which might even suggest the deletion of paragraph 5. Moreover, it was pointed out that the proposed extension of the duty of disclosure under paragraphs 4 and 5 could undermine the concept of confidentiality which lay at the basis of commission agency and that it would encourage commission agents not to apply the provisions of paragraphs 4 and 5 by refusing to disclose the name of the principal or the third party, since they would in any event already be open to an action for damages for failure to perform brought by the principal or the third party, as the case might be. In these circumstances the Committee decided not to extend the scope of paragraphs 4 and 5 to cover default by the agent himself.

79. — Lastly, in connection with these two paragraphs, some clarification may be necessary regarding the difference in wording between paragraph 4, which speaks of the agent being "precluded from fulfilling his obligations to the third party by reason of a breach of duty on the part of the principal" and paragraph 5, which refers to the case where "the third party fails to fulfil his obligations under the contract to the agent". It has however been suggested that the basis for the distinction lies in the fact that, whereas under paragraph 5 what is of importance is the actual failure of the third party to fulfil his obligations, paragraph 4 only applies in cases where there is no independent breach of the agent's obligations so that it is necessary to speak of his being precluded from fulfilling his obligations by reason of the breach of duty on the part of the principal.

80. — Paragraph 6 deals with the special case in which it appears that the third party would not have entered into the contract had he had knowledge of the principal's identity at the time of dealing with the agent. Behaviour of this kind could be motivated, for instance, by reasons of competition, exclusive agreements, international embargo, reasons of commercial policy such as the refusal to sell to businesses of certain types or size, or to those using certain commercial methods etc. The draft does not touch on the delicate question of refusal to sell or to purchase; it limits itself to laying down the rule that, in cases of this kind, direct exercise of rights by the principal against the third party, as provided for in paragraph 2, is excluded. It is indeed logical not to oblige the third party to have dealings against his will with a party with whom he does not wish to enter into a contract. Nothing, however, prevents the third party himself exercising the rights conferred upon him by paragraph 2 against the principal, if he so desires. In the converse case to that contemplated by paragraph 6, namely where a principal chooses to conceal his identity or indeed his very existence when purchasing goods, perhaps indeed because of the nature of those goods, there seems to be no justification for allowing him to withdraw from the contract if the third party subsequently turns out not to be to his liking.

81. — Paragraph 7 allows the agent and the third party to exclude the

direct exercise of rights between the principal and the third party under Article 15 on condition that the agent has been expressly or impliedly instructed to do so by the principal. The Committee noted that the restricted group of experts had been of the opinion that such an exclusion should be possible in all cases on the ground that the principal should in this respect take the agreement between the agent and the third party as he finds it. In support of this view, it was also stated that one of the justifications for granting the principal a direct action against the third party is that the agent may assign to him his rights against the third party and that logically the agent and the third party should be entitled to exclude the possibility of such an assignment. It was further pointed out that, in any event, the question is one which falls within the compass of Article 5, paragraph 2 and that, whether or not it is expressly stated in the Convention, the principal will not be debarred from claiming damages from the agent if the agent has acted in a manner contrary to his instructions in this regard.

82. — A majority in the Committee however objected to any reference in the text to a possible claim by the principal against the agent as in this situation the question was one concerned exclusively with their internal relations and it was further considered that the Convention should not restrict still further the possibility of the direct exercise of rights between the principal and the third party.

83. — Finally in connection with paragraph 7, it should be noted that it may apply in cases of undisclosed as well as commission agency, as one can imagine a third party stating in his general conditions that as regards any contracts which might be concluded with undisclosed principals there shall be no direct exercise of rights against him by the principal.

Article 16

84. — The possibility for the principal to ratify an act of an agent without authority, which exists in most legal systems, renders more flexible Article 14, paragraph 1, under the terms of which the principal and the third party are not bound by a contract made by an agent acting without authority or outside the scope of his authority. This general principle is established by the first sentence of Article 16, paragraph 1 which, however, further provides that ratification is not possible where, in accordance with Article 15, paragraph 1, the agent binds only himself. This exception to the rule was inserted by the Committee so as to avoid the implication that under paragraph 2 a third party might withdraw from a sales contract concluded by him with a commission agent acting without authority. It should also be noted that, although cases of ratification arise primarily in connection with Article 14, paragraph 1, it was the intention of the Committee that paragraph 2 and the remaining provisions of Article 16 should also apply to the cases contemplated by Article 14, paragraph 2.

85. — The second sentence of paragraph 1 provides that on ratification the act of the agent produces the same effects as if it had initially been carried out with authority. At first sight this formulation might appear to give rise to difficulty in a case not uncommon in practice, namely where an agent sells goods without the authority of the principal and where the principal, after selling and delivering the same goods to another person, then ratifies the first contract concluded by the agent. The implication of paragraph 1, second sentence of Article 16 would be that although title to the goods has effectively been transferred to the person to whom they have been delivered, this right of ownership could be affected by the subsequent ratification by the principal of the contract which the agent acting without authority had purported to conclude. The problem would however seem to be more apparent than real, once it is recalled that Article 1, paragraph 3 provides that the Convention is concerned only with the relations between the principal and the third party and between the agent and the third party with the consequence that it cannot affect the rights of other persons.

86. — In order to give the third party the possibility of an option similar to that of the principal and to attenuate the unjustified advantage that the latter could draw from a situation of which he would be the sole master, paragraph 2 enables the third party in certain circumstances to avoid becoming bound to the principal. The paragraph is concerned with two different factual situations. In the first of these, the third party neither knows nor ought to have known of the agent's lack of authority. In this case, which is dealt with in the first sentence, a purported ratification by the principal will be ineffective if, at any time prior to it, the third party, after becoming aware of the lack of authority, gives notice of his refusal to be bound by the purported ratification.

87. — In the second situation, contemplated by the second sentence of paragraph 2, the third party either knows or ought to have known of the agent's lack of authority and in consequence he may not refuse to become bound to the principal before the expiration of the time agreed for ratification or, failing such agreement, before such reasonable time as the third party may specify. The word "however" at the beginning of the second sentence is intended to spell out the fact that the time at which the third party's knowledge is critical is, as in paragraph 1, that when the act is performed by the agent.

88. — Lengthy consideration was given by the Committee to the question of whether some limitation should not be placed upon the possibility for the principal to ratify the acts of the agent, and in particular a proposal to the effect that ratification must take place within a reasonable time of the conclusion of the contract and before the time due for commencement of performance by the third party. Ultimately, however, the Committee decided against such a limitation as it would effectively grant a virtually absolute right of withdrawal to the third party. It was pointed out that in those cases where the third party knew or ought to have known of the agent's lack of authority the third party himself could, in accordance with the second sentence of para-

graph 2, decide not to proceed with the performance of the contract at any time before the expiration of the time agreed for ratification or before the expiration of such reasonable time for ratification as the third party might himself specify. The problem therefore centred around those cases where the third party neither knew nor ought to have known of the lack of authority but here it may be assumed that since the third party was acting in the belief that he had concluded a contract of sale he would welcome ratification by the principal. If, moreover, the third party were to begin performance, for example by delivering goods to the principal, and the latter did not raise the question of the agent's lack of authority, it could be argued that ratification may be inferred from the principal's conduct in accordance with paragraph 7 of Article 16. If, on the other hand, the principal were ultimately not to ratify, then the third party would be in no worse a position and would have to rely on his action against the agent for breach of warranty of authority. The only difficulty therefore would arise where a third party who was not initially aware of the agent's lack of authority subsequently became acquainted with this fact and, acting on the assumption that he was no longer bound to perform the contract of sale, failed to inform the principal of this intention only to be met with a subsequent ratification by the latter. Such cases however would be rare in practice and it was suggested in the Committee that they could be settled by reference to the general principles of good faith to which specific reference is made in Article 6, paragraph 1 of the draft Convention. Lastly, it has been pointed out that the introduction of a requirement that ratification be given within a reasonable time could lead to the curious result that both a principal and a third party might be unaware of a lack of authority and continue to act on the assumption that a contract existed between them only to find out afterwards that ratification had become impossible as a result of the expiration of the reasonable time.

89. — Paragraph 3 lays down the eminently reasonable rule that the third party may refuse to be bound by a partial ratification, while paragraph 4 provides that the ratification will take effect only when it has come to the attention of the third party and that, once effective, it may not be revoked. The words "comes to the attention of the third party" were the subject of long debate in the Committee. In the opinion of some delegations, they could be interpreted as not covering the case where notice of the ratification reaches the office of the third party but for one reason or another is not actually brought to his attention. Moreover, if actual knowledge were required, there might be a substantial limitation of the effectiveness of ratification to be inferred from the conduct of the principal and it was proposed that wording along the lines of Article 24 or Article 79, paragraph 4 of the Vienna Convention should be adopted which would avoid the need for actual knowledge on the part of the third party for the ratification to be effective. Other delegations however were not convinced of the necessity of following the Vienna Convention on this point and considered that a distinction should be drawn between paragraph 2, under which the dispatch rule is applied to the third

party's refusal to become bound by a subsequent ratification by the principal, and the requirement that ratification must come to the actual attention of the third party for it to be effective which, it was pointed out, was not equivalent to requiring an express notice of ratification. In these circumstances it was decided to maintain the formula "comes to the attention of the third party" pending the final resolution of the question at the Diplomatic Conference.

90. — Paragraph 5 provides that ratification is effective notwithstanding that the act itself could not have been effectively carried out at the time of ratification, while paragraph 6 lays down what is in effect a conflict of law rule by providing that if the act has been carried out on behalf of a corporation before its creation, ratification is effective only if allowed by the law of the State governing its creation.

91. — Paragraph 7 raises the same problem of written form as that already discussed in connection with Article 10 and the same solution has been adopted in that ratification is subject to no requirements as to form (see paragraph 54 *et seq.* above). A similar difficulty was experienced by one delegation in connection with the possibility for ratification to be otherwise than express. A number of delegations insisted however on the need for a specific reference to the possibility of ratification being inferred from the conduct of the principal, as would be the case for example where he began delivering goods to the third party in accordance with the contract which his agent purported to have concluded, and it was accordingly agreed to leave the matter to be settled by the possible introduction of a reservation clause (see above, paragraph 56).

Article 17

92. — Paragraph 1 of this article lays down the rule that an agent who acts without authority or outside the scope of his authority shall, failing ratification, not only compensate the third party for the loss he has actually suffered (negative interest) but also pay him such compensation as will place him in the same position as he would have been in had the agent acted within the scope of his authority (positive interest). Although one delegation expressed the strongest disapproval of the provision on the ground that it reflected the approach of some systems of law to the exclusion of others in an area as delicate as that of the assessment of damages, a large majority within the Committee saw paragraph 1 as regulating a question of principle which is too important to be left to national law. In this connection it should however be recalled that a suggestion was made in the Committee that the provision does not apply to cases where the agent undertakes only to bind himself, as in commission agency, since Article 17 deals only with those situations where ratification is possible under Article 16. If this were the case, then the scope of Article 17 would be substantially reduced and the damages

allowed to the third party in situations where the agent undertakes only to bind himself would be determined by national law on the basis of the agent's failure to perform the contract of sale concluded by him with the third party.

93. — The Committee deemed it to be unnecessary to make special provision in paragraph 1 for cases where the agent is prepared to perform the contract as it goes without saying that the third party can always accept such performance in lieu of claiming damages. Similarly, it rejected a proposal to specify that the third party should not be liable to pay damages in cases where the principal is himself bound as this likewise seemed to be self-evident.

94. — Although there was some feeling within the Committee that paragraph 2 was not strictly necessary, it was agreed to retain it so as to avoid the danger of an extensive interpretation being given to paragraph 1. Although the provision lacks flexibility in that it fails to provide for some reduction in damages, as opposed to a total exoneration of the agent, in cases where the third party ought to have known that the agent was acting without or in excess of authority, the Committee considered this to be a matter which could be left to national law for if judges wished to apply some form of contributory negligence rule they would doubtless do so.

CHAPTER IV — TERMINATION OF THE AUTHORITY OF THE AGENT

95. — Apart from the now deleted chapter governing the relations between the principal and the agent, this is the only chapter of the 1972 draft which was not discussed at all at the Bucharest Diplomatic Conference. It is not therefore surprising that it was radically amended by the Committee in November 1981. In particular, the chapter as conceived in the 1972 draft dealt with the termination of the contract of agency and, given the new conception of the draft Convention as focusing on relations between the principal and the third party and between the agent and the third party, it was inevitable that the emphasis in the chapter would be switched to the termination of authority. In the opinion of some, as will be seen in the commentary on Article 18, even the question of the grounds for the termination of authority is a subject falling essentially within the domain of the internal relations between the principal and the agent and Articles 18 and 19 attempt to provide a compromise solution between differing views on the matter. The other main features of the changes brought about by the Committee with respect to the 1972 text are the extension of the requirement that termination of authority will only affect the third party when he knows or ought to have known of it, and the elimination of certain cases where he is deemed to have constructive notice of termination.

Article 18

96. - This article lists, for the purposes of the prospective Convention, a number of cases where the authority of the agent is terminated. The question of whether and, if so, to what extent Chapter IV should lay down substantive rules concerning the termination of authority was discussed at length by the Committee and three main approaches emerged. The first of these set out from the belief that, notwithstanding the fact that Chapter IV now deals with termination of authority rather than with termination of the contract of agency, the question is still one essentially concerned with the internal relations between the principal and the agent. It would therefore be illogical in the light of Article 1, paragraph 3 to specify the cases in which authority is terminated. Moreover, it was observed that problems could arise if under the future Convention authority were to be terminated by, for example, the death of the principal, whereas under the applicable law it would not be terminated, or vice-versa. In addition, it was suggested that, apart from the great difficulties which would be encountered in reaching agreement as to which circumstances should or should not be considered as terminating authority under the Convention, it would be more attractive to Governments if a flexible solution were to be adopted in this regard. This aim could best be achieved by leaving it entirely to the applicable law to determine in which cases authority is terminated, and concentrating in the draft on the effects of such termination.

97. - Other delegations however were strongly opposed to such a solution. In their view it was not correct to see the termination of authority solely in terms of the relations between the principal and the agent as it was of critical importance for the third party also. This was demonstrated by the problem of the relevance of the third party's knowledge of the facts causing termination. In these circumstances it would be important for the third party to know what these facts were and it seemed therefore to be of the utmost importance to bring about as great a degree of unification as possible of the grounds for termination in the interest of the certainty of international trade. Moreover, Article 9 states that authorisation may be express or implied and, if the argument invoked here were to be carried to its logical conclusion, then Article 9 should likewise be deleted for the reason that it also is concerned exclusively with the internal relations between the principal and the agent. It was furthermore observed that even if the inclusion in the draft Convention of substantive law provisions regarding the termination of authority were to involve some changes in national law, they would be of minor importance compared with the changes necessary in the legislation of some States to accommodate the rules laid down in Chapter III. It was also suggested that a simple reference to the applicable law would solve nothing and could even be a source of confusion in that the Convention itself would not seek to establish criteria as to what would be the law applicable to cases of termination of authority. Finally, some delegations recalled that in the light of the deletion of the former chapter governing relations

between principal and agent, a decision to reduce still further the number of substantive provisions could well make it less attractive to States.

98. — While sharing many of the views set out in the preceding paragraph of this report, a number of delegations favoured an intermediate solution. They supported the introduction wherever possible of substantive rules of law concerning termination of authority but recognised that in those cases where it would not prove possible to reach agreement it would be necessary to leave the matter to be decided by the applicable law and it is this approach which was ultimately reflected in Articles 18 and 19. Article 18 contains four paragraphs. The first two of these provide for the termination of the agent's authority when this follows from agreement between the principal and the agent and on completion of the transaction or transactions for which the authority was created. These rules were not the subject of controversy within the Committee.

99. — More difficulty was however encountered with regard to paragraph (c), which states that the authority is terminated on revocation by the principal or renunciation by the agent, whether or not this is consistent with the terms of their agreement. Clearly, the principal or the agent may in such cases have a right of action against the party who has broken the terms of the agreement but the matter is not dealt with in the draft Convention as it is concerned with the internal relations between the principal and the agent. One delegation however took strong exception to the wording of paragraph (c) on the ground that, in view of the Committee's decision not to retain a provision corresponding to Article 31, paragraph 3 of the 1972 draft regulating the so-called "power coupled with an interest" or "power given as a security", which are by their nature irrevocable, the effect of paragraph (c) would be to make it impossible for the parties to exercise their freedom to derogate from the provisions of the Convention under Article 5 and consequently make an irrevocable authority impossible. It might however be argued that a distinction should be drawn between irrevocable authority and a power coupled with an interest in that a contract creating the latter is not a pure agency contract but rather a kind of combined contract involving on the one hand a granting of authority and on the other an assignment of a right arising out of an agency relationship or a contractual according of a security interest. Since therefore it is not intended to deal with such a situation in the future Convention it could be regarded as falling outside its scope.

100. — Paragraph (d) was the subject of lengthy discussion. It provides that authority shall terminate when the principal or agent dies or, under the applicable law, ceases to exist or loses his capacity to act. It should be noted that the provision does not seek to state when a principal or agent ceases to exist, for example the conditions for the dissolution of a company, or when capacity is lost. This is a question of qualification to be determined by the applicable law. If however the principal or agent does cease to exist or loses

his capacity under that law, then the authority will be terminated under paragraph (d). The Committee considered at length the question of whether a reference should be made in paragraph (d) to bankruptcy but, in view of the widely differing rules in different legal systems as to the effects of bankruptcy on authority, it was decided to leave the question to be regulated under Article 19.

101. — It should be noted that the highly compressed formulation of paragraph (d) fails to distinguish between the circumstances affecting the principal and those affecting the agent which could result in the termination of authority and it was in particular recalled in the Committee that under the 1972 draft the death or loss of capacity of the principal would only terminate authority if personal performance by him was essential. In view, however, of the fact that there was not enough time to discuss in sufficient detail the question of whether any distinctions should be drawn in this regard, the Committee decided to place paragraph (d) in square brackets so as to indicate the existence of the problem to the Diplomatic Conference.

Article 19

102. — This article should be seen as a complement to Article 18 as it states that in addition to the cases mentioned in the former provision, the agent's authority will also be terminated when the applicable law so provides. There was some support in the Committee for providing illustrations of this general rule and reference was made in particular to bankruptcy and to illegality and frustration of the contract. The view of a large majority of delegations was however that a list of examples might give the impression that they were of universal application in all legal systems, which was certainly not the case with, for instance, the Common Law concept of frustration. In consequence it was decided not to give illustrations of the causes of termination of authority under Article 19.

Article 20

103. — This article lays down a general rule to the effect that termination of authority shall not affect the third party unless he knew or ought to have known of the termination or of the facts which caused it and thus constitutes an extension of the corresponding rule to be found in the 1972 draft (Article 35) which was limited to cases of revocation or renunciation, and even then subject to some exceptions, for example in respect of authority made public by statutory registration or publication.

104. — The new text of the provision represents therefore a step in the direction of according further protection to the third party although on the other hand it should not be forgotten that the words "or ought to have

known" have brought in the notion of constructive notice. While a number of delegations expressed some misgivings at the introduction of this doctrine into mercantile law, the majority felt that it left a certain degree of discretion to the judge in evaluating the facts of the case, which would prevent possible abuses by the third party of a requirement of actual knowledge, for example where the principal is a very well-known person whose death has been given wide publicity and where the third party attempts to deny knowledge of such death. Some delegations wondered whether the requirement that the third party "ought to have known of the termination or the facts which caused it", was not too strict and whether it might not be preferable to adopt a less rigorous formula such as "could not have been unaware of", to be found in Article 8, paragraph 1 of the Vienna Convention. A majority of delegations expressed hesitations regarding this wording for while it was true that, whatever form of words was chosen to express the concept of constructive notice, the judge would always be able to interpret it to reach what was in his view the correct result, there was much to be said for following the formula "knew or ought to have known" which had been used throughout the draft Convention and which was more readily understandable. In this connection it should also be noted that what is relevant is the knowledge or presumed knowledge of the third party; there is no requirement that formal notice be given to him by either the principal or the agent.

105. — Finally, one delegation wondered whether the extension of the provision's scope to cover all cases of termination meant that, in the event of the winding up of a company which had acted as a principal, the third party's lack of knowledge of such winding up would perpetuate the authority even though the principal had ceased to exist. Some delegations considered that this was the only case where difficulty could arise as a result of the extension of the provision to cover all cases of termination and it was agreed that the problem could be left to be dealt with by national law.

Article 21

106. — This provision, which corresponds to Article 36 of the 1972 draft, constitutes an important exception to the general rule laid down in Article 20 by providing that where the third party knows of the authority of the agent only from the agent, without any confirmation by the conduct of the principal, termination of the authority has effect upon the third party as soon as the agent has notice of it, even if the third party has no such notice. Although some criticism was levelled against the provision on the ground that it could operate unfairly against the third party, a majority of delegations favoured its retention precisely because of the protection it affords the principal. In the cases contemplated by Article 21, the third party acts at

his own risk and peril by relying entirely on what the agent has told him and if this is true as regards the existence of authority, it should also be the case in respect of termination. In addition, it was pointed out that the principal in many cases will not know who the third party is and can only rely on the agent to communicate to the third party information regarding the termination of authority. If therefore the agent continues to act as though he has authority, the principal should not be bound and the agent should be liable to the third party for breach of warranty of authority.

Article 22

107. — This provision, based on Article 37 of the 1972 draft, provides that notwithstanding the termination of authority, the agent remains authorised to perform on behalf of the principal or his successors the acts which are necessary to prevent damage to their interests. Although the need for such a provision has been queried on the ground that it is concerned purely with the internal relations between the principal and the agent, the rule contained therein would seem to have a certain interest for third parties who will thus be aware of the fact that although the authority has been terminated the agent remains authorised to protect the principal from damage. Indeed it is believed in some quarters that the agent is under a duty to protect the principal after the termination of the authority.

CHAPTER V — FINAL PROVISIONS

108. — With the exception of Articles X and Y, the Committee did not consider the possible content of the final provisions of the future Convention, a draft of which will, in accordance with traditional practice, be prepared by the Secretariat for consideration at the Diplomatic Conference. It was also agreed that while the Secretariat should be left a degree of latitude in choosing the models on which these articles would be based, particular regard should be had to the corresponding provisions of the Vienna Convention and also perhaps to those to be found in the most recent Conventions adopted by the Hague Conference on Private International Law.

[Articles X and Y]

109. — As mentioned above, these articles are related to paragraphs 1 and 2 of Article 11 of the draft Convention in that they make provision for the declarations necessary to permit those States which wish to do so to insist on written form for authorisation, ratification or termination of authority, or for authorisation or ratification to be express.

110. — It should be pointed out in connection with Article Y that a number of delegations expressed their disquiet at the notion that any State might avail itself of that reservation, for whereas a degree of certainty exists in relation to Article X in that it is a widely known fact that only a limited number of States require written form, and Article X specifically limits the possibility of making the reservation to those States whose legislation contains such a requirement, the absence of a reference to national legislation in Article Y would render its applicability totally unforeseeable. As was the case however with Articles 11 and 12, there was no detailed discussion of Articles X and Y, which were placed in square brackets pending consideration of them by the Diplomatic Conference.

ANNEX

FINAL RESOLUTION ADOPTED BY THE DIPLOMATIC
CONFERENCE AT ITS SIXTEENTH PLENARY MEETING
HELD ON 13 JUNE 1979

The Diplomatic Conference for the adoption of a Convention providing a Uniform Law on Agency of an International Character in the Sale and Purchase of Goods, convened in Bucharest from 28 May to 13 June 1979,

Grateful to the Government of the Socialist Republic of Romania for having taken the initiative of convening the Conference and to the Romanian people, and in particular to the city of Bucharest, for their generous hospitality;

Conscious of the importance of developing international trade as a means of furthering cooperation and understanding between nations;

Conscious of the desirability of achieving this objective by replacing the various national legislations by a generally acceptable uniform law;

Recognising that on account of the complexity of the subject of agency of an international character in the sale and purchase of goods it has not been possible to arrive at a final text of the aforementioned Convention;

Noting the progress achieved during the Conference and in particular the final text worked out in respect of certain articles of the Convention, which are attached to this Resolution;

REQUESTS the International Institute for the Unification of Private Law (UNIDROIT), which was responsible for the preparation of the draft Convention and under the auspices of which this Conference was convened, to take the necessary steps to ensure that the work begun by this Conference is completed as soon as possible.

APPENDIX I

TEXT OF THE ARTICLES ADOPTED BY THE CONFERENCE AT ITS
FIFTEENTH PLENARY MEETING, HELD ON 12 JUNE 1979*Article 1*

1. — This Convention governs relationships of an international character arising where one person, the agent, has authority to act, acts or purports to act on behalf of another person, the principal, in dealing with a third party.

2. — Its application is limited to cases where the function of the agent is to make contracts for the sale or purchase of goods or to receive and to communicate proposals or to conduct negotiations in relation to such contracts.

3. — It applies whether the agent acts in his own name or in that of the principal and whether he acts regularly or occasionally.

Article 2

As regards relations between the principal and the agent, the Convention applies where their places of business are in different States and:

- (a) these States are Contracting States, or
- (b) the rules of private international law of the forum lead to the application of the law of a Contracting State.

Article 3

1. — As regards relations with the third party, the Convention applies where two of the three parties, principal, agent and third party, have their places of business in different States and:

- (a) the agent has his place of business in a Contracting State, or
- (b) the rules of private international law of the forum lead to the application of the law of a Contracting State.

2. — Nevertheless, it does not apply to such relations if, at the time of contracting, the third party neither knew nor had reason to know that one other party, the principal or the agent, had his place of business in another State.

Article 4

1. — If a party has more than one place of business, the reference to his place of business shall be to the place of business with which the relationship concerned has the closest connection.

2. — If a party does not have a place of business, the reference shall be to his habitual residence.

Article 5

This Convention does not apply to:

- (a) the agency of a dealer on a stock, commodity or other exchange;
- (b) the agency of an auctioneer;
- (c) agency by operation of law in family law, in the law of matrimonial property, or in the law of succession;
- (d) agency arising from statutory or judicial authorisation to act on behalf of a person without full legal capacity;
- (e) agency by virtue of a decision of a judicial or quasi-judicial authority or subject to the direct control of such an authority.

Article 6

As regards relations between the principal and the agent, this Convention does not apply where the agency relationship is created by a contract of employment.

Article 7

For the purposes of this Convention:

- (a) an organ, officer or partner of a corporation, association, partnership or other entity, whether or not possessing legal personality, shall not be regarded as the agent of that entity in so far as, in the exercise of his functions as such, he acts by virtue of an authority conferred by law or by the constitutive documents of that entity;
- (b) a trustee shall not be regarded as an agent of the trust, of the person who has created the trust, or of the beneficiaries.

Article 8

This Convention applies regardless of the nationality of the parties or the civil or commercial character of their status or of the contract.

Article 9

As regards their mutual relations, the parties may exclude the application of this Convention or derogate from any of its provisions.

Article 10

1. — As regards their mutual relations, the parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.

2. — They are considered, unless otherwise agreed, to have impliedly made applicable any usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.

Article 11

In the interpretation of this Convention, regard shall be had to its international character and to the need to promote uniformity in its application as well as to ensure the observance of good faith in international trade.

(Former Article 13)

1. — Unless the circumstances indicate otherwise, an agent may appoint a sub-agent only with the agreement of the principal.

2. — In that case, the agent continues to be responsible to the principal for the fulfilment of the obligations of the agent under the agency relationship.

3. — The relationship between the agent and his sub-agent is an agency relationship.

(Former Article 14)

1. — An agent may substitute another for himself only with the express agreement of the principal.

2. — The substitute becomes the direct agent for the principal and the original agent is liable to the principal only for lack of care in choosing or in instructing the substitute.

APPENDIX II

TEXT OF THE ARTICLES PROVISIONALLY ADOPTED
BY THE CONFERENCE AT ITS FIFTEENTH PLENARY MEETING,
HELD ON 12 JUNE 1979

(Article 24 bis)

1. — The agent's authorisation by the principal may be express or implied.
2. — The agent is authorised to perform all acts necessary to achieve the purpose for which the authorisation was given.

(Article 26)

1. — When an agent acts without authorisation or acts outside the scope of his authorisation, his acts do not bind the principal to the third party.
2. — Nevertheless, where the principal's conduct causes the third party reasonably and in good faith to believe that the agent is authorised to act on behalf of the principal, the principal is bound to the third party by the agent's acts to the same extent as if he had actually authorised those acts.

MARKIN

DRAFT FINAL PROVISIONS OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (I)

CHAPTER V – FINAL PROVISIONS

Article 23

The Government of is hereby designated as the depository for this Convention.

Article 24

(1) This Convention is open for signature at the concluding meeting of the Diplomatic Conference on Agency in the International Sale of Goods and will remain open for signature by all States at until 30 September 1983.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Government of

Article 25

(1) If a Contracting State has two or more territorial units in which [, according to its constitution,] different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval

(1) Prepared by the UNIDROIT Secretariat.

or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

Article 26

Alternative I

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that they do not consider themselves as different States for the purpose of the requirements as to place of business laid down in paragraphs 1 and 2 of Article 2 of the Convention.

(2) A Contracting State may at any time declare that it does not consider one or more non-Contracting States as different States from itself for the purpose of the requirements referred to in paragraph 1 of this article because such States apply to matters governed by this Convention 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.

Alternative II

(1) Two or more Contracting States which have the same or

closely related legal rules on matters governed by this Convention may at any time declare that the Convention shall not apply when the principal and the third party have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply when the principal and the third party have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph 1, provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

[Article 27

A Contracting State whose legislation requires authorisation, ratification, or termination of authority to be made in or evidenced by writing may at any time make a declaration in accordance with Article 11 that any provision of Article 10, Article 16 or Chapter IV of this Convention that allows an authorisation, a ratification, or a termination of authority to be other than in writing, does not apply where the principal or the agent has his place of business in that State.]

[Article 28

A Contracting State may at any time make a declaration in accordance with Article 11 that any provision of Article 9 or Article 16 that allows an authorisation or a ratification to be other than express, does not apply where the principal has his place of business in that State.]

Article 29

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under Article 26 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under Article 26 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

Article 30

No reservations are permitted except those expressly authorised in this Convention.

Article 31

(1) This Convention enters into force on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, appro-

val or accession.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article 32

(1) This Convention applies when the agent is authorised by the principal on or after the date when the Convention enters into force in respect of the Contracting State referred to in either sub-paragraph (a) or sub-paragraph (b) of Article 2, paragraph 1, to conclude a contract of international sale of goods with a third party.

(2) This Convention only applies in the cases contemplated by Article 14 where the acts of the agent or the conduct of the principal mentioned therein occur after the date when the Convention enters into force in respect of the Contracting State referred to in either sub-paragraph (a) or sub-paragraph (b) of Article 2, paragraph 1.

Article 33

(1) A Contracting State may denounce this Convention by a formal notification in writing to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

DONE AT GENEVA this day of February, one thousand nine hundred and eighty three, in a single original, of which the English and French texts are equally authentic.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised by their respective Governments, have signed this Convention.

EXPLANATORY NOTES

prepared by the UNIDROIT Secretariat

A. INTRODUCTION

With the exception of Articles 27 and 28, the Committee of Governmental Experts which met in Rome from 2 to 13 November 1981 and which adopted the text of the draft Convention on Agency in the International Sale of Goods, did not discuss in detail the final provisions of the future Convention. The Committee did however request the Secretariat of UNIDROIT to complete, in good time for the Diplomatic Conference, a set of final provisions. It was also agreed that while the Secretariat should be left a degree of latitude in choosing the models on which these articles would be based, particular regard should be had to the corresponding provisions of the Vienna Sales Convention of 1980 and also perhaps to those to be found in the most recent Conventions adopted by the Hague Conference on Private International Law.

It is in accordance with this request of the Committee of Governmental Experts that the Secretariat has prepared the draft final provisions which are accompanied by the present brief explanatory notes.

B. THE DRAFT ARTICLES

Articles 23 and 24

These provisions, dealing respectively with the depositary and with the opening to signature of the Convention, ratification, acceptance, approval and accession, are based on Articles 89 and 91 of the 1980 United Nations Convention on Contracts for the International Sale of Goods, hereafter referred to as the "Vienna Sales Convention".

Article 25

At the meeting of the Committee of Governmental Experts which took place in Rome in November 1981, one representative stated that he assumed that the final provisions to be prepared by the Secretariat would include a

val or accession.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

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Article 25

At the meeting of the Committee of Governmental Experts which took place in Rome in November 1981, one representative stated that he assumed that the final provisions to be prepared by the Secretariat would include a

federal clause. In this respect he mentioned that the formulation of such provisions was one of the greatest importance to his authorities and, since the Bucharest Conference, the question had been the subject of consultations between the federal and the state governments in his country. He was quite prepared in principle to see the draft final clauses to be prepared by the Secretariat follow the model of the Vienna Sales Convention but while he could in no way prejudge the attitude which his authorities would take at a Diplomatic Conference for the adoption of the draft agency Convention with regard to the federal clause, it was likely that its view would be influenced by the apparent trend reflected in the most recent Hague Conventions of 1980. Apart from very slight differences in wording, the one substantial difference between Article 93 of the Vienna Sales Convention and Article 26 of the most recently concluded Convention of the Hague Conference on Private International Law, on International Access to Justice, lies in the absence in the latter of the words in square brackets "according to its constitution", in paragraph 1. Both texts are therefore offered for consideration as alternatives.

Article 26

The alternative texts are based respectively on Article II, paragraphs 1 to 3 of the 1964 ULIS and on Article 94 of the Vienna Sales Convention. Clearly, the drafting of a provision of this nature to cater for a tripartite situation such as agency, as opposed to a bipartite situation, exemplified by the contract of sale, raises certain difficulties and it is perhaps a question of taste whether the more generally formulated version in Alternative I or the simplified version in Alternative II, which refers expressly to the principal and the third party, is to be preferred.

Articles 27 and 28

As mentioned in the Explanatory report on the draft Convention itself (Study XIX — Doc.63, paragraph 108), these articles (formerly Articles X and Y) were the only final provisions to be the subject of detailed discussion by the Committee of Governmental Experts at its meeting in November 1981. The articles are related to paragraphs 1 and 2 of Article 11 of the draft in that they make provision for the declarations necessary to permit those States which wish to do so to insist on written form for authorisation, ratification or termination of authority (Article 27) or for authorisation or ratification to be express (Article 28).

While Article 27 corresponds in essence to Article 96 of the Vienna Sales Convention, Article 28 has no antecedents in international trade law Conven-

tions and a number of delegations to the November 1981 meeting in Rome expressed their disquiet at the notion that any State might avail itself of the reservation. Whereas a degree of certainty existed in relation to Article 27 in that it is a widely known fact that only a limited number of States require written form, and since Article 27 specifically limits the possibility of making the reservation to those States whose legislation contains such a requirement, the uncertainty under Article 28 would, it was suggested, be all the more acute in the light of the difficulty of drawing a distinction between the terms "express" and "implied".

Articles 29 and 30

These provisions, dealing respectively with declarations made under the Convention and with the prohibition of reservations other than those expressly authorised by it, have been taken over virtually unchanged from the Vienna Sales Convention (Articles 97 and 98).

Article 31

Subject to the necessary drafting amendments, Article 31 reflects the content of paragraphs 1 and 2 of Article 99 of the Vienna Sales Convention. The remaining paragraphs of that article, which are concerned with the denunciation of the 1964 Hague Sales Conventions, are of course irrelevant in this draft.

Article 32

This provision is based on the language to be found in Article 100 of the Vienna Sales Convention. In the absence of any discussion on the matter by the Committee of Governmental Experts, the Secretariat proposes that the temporal connecting factor in relation to the entry into force of the Convention for the purpose of determining whether it is applicable in a given case should be the time at which the agent is authorised by the principal to conclude a contract of international sale of goods.

Article 33

With only slight modifications, this article reproduces the language of Article 101 of the Vienna Sales Convention.

**OBSERVATIONS AND PROPOSALS BY GOVERNMENTS
AND INTERNATIONAL ORGANISATIONS ON THE
DRAFT CONVENTION AND ON THE DRAFT
FINAL PROVISIONS (1)**

Preamble

PEOPLE'S REPUBLIC OF CHINA (CONF. 6/C.2/W.P.7)

"THE STATES PARTIES TO THIS CONVENTION,

BEARING IN MIND the broad objectives in the resolutions adopted by the sixth special session of the General Assembly of the United Nations on the establishment of a New International Economic Order,

CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States,

BEING OF THE OPINION that the adoption of uniform rules which govern the agency system for the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

HAVE AGREED as follows:"

NETHERLANDS (CONF.6/C.2/W.P.5)

"THE STATES PARTIES TO THIS CONVENTION,

DESIRING to establish common provisions concerning agency in the international sale of goods,

HAVE AGREED as follows:"

(1) Contained in CONF.6/3, Addenda 1 and 2 thereto and CONF.6/4, as well as in CONF.6/C.1/W.P.1-41 and CONF.6/C.2/W.P.1-10.

CHAPTER I – SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1

COSTA RICA (CONF. 6/3, page 7)

Article 1 provides that the Convention on agency governs any act in relation to performance. This is a strange formulation since the phase of performance strictly speaking refers to the relation between the principal and the third party, which is affirmed in the third paragraph.

Paragraph (1)

CZECHOSLOVAKIA (CONF. 6/C. 1/W.P.1)

Revise paragraph (1) of Article 1 to read as follows :

“(1) This Convention applies where one person, the agent, has authority to act, acts or purports to act in dealing with a third party on behalf of another person, the principal, for the purpose of concluding an international contract or in relation to its performance.”

NETHERLANDS (CONF. 6/3 Add. 2, page 1)

Proposal: delete “international”.

Comments: According to the present text there are *two restrictions*: one as a result of the requirement in this paragraph that the *sale* should be *international* and one as a result of Article 2, paragraph (1), which indicates that and how the *agency* should be *international*. That these are two separate requirements also follows from paragraph 19 of the Explanatory Report, according to which Article 2 contains “further” conditions. This raises the question what kind of restriction is meant by “international”, the more so as it appears from paragraph 20 of the Explanatory Report that this term should not be defined in the same way as in the Vienna Sales Convention. If “international” is only a reference to Article 2, one should say so. We would prefer to delete the word altogether. It could remain in the title of the convention, as in the Vienna Sales Convention (in which it is only mentioned in the title). It would however be more correct to put the word “international” before “agency” (instead of before “sale”).

Paragraph (2)

CZECHOSLOVAKIA (CONF.6/C.1/W.P.1)

Delete paragraph (2) of Article 1.

Paragraph (3)

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (CONF.6/4, page 1)

The drafting of this provision is unhappy for, when read in conjunction with Article 2, paragraph (1), it would suggest that a sales contract concluded by the agent between the principal and the third party falls within the scope of the Convention. Now, the Convention is concerned only with *agency* in the international sale of goods and it therefore can in no wise affect the sales contract itself, which falls entirely outside the scope of the draft. What should be included in the scope of application of the future agency Convention are on the one hand the relations between the agent and the third party and, on the other, as regards relations between the principal and the third party, the existence and scope of the authority of the agent as well as the *effects* of the latter's acts. So as to avoid any ambiguity, the drafting of the provision should therefore be amended along the following lines:

"It is concerned only with relations between the agent and the third party on the one hand and, as regards the relations between the principal and the third party, only with the effects of the acts of the agent in actual or purported exercise of his authority on the other".

Article 2

COSTA RICA (CONF.6/3, page 7)

Article 2 seems to overlook the fact that there may be an agency in an international sale without the parties necessarily having their places of business in different States. The place of business is only one of the criteria for determining the international character of the sale. The fact that the goods are transported from one State to another or that there is an international payment is often of greater importance.

It does not seem necessary that the agent should have his place of business in a Contracting State. This excludes the case of an agent who performs the contract in a State which is a party to the Convention and whose place of business is in another State which is not. There seems to be no justification for this.

Article 2 requires that "the rules of private international law lead to the application of the law of a Contracting State". This ignores those cases where the sale is submitted to arbitration and the arbitrator is allowed to apply different criteria, which is the case in the majority of important international sales contracts.

Paragraph (1)

CZECHOSLOVAKIA (CONF.6/C.1/W.P.2)

Revise paragraph (1) of Article 2 to read as follows:

"(1) The Convention applies where two of the three parties, principal, agent and third party, have their places of business in different States and:

- (a) the agent and the third party have their places of business in Contracting States, or
- (b) ..."

NETHERLANDS (CONF.6/3 Add.2, page 1)

Suggestion: replace (a) by:

- (a) the agent has his place of business in a contracting state and has acted in a contracting state.

Comments:

As long as (a) is retained as an alternative to (b) (referring to the rules of international private law) some kind of potential conflict with the 1978 Convention of the Hague Conference would seem inevitable.

The proposed addition of seven words would however very much reduce the possibility of such conflict and make the provision less exorbitant.

Note: In the first line we would prefer to replace "applies where" by "does not apply unless", as in paragraph (2). That would make it clearer that this is a restriction.

UNITED KINGDOM (CONF.6/C.1/W.P.20)

For Article 2, paragraph (1) (a) substitute:

"(a) those States are Contracting States"

Comment:

This would have the following advantages:

- (1) The scope of application of the Convention would exactly coincide with that of the Vienna Sales Convention.

(2) It seems right in principle that the Convention should apply when both the principal and the third party have their places of business in different Contracting States, irrespective of the agent's place of business.

(3) It reduces the risk of a conflict with the Hague Convention. This is because both the States in question will be parties to the proposed Convention, and so, by virtue of Article 22 of the Hague Convention, the proposed Convention would prevail. (The risk of a conflict can only be eliminated totally by requiring all three parties to have their places of business in a Contracting State).

(4) It will ensure that the Convention is applied regardless of whether the action is brought where the principal has his place of business or where the third party has his place of business.

(5) It avoids problems which may arise under the present text where both the principal and the third party have their own agents, only one of whom has his place of business in a Contracting State.

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (CONF.6/4, page 1)

If the draft Convention is to be understood as adopting an objective connecting factor for the purpose of its application, that to be found in Article 2, paragraph (1) (a) is open to criticism, on the one hand because it introduces a provision of exorbitant scope into the future Convention and on the other because this provision may be a source of conflict with Article 11 of the Hague Convention of 1978 on the law applicable to agency.

(a) As to the first point, while it is true that in the normal agency situation the agent is the party situated at the centre of the agency relationship so that it is legitimate to apply to that relationship the law of the State of his place of business, the arguments in favour of another law are far more compelling when, because of the agent's activity itself, the centre of gravity is displaced and has closer links with another State. When the State in which the agent has acted is also that in which the third party has his business establishment or his habitual residence, the centre of gravity of the agency relationship is clearly tilted towards that State. If a German company wishes to negotiate an important contract with a party who has his place of business in Nigeria and has recourse to the services of an agent whose business establishment is in London, it would be difficult to justify the application of English law (assuming that the United Kingdom had ratified the future Convention) to the Nigerian party to the contract if the agent were to negotiate the contract in Nigeria, and even though neither the Federal Republic of Germany nor Nigeria were Parties to the future Convention.

The party in Nigeria conducting negotiations with a German company will

not expect the agency relations to be governed by English law: *à la rigueur*, there would be more justification in such cases for taking as the sole objective connecting factor the place of business of the third party. Since however the principal should also be protected and as he is aware of the place of business of the third party, the most satisfactory solution, which would at the same time meet the legitimate expectations of the three parties involved, would seem to lie in a combination of connecting factors.

The system established by Article 2, paragraph (1) (a) would seem to constitute a kind of legal "imperialism", such as already permeated the spirit of the Hague Conventions of 1964 relating to a uniform law on the international sale of goods. More recent codifications have recognised that it is preferable to adopt connecting factors for the application of international Conventions which take account of the situation of all the parties involved: it is sufficient in this regard to refer to the Vienna Convention of 1980 on contracts for the international sale of goods, whose objective connecting factor requires that the seller and the buyer must have their places of business in different Contracting States.

It is moreover interesting to note that in another draft prepared under the auspices of UNIDROIT which also deals with a tripartite relationship, namely the preliminary draft rules on *leasing* operations, the objective factor permitting the application of the future Convention is that the lessor and the lessee have their places of business in different Contracting States.

(b) Article 11 of the Convention on the law applicable to agency of 14 March 1978 provides that it is the internal law of the State in which the agent has acted which shall apply if the third party has his business establishment or, if he has none, his habitual residence in that State (Article 11, paragraph (b)). This provision, the spirit of which is in conformity with the generally accepted rules of private international law, would enter into conflict with the future Convention if Article 2 paragraph (1) (a) of the draft were to be retained. In this connection, the remarks set out in the report of the Secretariat of UNIDROIT (UNIDROIT 1982, Study XIX - Doc. 62) do not seem to be relevant: in the first place, an international Convention is not intended solely for the use of the courts, but also for the parties who must know before a dispute arises which is the law which will govern their relations. It is therefore not exact to state, as does the report, that there would be no problem unless the court seized of the case were situated in a State Party to the future Convention. On the other hand, recourse to Article 22 of the Hague Convention which provides that the latter "shall not affect any other international instrument containing provisions on matters governed by this Convention to which a Contracting State is, or becomes, a Party", can only come into play if the two States in question are Parties to the new instrument worked out under the auspices of

UNIDROIT. However, if the agent's State, State A, is a Party to the Hague Convention and to the future Convention, while that of the third party, State B, is a Party only to the Hague Convention, a judge in State A will inevitably be faced with a conflict of Conventions since on the one hand he must apply the provisions of the future Convention while on the other he is bound by the Hague Convention in relation to State B.

For all these reasons, it is proposed to amend Article 2, paragraph (1) (a) as follows:

"(a) the agent and the third party have their places of business in Contracting States".

Paragraph (2)

FRANCE (CONF.6/C.1/W.P.21)

"However, where the third party neither knew nor ought to have known that the agent was acting as an agent, the Convention shall only apply if, in addition to the requirements of paragraph 1, the agent and the third party have their places of business in different States."

Commentary:

This is intended to be only a drafting proposal.

NORWAY (CONF.6/3, page 8)

Paragraph (2) should read:

"(2) However, those provisions of the Convention governing the case where, at the time of contracting, the third party neither knew nor ought to have known that the agent was acting as an agent shall, *regardless of the principal's place of business*, [not apply unless] (*) the agent and the third party have their places of business in different States. *The same applies where it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent undertakes to bind himself only.*"

(*) Alternative text: [shall apply and only apply where].

Note:

Paragraph (2) ought to determine independently the scope as regards the international character in the case of an undisclosed principal and so reflect,

partly a principle of exception from the scope determined in paragraph (1), partly a principle of extension of the scope determined in that paragraph. The principle of paragraph (2) should be to disregard the principal's place of business in the case of an undisclosed principal and instead rely on the agent's place of business for the purpose of determining the scope. The principle should be upheld even if the principal has his place of business in the same State as the third party, where this fact is disclosed after the time of contracting. The principle of replacing the principal's place with the agent's place as the relevant criterion is particularly important in the case of commission agency, where the agent — and in general not the principal — will be the party to the contract of sale. Cf. Article 15. In such a case it is important that the more exceptional rights of the principal and the third party against each other (see Article 15 paragraphs (2) through (7)) are subjected to the same law as the law governing the relations between the agent and the third party. It is further important that the law applicable is known at the time of contracting, see in particular the derogatory authority pursuant to paragraph (7) of Article 15. With the present text paragraph (2) will only restrict the possible scope of the Convention and in a different way than the Vienna Convention (see Explanatory Report, pp. 15-16).

NORWAY (CONF.6/C.1/W.P.25)

Paragraph (2) should read:

"However, where the third party at the time of contracting neither knew nor ought to have known that the agent was acting as an agent, the Convention shall [regardless of the principal's place of business] apply if the agent and the third party had their places of business in different States [and the requirements under *litra* (a) or (b) of paragraph (1) are fulfilled]."

TURKEY (CONF.6/C.1/W.P.10)

The provision of paragraph (2) of Article 2 of the draft Convention deserves special consideration.

As is known, according to the first part of this provision, the Convention shall not apply where, at the time of contracting, the third party neither knew nor ought to have known that the agent was acting as an agent.

On the other hand the second part of the same provision lays down that the Convention applies where the agent and the third party have their places of business in different States and the Convention would otherwise be applicable under paragraph (1).

As far as we understand, the main idea in the second part of this provision

beginning with "unless", as stated in the Explanatory Report, is that the third party should have known the international character of the contract if their places of business are in different States. In principle this consideration corresponds to the interests of the parties. However, there are some cases where the third party cannot know the existence of an agency relation behind the sales contract which he has concluded and may suppose that he has concluded it with his contracting party, but not with an agent.

In those cases, with regard to the protection of the third party, we are of the opinion that his situation should not be affected by the results of a transaction where he neither knew nor ought to have known that his contracting party was acting as an agent, even though their places of business are in different States.

Therefore, we are of the belief that the last part of paragraph (2) beginning with "unless" has to be deleted from the draft Convention.

Paragraph (3)

PEOPLE'S REPUBLIC OF THE CONGO (CONF.6/C.1/W.P.27 corr.)

"Neither the nationality of the parties, nor their civil or commercial capacity, nor the civil or commercial character of the contract of sale is to be taken into consideration in determining the application of this Convention."

Comments:

This proposal has the advantage of using the terms suitable for the qualification required. In fact, whilst it is possible to talk about the civil or commercial character of a contract of sale, it is necessary to use the word "capacity" when referring to the parties to this agreement. The use of inappropriate terms would thus be avoided.

Note: This proposal is purely of a drafting nature.

Proposed new paragraph (3)

NORWAY (CONF.6/3, page 9)

Add the following as a new paragraph (3) (like Article 1, paragraph (2) of the Vienna Sales Convention).

"(3) The fact that the principal or the agent, as the case may be, has his place of business in a State different from the third party shall be disregarded whenever this fact does not appear either from the contract of

sale or from any dealings between the parties or from information disclosed by the principal or the agent before the contract has been concluded."

The present paragraph (3) should be transferred to a new paragraph (4).

Note:

It is proposed to adopt a provision similar to Article 1, paragraph (2) of the Vienna Sales Convention of 1980 to avoid the third party being subjected to unexpected surprise application of the Convention.

Proposed new Article 2 bis (2)

FEDERAL REPUBLIC OF GERMANY (CONF.6/C.1/W.P.39)

Insert the following Article 2 bis:

"(1) A Contracting State may at any time make a declaration that this Convention is likewise to be applied by the authorities of that State to cases not falling within the scope of application of this Convention.

(2) A declaration according to the precedent paragraph may, in particular, be made to the effect that the Convention shall be applied,

(a) where the agent has or purports to have authority to conclude any other business than a contract of sale;

(b) where the places of business, as required in Article 2, paragraph (1), are not situated in Contracting States."

Article 3

Paragraph (a)

UNITED KINGDOM (CONF.6/C.1/W.P.23)

In Article 3 (a), insert at the end (after "exchange") the words "or market".

Comment:

This is to deal with the fact that "a commodity exchange" may be interpreted as meaning an actual institution or the floor of an actual exchange,

(2) A revised text was submitted by the Final Clauses Committee to the Conference as Article 30.

whereas many commodity markets now operate by telecommunications as well as, or as an alternative to, dealing on the floor of the exchange.

Paragraphs (c), (d) and (e)

BULGARIA (CONF.6/C.1/W.P.26)

Delete paragraphs (c), (d), and (e).

Commentary:

This proposal is designed to exclude texts connected with agency by operation of law, bearing in mind that the Convention only relates to the subject of so-called "voluntary" agency (Article 9). Thus the texts that it is proposed to exclude are superfluous.

COSTA RICA (CONF.6/3, page 7)

Agency in the law of succession is excluded; it is however possible that acts relating to international sale may be performed in this context in the case of private traders. Take the case for example of international payments.

Proposed new paragraph (2)

NORWAY (CONF.6/3, page 9)

Add the following provision as a *new paragraph (2)*:

"(2) Nothing in the Convention affects any provision of national law for the protection of consumers."

Article 4

COSTA RICA (CONF.6/3, page 7)

Article 4 seems to be superfluous since it is evident that the organ of a legal person is not, for the purposes of the contract, another person but precisely an organ which forms part of it.

Paragraph (a) and proposed new paragraph (b)

UNITED KINGDOM (CONF.6/C.1/W.P.24)

1. Add to *Article 4*, after paragraph (a), "(b) any person appointed by the

creditors of an entity referred to in paragraph (a) above to act in relation to the affairs of that entity shall not be regarded as the agent of that entity in so far as he acts by virtue of such appointment;"

2. In consequence, after "(b)" to "(c)".

3. Insert in Article 4 (a), after "conferred by law or by", the words "or under".

Comment:

The first amendment is to deal with the case of a manager or receiver appointed by the debenture holders or other creditors of a company to take over the management of its property in place of the directors. This case is not covered by Article 3 (d) or (e) because there is no judicial etc. authority and the company may not be incapable of acting.

The third amendment is to deal with the case of an officer (e.g. director) or partner acting by authority of a resolution of the board of directors or his fellow partners. Such authority need not be specifically conferred by law or the constitutive documents.

The documents might be silent as to the particular authority and a partnership does not require articles of constitution.

Article 5

NORWAY (CONF.6/3, page 9)

This article should read as follows:

"The principal or the agent on the one side and the third party on the other may in their mutual relations exclude the application of the Convention or [, subject to Article 11.] derogate from or vary the effect of any of its provisions."

Note:

Paragraph (2) in the present text is formulated in too absolute a manner. The agent may have authority to derogate from or vary the effect of provisions in the Convention on behalf of the principal.

NETHERLANDS (CONF.6/3 Add.2, page 2)

Replace "parties" by other words as proposed by Norway.

FRANCE AND NORWAY (CONF.6/C.1/W.P.41)

Drafting proposal:

"The agent may agree with the third party to exclude the application of this Convention or, subject to Article 11, derogate from or vary the effect of any of its provisions.

Such agreement shall not affect the rights of the principal if the agent has acted outside the scope of his authority in this respect."

Paragraph (2)

PEOPLE'S REPUBLIC OF THE CONGO (CONF.6/3, page 2)

We are of the opinion that agency is a term which indicates the tripartite relations among the principal, the agent and the third party.

Since under the terms of the Convention the agent acts on behalf of the principal (Article 1, paragraph (1)), his acts in consequence bind the principal unless it is shown that he has exceeded his authority.

Thus, when the agent and the third party conclude a contract of sale from which they exclude the application of the Convention or of some of its provisions, or vary their effects, the principal, whether debtor or creditor under the contract, and in whose name the agent acts, can only lay claim to those rights enjoyed by the person who represents him in the performance of the contract.

We are of the belief that in the relations between the third party, considered as co-contractant of the agent, and the principal, the agent should disappear.

In any case, if there is an express exclusion of the Convention or of some of its provisions by the contract between the third party and the agent, then none of the contracting parties, nor even a third party, may any longer legally rely on the texts which the parties have set aside as not governing their contract. To proceed otherwise would not only constitute a serious attack on the principle of freedom of contract but also on the autonomy of the will of the parties and even on the effect to be given to contracts.

Is there any need to stress that the contract of sale is formed not between the third party, the agent and the principal but between the agent and the third party? The principal is here bound solely by the will of the agent, the latter assuming liability in his relations with the principal only for fault committed by him in the conclusion of the performance of the contract.

The agent and the principal must be put on the same footing vis-à-vis the third party since the Convention itself excludes from its scope of application the internal relations between the agent and the principal in such a manner that one must consider them as being normally bound, having regard to the contract.

GHANA (CONF.6/C.1/W.P.29)

Paragraph (2) to read as follows:

"(2) However, any such exclusion or derogation agreed upon by the parties shall not under this Convention affect the rights of a party not privy to the agreement."

Article 6

COSTA RICA (CONF.6/3, page 7)

It is not clear which are the principles referred to in Article 6. Are they the same as those in paragraph (1)?

NORWAY (CONF.6/3, page 9)

Transfer to the end of Chapter I.

Paragraph (2)

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (CONF.6/C.1/W.P.28)

"Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled [in conformity with the general principles on which it is based or, in the absence of such principles,] in conformity with those rules, not contained in this Convention, of the law applicable by virtue of Article 2 (1) of this Convention".

Article 7

NETHERLANDS (CONF.6/3 Add.2, page 2)

Proposal: Replace "parties" by other words, as proposed by Norway.

NORWAY (CONF.6/3, page 10)

Paragraph (1) should read:

"(1) *The principal or the agent on the one side and the third party on the other* are bound by any usage to which they have agreed and by any practices which they have established between themselves."

Paragraph (2) should commence as follows:

"(2) *They* are considered, . . ."

Note:

The inter-relations between the three parties should be made more clear than just by referring to the parties "between themselves". Cf. the note under Article 5.

Paragraph (2)

BULGARIA (CONF.6/C.1/W.P.30)

Replace "ou auraient dû avoir connaissance" by "ou auraient été en mesure de connaître" in the French text of the second line.

Commentary:

We note that there is a legal *non sequitur* affecting both the terminology and the substance, as "auraient dû avoir connaissance" is considerably different from the idea of "auraient été en mesure de connaître" (see Articles 11 (3) and 16 (2)).

It seems to us that one of the principles of Article 2 (2) is the requirement "to know" or "to be in a position to know" certain circumstances (usages — Article 11 (3), the fact that the agent was acting as an agent — Article 13, the agent's lack of authority — Article 16 (2)) and not the duty to know them.

TURKEY (CONF.6/C.1/W.P.11)

According to Article 7 (1), "the parties are bound by any usage to which they gave agreed and by any practices which they have established between themselves".

This paragraph, which follows very closely the language of Article 9 of the Vienna Convention, describes the extent to which usages and practices are binding on the parties. We are of the opinion that this paragraph is rather clear and reasonable.

As regards the provision of paragraph (2) of Article 7, however, we think that some points have to be considered with great care.

According to this paragraph, unless otherwise agreed, the parties are considered to have impliedly made applicable to their relations any usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to agency relations of the type involved in the particular trade concerned.

As is seen, in this provision the usage must meet two conditions in order

to bind the parties: (i) it must be one of which the parties knew or ought to have known; and (ii) it must be one "which in international trade is widely known to and regularly observed by, the parties to agency relations of the type involved in the particular trade concerned".

With regard to the word "parties", it is possible to find a satisfactory explanation in the Explanatory Report (paragraph 42). Furthermore, the first requirement with respect to the binding effect of a usage is also very clear.

As regards the second requirement which deals with "international trade", it seems to us rather vague and dangerous for a party in a developing country that has entered into a such relationship.

Instead of this requirement, therefore, we propose the requirement of acknowledgement of a usage by an international organisation like the International Chamber of Commerce that has an important role in international trade.

Thus, we are of the belief that the text of paragraph (2) of Article 7 will be more objective and appropriate to the interests of the parties.

Therefore, Article 7 (2) should be drafted as follows:

"(2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their relations any usage of which they knew or ought to have known and which is widely acknowledged by the international organisations active in the particular trade concerned and regularly observed by parties to agency relations of the type involved in the particular trade concerned."

UNION OF SOVIET SOCIALIST REPUBLICS (CONF.6/3 Add.1, page 1)

The use of the word "parties" at the beginning of this paragraph presupposes that what is being dealt with are the relations of all the parties (principal, agent and third party) among themselves, while the draft Convention in fact regulates only the relations between the principal or the agent on the one hand, and the third party on the other. Moreover, the present drafting of Article 7 (2) leaves it unclear as to whether the concept "the parties to agency relations" means the same as those mentioned at the beginning of this paragraph or rather different persons. This being so, it would be useful to add to the text of the draft itself the phrase to be found in paragraph 44 of the Explanatory Report of the Secretariat of UNIDROIT.

Article 8

Paragraph (a)

NORWAY (CONF.6/3, page 10)

This article should commence as follows:

"(a) If a party has more than one place of business, the place of business is that which has the closest relationship with the contract of sale which the agent has concluded or purported to conclude, *including its performance*, having regard to . . .".

Note:

Article 10 of the Vienna Sales Convention of 1980 refers to "the contract and its performance". Alternatively, one could simplify the text by replacing the words "the contract of sale" by "the sale".

TURKEY (CONF.6/C.1/W.P.12)

In the draft Convention, Article 8 paragraph (a) provides that "for the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract of sale which the agent has concluded or purported to conclude, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of that contract".

In this provision the place of business which has the closest relationship to the contract of sale that the agent has concluded is rather clear. For the moment the conclusion of a contract of sale is definite.

As regards the other part of the paragraph which deals with the purpose of the agent to conclude a contract of sale, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of that contract, this seems to us rather ambiguous.

We are of the opinion that in this part of the said paragraph, not only the word "parties", but also the provision itself is ambiguous. It seems to us that the draft Convention lays down here a rather subjective criterion whereas the

"conclusion of the contract" of sale is ascertained and objective.

For this reason we are of the belief that the second part of paragraph (a) (beginning with "or purported to conclude") has to be deleted from the text.

CHAPTER II – ESTABLISHMENT AND SCOPE OF THE AUTHORITY OF THE AGENT

Article 9

Paragraph (1)

PEOPLE'S REPUBLIC OF THE CONGO (CONF.6/3, page 3)⁽³⁾

As authorisation is a legal concept, at least in Civil Law systems, and is understood in the sense of authority which the law confers on a person to perform certain legal acts, the term is improperly used in Article 9 *et seq.* of the Convention.

Article 9, paragraph (1) should therefore read:

"The authority to act conferred on the agent by the principal may be express or implied".

CZECHOSLOVAKIA (CONF.6/C.1/W.P.3)

Revise paragraph (1) of Article 9 to read as follows:

"(1) The authorisation of the agent by the principal must be express or must be such that it may be inferred with reasonable certainty from the acting of the parties or from the circumstances of the case."

(3) The same proposal was submitted by the People's Republic of the Congo in CONF.6/C.1/W.P.32, although only as a drafting amendment affecting the French text. The commentary on the proposed text "Le pouvoir d'agir conféré à l'intermédiaire par le représenté peut être expresse ou implicite", reads as follows:

"The term "habilitation" as used in the French text is defined in the majority of countries, especially in those with a Civil law system, as "the authority given by the law or a judge to a person to perform certain legal acts in the place of another person lacking capacity".

Now, an agent is a person who enjoys full legal capacity. Therefore, he has no need for "habilitation", in the above-mentioned sense, to act. What he lacks is rather a "mandat" to contract in the name, and on behalf of another person. In order to remain faithful to the draft Convention (Article 9, paragraph (2)), the term "pouvoir" is more appropriate.

If a majority should be in favour of retaining the term "habilitation", it should be defined as "le pouvoir conféré à l'intermédiaire par le représenté d'agir pour son compte (the authority given to the agent by the principal to act on his behalf)".

Paragraphs (1) and (2)

BULGARIA (CONF.6/C.1/W.P.31)

We propose taking the first paragraph of Article 9 and placing it in a separate article bearing in mind its subject-matter. There is no logical or systematic connection between the two paragraphs as proposed in the draft. In fact, the first paragraph deals with the source of the obligation, whilst the second deals with the extent of the authority of the agent.

Paragraph (2) must remain as a separate article.

We also propose deleting from the above-mentioned text (Article 9, paragraph (1), split up or not) the words "or implied".

Comments

The Bulgarian delegation is extremely worried lest implied authorisation might create substantial difficulties for the proving of the intention to act as an agent.

We believe the main danger lies in the formula of implied authorisation which would lead to the hypothesis of apparent agency.

Paragraph (2)

MEXICO (CONF.6/C.1/W.P. 34)

Add the following to Article 9 (2):

"... except for acts concerned with the bringing of proceedings before a judicial or quasi-judicial authority for which no express authority would have been granted to the agent by the principal".

In making this proposal, Mexico wishes expressly to draw attention to the fact that, as regards proceedings brought before either a judicial or a quasi-judicial authority, in view of the Mexican legislation requiring that all acts concerned with the bringing of proceedings, including the receipt of service of proceedings, may only be performed by an agent expressly so authorised by his principal, an agent without such express authority is unable to act in such cases.

Equally, Mexico considers it to be fair and reasonable, given the implications for the principal of judicial or quasi-judicial proceedings, to give the said principal the possibility of the best defence possible, which, from a Mexican point of view, is ensured by an express authorisation.

Finally, Mexico is of the opinion that such a restriction on the implied authority of the agent also exists under the law of a good number of coun-

tries and that its inclusion in the Convention would make it more likely to be signed and eventually ratified.

The inclusion of such a provision in the Convention is therefore necessary before Mexico could consider becoming a party to this Convention."

Proposed new Article 9 bis or 10 bis

NORWAY (CONF.6/3, page 10)

"The authority of the agent may furthermore arise from the conduct of the principal and the circumstances of their situation, to the extent specified in [Article 14]."

Note:

On this point we support the proposal by one of the three members of the restricted expert group (Professor L.C.B. Gower) referred to in Doc. 58, page 3, footnote 1 and in the Explanatory Report (Doc. 63, page 9, paragraph 3). See also Explanatory Report, paragraphs 50 through 52 and comments *infra* or Article 14 paragraph (2).

Article 10

PEOPLE'S REPUBLIC OF THE CONGO (CONF.6/3, page 3) (4)

Article 10 should be drafted as follows:

"The authority to act conferred on the agent may be evidenced by writing. It is not subject to any requirement as to form and may be proved by any means".

We believe that when the text of the Convention employs the formula "need not be evidenced by writing", this amounts to the exclusion of written form. It seems to us that the intention of the drafters was rather to say that the authority may assume any form, thus including written form.

Since, moreover, the presence of witnesses is in itself a means of proof, it is in our view superfluous to add the words "including witnesses" since they are not excluded by the expression "by any means".

In the event of the majority favouring the maintenance of the term "authorisation", it would be desirable to define it as "authority conferred on the agent by the principal to act on his behalf", before employing it in Arti-

(4) The same proposal was made by the People's Republic of the Congo in CONF. 6/C.1/W.P.33.

cle 9. This definition could be included in a first paragraph of the article, thereby increasing the number of paragraphs in the article to three.

TURKEY (CONF.6/C.1/W.P.13)

According to Article 10 "The authorisation need not to be given in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses".

As is known, this provision follows closely the wording of Article 11 of the Vienna Convention. In the 1972 draft there was also a corresponding article on the form of authorisation under which "the contract between principal and agent is subject to no requirement as to form. It need neither be made in nor evidenced by writing".

This rule was adopted by the 1972 draft, for many legal systems do not require a contract of agency to be made in written form. According to this article, an agent can be nominated verbally and the existence of a contract of agency can be proved by any means.

As is known, Article 11 of the 1972 draft was deleted at the Bucharest Conference by a narrow majority, but it was agreed by the Committee to restate the provision.

On the other hand, Article 11 of the present draft Convention contains the following provision:

"(1) Any provision of Article 10, Article 16 (on the act by an agent who acts without authority or outside the scope of his authority) or Chapter IV (on the "Termination of the Authority of the Agent") of this Convention that allows an authorisation, a ratification, or a termination of authority to be made in any form other than in writing does not apply where the principal or the agent has his place of business in a Contracting State which has made a declaration under Article 27 of this Convention.

The parties may not derogate from or vary the effect of this paragraph."

As is known, the legislation of certain States requires all acts relating to foreign trade concluded by their economic organisations to be made in writing. Therefore, as is explained in the Explanatory Report (paragraph 55), at the request of a number of these States a formula along the lines of Articles 11, 12 and 96 of the Vienna Convention has been introduced in Articles 11, 12 and 27 of the draft Convention. So the effect of paragraph 1 of Article 11 is on the one hand to permit a State to make a declaration under Article 27 to the effect that any provision of Articles 10 or 16 or of Chapter IV of the Convention which allows an authority, ratification or termination of authority to be

made in any form other than in writing does not apply where the principal or the agent has his place of business in that State, and on the other hand to prohibit the parties derogating from or varying the effect of that paragraph.

As is seen, Article 11 is an extension of the provision of Article 10. Both articles deal with form.

Therefore, we are of the opinion that for systematic reasons the wording "*subject to Article 11*" has to be added to Article 10 so as to give a more satisfactory text.

Article 11

PEOPLE'S REPUBLIC OF THE CONGO (CONF.6/3, page 3)

Delete paragraph (3). By obliging the agent to reveal to the third party the fact that he is acting as an agent (Article 13 below), this paragraph would become unnecessary.

Articles 11, 12, X and Y

NETHERLANDS (CONF.6/3 Add.2, page 2)

Proposal: delete these (proposed) articles.

Comments:

These articles contain a kind of reservation which would be inconsistent with the object and purpose of the Convention. As has been pointed out in the Explanatory Report (paragraph 12) the fact that the authority of the agent may be implied — and consequently does not have to be in writing — is one of the few basic principles of the Convention.

States which require all authorisations to be in writing will probably, at least in their mutual relations, encounter very few of the problems dealt with in the Convention and it is somewhat difficult to understand why they would want to become a party to this Convention. However, if they would do so and would make a reservation of this kind, it would create an imbalance, because it would provide a certain protection to the residents of those States, without giving the same protection to the residents of other States. That possibility might prevent other States from becoming Parties to the Convention.

The proposed reservations would not only be excessive as to substance, but also as to form, taking into account that they:

- a) would be open to any State whose legislation requires an authorisation to be made in writing, be it only in respect of one type of contract;
- b) do not require those States to give any information concerning their

legislation;

c) could be made at any time, even after ratification.

If one would allow these kind of reservations, there would be very little reason, if any, to exclude other reservations, as proposed in Article 30.

One should realise that the problem here is quite a different one from the one in the Vienna Sales Convention. There the implied or oral nature of the contract (of sale) does not present a major problem. That Convention applies to the internal relations of only two parties. Here, in this Convention, the implied authority is a basic issue and we are dealing with the relations with a third party.

We would prefer the deletion of Article 10, as decided at Bucharest, to the adoption of these reservations.

Article 12

NORWAY (CONF.6/3, page 11)

The wording of this provision in connection with Article 11 appears to say the opposite of the purpose, which is that telegram and telex should always be allowed and not excluded. In Article 11 it is said that certain provisions which allow an act "to be made in any other form than in writing does not apply where . . .". If "writing" here includes telegram and telex, this might be interpreted to mean that also the use of such means of communication would be excluded.

CHAPTER III – LEGAL EFFECTS OF ACTS CARRIED OUT BY THE AGENT

Article 13

PEOPLE'S REPUBLIC OF THE CONGO (CONF.6/3, page 3)

Clarifications should be made in respect of the relations between the agent, the third party and the principal, so as to avoid any ambiguities which might affect the performance of undertakings.

Article 13 should be articulated in the form of three paragraphs as follows:

"1. The agent must reveal to the third party the fact that he is acting as an agent.

2. The agent must further expressly indicate the identity of the principal.

pal as well as any other information which will permit the third party to realise the extent of the legal relations between the principal and the agent.

3. When the agent acts within the scope of his authority his acts shall directly bind the principal".

We do not understand why Article 13 states that the acts of an agent who acts within the scope of his authority bind the third party. The latter can logically be bound in the contract concluded with the agent only in respect of the undertakings personally contracted by him.

The remainder of the phrase in Article 13 "... and that the third party know or ought to have known that the agent was acting as an agent" is no longer necessary since an obligation is incumbent on the agent, in accordance with our suggestion, to indicate to the third party that he is acting as an agent, as well as the identity of the principal.

Similarly, the expression "on behalf of a principal" in Article 13 is of no value as this is the only case, by the way already mentioned in Article 1, paragraph (1), where the Convention applies, to the exclusion evidently of that where the agent acts on his own behalf.

Finally, the phrase in Article 13 "unless it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent undertakes to bind himself only" is to no purpose because this case is not governed by the Convention. There is therefore no need to exclude it and no reason to refer to it. The provisions of the Convention regarding its scope of application are clear and precise.

Articles 13 and 15

JAPAN (CONF.6/C.1/W.P.9)

Amend Article 13 and incorporate Article 15 into a new Article 13.

"(1) When the agent acts on behalf of a principal within the scope of his authority, the acts of the agent shall directly bind the principal and the third party to each other *and shall not bind the agent as a party*, except where:

(a) *the third party, at the time of contracting neither knew nor ought to have known that the agent was acting as an agent, or*

(b) *it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent undertakes to bind only himself.*

[(2) Where the acts of the agent do not directly bind the principal and

the third party to each other under paragraph (1), the acts of the agent bind only himself and the third party to each other.]

(3) Even where the acts of the agent bind only himself and the third party to each other [or, despite paragraph (2)],

(a) [the same as in the present Article 15 (2) (a)

(b) and (h)]."

Note:

1. Under the present *Article 13*, it is not clear enough whether the agent is bound, as a party, to the third party when the acts of the agent directly bind the principal and the third party to each other, although the Explanatory Report makes this clear (paragraph 63). This proposal tries to make it clear that the agent is not bound as a party to the third party in that situation.

2. The second point to be raised here is related to the problem of the allocation of burden of proof. There seems to be inconsistency in this respect between *Article 13* and *paragraph (1) of Article 15* of the present draft.

Here four situations, (a) to (d), may be envisaged and situations (a), (b) and (d) deserve attention.

(a) The principal (P) asserts a claim against the third party (T).

(b) T asserts a claim against P.

(c) The agent (A) asserts a claim against T.

(d) T asserts a claim against A.

3. In case (d), T has a claim against A by proving that T made a contract with A, who, trying to avoid his own contractual relation with T, in turn can set up a defence, under the present *Article 13*, by proving

— that A acted on behalf of P within the scope of his authority and

— that T knew or ought to have known that A was acting as an agent.

However, considering paragraph (1) of the present *Article 15*, the only requirement on A who tries to set up a defence to avoid his contractual relation with T would be to prove

— that A acted on behalf of P within the scope of authority,

and it is T who, trying to break the defence, should prove

— that T himself neither knew nor ought to have known that A was acting as an agent.

4. The same can be said in case (a), where P would have a claim against T only by proving

— that A made a contract with T and

— that A acted on behalf of P within the scope of A's authority.

Then T, who tries to seek contractual relations with A, has a valid defence if T proves

— that he neither knew nor ought to have known that A was acting as an agent.

This proposal is based on such a principle. (Even if the principle on burden of proof is contrary to this proposal, there should be the same kind of adjustment between *Article 13 and paragraph (1) of Article 15* of the present draft.)

5. Certainly after this problem (i.e. who are bound by the contract as parties) is settled, there is a special problem which appears in the present *paragraph (2) of Article 15*.

6. Moreover, under the present provisions, the third party, who did not succeed in seeking contractual relations with the principal under *Article 13* when the agent acts on behalf of the principal within the scope of his authority [see case (b)], does not automatically get a contractual relation with the agent [see case (d)], since he further has to prove either sub-paragraph (a) or (b) of the present *Article 15 (1)*. It is not certain that a special provision is necessary to give automatically to the third party contractual relations with the agent in that situation, but a new *paragraph (2) of Article 13* might help to make the relationship clearer.

Article 14

TURKEY (CONF.6/C.1/W.P.14)

As is known, *Article 13* of the draft Convention lays down the general principle when the agent acts within the scope of his authority and the third party knows or ought to have known that he was acting as an agent.

In such a case, the acts of the agent bind directly the principal and the third party.

This provision is followed by the provisions of *Article 14*.

This article deals with the cases where an agent acts without authority or acts outside the scope of his authority.

In such a case, as is well known, his acts do not bind the principal and the third party to each other.

On the other hand *Article 15*, which is probably the most important article of the draft Convention, deals with the relationships established in cases which have not been provided for in *Article 13*.

These cases are of two types: (i) the agent acts on behalf of a principal, but the third party neither knows nor ought to have known that he was acting as an agent at the time of the conclusion of the contract with the third party; or (ii) it has been agreed or simply understood that the agent is binding himself vis-à-vis the third party even though he is acting on behalf of another person. This is the case especially when the agent is a commission agent (*Explanatory Report, paragraph 68*).

As is seen, there is a close connection between the provisions of Article 13 and Article 15. In other words, Article 15 seems to be a continuation of Article 13. Both deal with the cases where an agent acts on behalf of a principal within the scope of his authority, whereas Article 14 is related to the cases when an agent acts without authority or outside the scope of his authority.

On the other hand, Article 14 deals also with the provision of Article 16. In other words, there is a natural connection between both articles.

Therefore, we are of the opinion that it would be more appropriate if Article 13 were followed by Article 15. For this reason, we propose that Article 15 be replaced by Article 14.

Paragraph (1)

PEOPLE'S REPUBLIC OF THE CONGO (CONF.6/3, page 4)

As the third party is not bound by the acts of the agent but by his own acts since the agent is not acting on his behalf, paragraph 1 of Article 14 should read as follows:

"When the agent acts without authority or outside the scope of his authority, his acts do not bind the principal".

CZECHOSLOVAKIA (CONF.6/C.1/W.P.4)

At the end of paragraph (1) of Article 14 add the words: "unless the principal ratifies this act by the agent."

Paragraph (2)

NORWAY (CONF.6/3, page 11)

It is proposed that paragraph (2) read as follows:

"(2) Nevertheless, where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that he is acting within the scope of that authority, the principal is bound to the third party by the acts of the agent to the same extent as if he has actually authorised those acts."

Comment:

It should not be a choice for the third party whether he wants to respect the contract which he has entered into with full knowledge of the situation and

which is binding on the principal. The present text implies that the third party is not bound, but that the principal may not invoke the lack of authority when the third party chooses to assert his rights. There is no indication of any limits in time or otherwise for this option of the third party.

The wording proposed is similar to that provisionally adopted (as Article 26) at the Bucharest Diplomatic Conference of 1979, and also to the proposal of the restricted expert group. It has the merits of describing in clear, easily understood words the situation contemplated and its legal effects.

When the text was changed in Rome in 1981 by a slight majority, it was as result of an intervention by the delegation of South Africa, which wanted the provision to reflect its origin in Common law practice, where it was developed by use of the "estoppel" technique: the principal's acts or conduct deprived him of the opportunity to invoke ("rely on") that the authority had been exceeded. It was argued that it should also follow as a consequence of this legal construction that the third party, when aware that actual authority had been exceeded, should be entitled to withdraw from the contract to the same extent as where an act of the agent could not be held against the principal. Cf. Article 16, paragraph (2) on refusal of ratification.

It seems highly disputable whether the third party should have such a right of withdrawal, when the contract is binding upon the other party, the principal, and the third party therefore has got what he bargained for. In no case should such a question be decided on the basis of highly theoretical reflections based on the historical development of one of the legal systems involved.

Whichever way the question of withdrawal will be solved is, however, under no circumstances of such practical importance that it should influence the drafting of provisions of more real importance, such as Article 14, paragraph (2). As it stands, it presents its meaning in an indirect way, whereas the original drafting better describes and explains the rule.

UNION OF SOVIET SOCIALIST REPUBLICS (CONF.6/3 Add.1, page 1)

Given the absence of any reference to Article 14 in Article 11 of the draft Convention, it would be useful, so as to avoid an erroneous interpretation of the former provision, to complete the text of paragraph (2) of Article 14 with the following words: "unless Article 11 provides otherwise".

Article 15

UNITED KINGDOM (CONF.6/C.1/W.P.35 and Add.)

W.P. 35 Amend Article 15 as follows:

Article 15

(1) As Article 15, paragraph (1) of the present text of the draft Convention, Study XIX — Doc. 63.

(2) Nevertheless, in cases not falling within paragraph (1) (b) of this Article:

(a) the principal may exercise the rights acquired on his behalf by the agent against the third party, subject to any defences which the third party may have against the agent, provided that he has first given notice to the agent and the third party of his intention to do so;

(b) the third party may exercise against the principal [once he has discovered the principal's identity] the rights which he has against the agent, subject to any defences which the agent may have against the third party, provided that he has first given notice to the agent and principal of his intention to do so.

(3) As soon as the parties have received such notice, the agent may no longer exercise his rights against the third party, and the third party or principal may no longer discharge his obligations by dealing with the agent.

(4) As Article 15, paragraph (6) of the present text of the draft Convention, Study XIX — Doc. 63.

(N.B. Paragraphs (1) and (4) of this text proposed by the United Kingdom delegation are the same as paragraphs (1) and (6) respectively of the present text of the draft Convention, Study XIX — Doc. 63).

Comments:

This proposal is designed to cure three separate defects in Article 15:

1. *System of Notices*

The present system seems unworkable in practice because:

a) the parties' rights are made to depend on whether or not the agent has fulfilled or is in a position to fulfil his obligations. This text is uncertain and will create unnecessary litigation.

b) the actual procedure for giving notice is incomplete (e.g. it omits the case of the agent who is himself responsible for non-performance), and it provides insufficient inducement for the agent to comply with his obligation under paragraphs (4) and (5) of the present text.

2. *Commission Agents*

There seems no need to provide a direct right of action between the principal and the third party in cases falling within paragraph (1) (b). To do so would be inconsistent with the terms of the contract between the agent and

the third party.

3. Defences

An undisclosed principal should not be able to set up against the third party defences which he has against the agent. It is appropriate to give the third party the right to set up his defences against the agent when he is sued by the principal because he did not know that he was contracting with the principal. The principal, on the other hand, knew who his agent was and was responsible for choosing him. Dealings between the principal and agent should not affect the third party. They do not in the case of the disclosed principal.

W.P.35 Add. The amended Article 15 as proposed by the United Kingdom delegation in CONF.6/C.1/W.P.35 would read as follows:

"(1) When the agent acts on behalf of a principal within the scope of his authority, his acts shall bind only the agent and the third party:

(a) if at the time of contracting the third party neither knew nor ought to have known that the agent was acting as an agent, or

(b) if it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent undertakes to bind only himself.

(2) Nevertheless, in cases not falling within paragraph (1) (b) of this Article:

(a) the principal may exercise the rights acquired on his behalf by the agent against the third party, subject to any defences which the third party may have against the agent, provided that he has first given notice to the agent and the third party of his intention to do so;

(b) the third party may exercise against the principal [once he has discovered the principal's identity] the rights which he has against the agent, subject to any defences which the agent may have against the third party, provided that he has first given notice to the agent and principal of his intention to do so.

(3) As soon as the parties have received such notice, the agent may no longer exercise his rights against the third party, and the third party or principal may no longer discharge his obligations by dealing with the agent.

(4) The principal may not exercise the rights of the agent against the third party if it appears from the circumstances of the case that, if he had been aware of the identity of the principal at the time of contracting, the third party would not have entered into the contract."

Paragraph (1)

PEOPLE'S REPUBLIC OF THE CONGO (CONF.6/3, page 5)

The acts of an agent acting on behalf of a principal within the scope of his authority must bind only the principal and the agent and not the third party as well.

Article 15, paragraph (1) should be formulated as follows:

"When the agent acts within the scope of his authority, his acts bind the principal".

We have already pointed out why it is superfluous to repeat each time the words "on behalf of a principal" (Cf. our observations on Article 13).

Sub-paragraphs (a) and (b) of paragraph (1) of Article 15 should be deleted for the reason that they are contrary to the above-mentioned provisions of the Convention.

Paragraphs (4), (5), (6) and (7) of Article 15 should likewise disappear from the text as they are contrary to the provisions of the Convention relating to the obligation imposed on the agent to communicate the identity of the principal to the third party.

NORWAY (CONF.6/3, page 12)

The drafting of paragraph (1) could be rearranged as follows (purely a drafting suggestion):

"(1) If at the time of contracting the third party neither knew nor ought to have known the agent was acting as an agent or if it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent undertakes to bind himself only, his acts shall bind only *himself* and the third party, *even* when *he* acts on behalf of the principal within the scope of his authority."

TURKEY (CONF.6/C.1/W.P.16)

Paragraph (1) of Article 15 deals with the cases "when the agent acts on behalf of a principal within the scope of his authority".

In such cases, his acts bind only the agent and the third party: (a) if at the time of contracting, the third party neither knew nor ought to have known that the agent was acting as an agent; or (b) if it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent undertakes to bind only himself".

In sub-paragraph (b), we are of the opinion that the words "for example"

should be deleted and instead of them, the adverb "*especially*" has to be inserted into the text. We think that by this adverb, in a case of a contract of commission, it follows from the circumstances that the agent undertakes to bind only himself. In other words, "*especially*" puts emphasis upon this effect of the contract of commission.

Furthermore, we are also of the opinion that the adverb "*especially*" would limit the scope of the article like "*notamment*" in the French text, whereas "*for example*" widens it.

Paragraph (2)

AUSTRALIA (CONF.6/C.1/W.P.37)

The words "... where the agent has not fulfilled or is not in a position to fulfil his obligations to the principal", in line 3 of paragraph (2) (a) of Article 15, should be replaced by the following:

"... where the third party has not fulfilled or is not in a position to fulfil his obligations under the contract to the agent, or the agent for any other reason fails to fulfil or is not in a position to fulfil his obligations to the principal."

Comment:

As presently drafted the words in line 3 of paragraph (2) (a) of Article 15, "where the agent has not fulfilled or is not in a position to fulfil *his obligations* to the principal" are open to the interpretation that they do not cover a failure by an agent to fulfil his obligations because of a default by the third party. The Australian proposal is intended to make it clear that the words do cover such a situation.

CZECHOSLOVAKIA (CONF.6/C.1/W.P.36)

Add at the end of Article 15, paragraph (2) (b) the following text:

"... and subject to the condition, that the principal has benefits from the act of the agent and only to the extent of the obtained benefits."

NETHERLANDS (CONF.6/3 Add.2, page 3)

Proposal: Under (a) and (b) delete the words "has not fulfilled or".

Comments:

The words "has not fulfilled or" do not in any way restrict the rights of

the principal and the third party to take direct recourse against each other, because it goes without saying that those rights cannot be exercised once the agent has fulfilled his obligations. If retained they would make the following words ("is not in a position to fulfil") superfluous, because if an agent is not in a position to fulfil his obligations, he has not fulfilled those obligations. We always took it for granted that the exercise of these rights would be limited to certain, more or less exceptional, cases, in particular the cases in which the agent would be unable or unwilling to fulfil his obligations. That could be expressed by "is not in a position to fulfil his obligations". The preceding words should however be deleted.

TURKEY (CONF.6/C.1/W.P.15)

Article 15 deals with the relationships established in cases which have not been provided for in Article 13.

As is stated in the Explanatory Report, these cases are of two types: (a) in the first group, the agent acts on behalf of a principal but the third party neither knows nor ought to have known that he was acting as an agent at the time of the conclusion of the contract with the third party, or (b) in the second type of case, it has been agreed or simply understood that the agent is binding himself only vis-à-vis the third party even though he is acting on behalf of another person. This is the case particularly when the agent is a commission agent.

In these cases the solution adopted by the draft Convention is situated halfway between the solutions of Civil law and Common law. According to the draft Convention, in a situation of this kind the agent binds only himself but, when their interests clearly so require, the principal and the third party may act directly one against the other. Such direct exercise of rights may however be excluded if it has been so decided by the agent and the third party in agreement with the principal (paragraph (7)).

The first paragraph of Article 15 states the basic principle according to which the contract of sale binds only the agent and the third party. In the normal situation the agent fulfils his obligations on both sides and no relationship is established between the third party and the principal.

Sometimes, however, the agent does not or can not fulfil his obligations.

Paragraph (2) concerns the cases where the agent does not fulfil or is not in a position to fulfil his obligations.

If the agent has not fulfilled or is not in a position to fulfil his obligation to the principal, the principal may exercise the right acquired on his behalf by the agent against the third party, subject to all the defences which the third party may set up against the agent.

Sub-paragraph (b) of paragraph (2) deals with the cases where the agent does not fulfil his obligations to the third party.

Sub-paragraph (b) provides that "the third party may exercise against the principal the rights which he has against the agent, subject to all defences which the third party and which the principal may set up against the agent, where the agent has not fulfilled or is not in a position to fulfil his obligations to the third party."

As is seen there is an imbalance between the legal situations of the principal and the third party.

The principal is entitled to set up all the defences against the third party which the agent may set up against the third party and which he (the principal) may set up against the agent (paragraph (2) (b)), whereas the third party may only raise all the defences which he can set up against the agent (paragraph (2) (a)).

We are of the opinion that it would be more appropriate to the interests of the principal and the third party, if the third party would be entitled to raise against the principal any defences which the agent may set up against the principal (see also Explanatory Report, paragraph 73). Indeed, this proposal was put forward and unfortunately rejected on the ground that it would lay down a very broad rule (see Explanatory Report, paragraph 73).

However, we consider that the present solution adopted by the draft Convention (paragraph (2) (b)) would be against the interests of the third party. Therefore, for the purpose of providing a balance between the interests of the principal and the third party we think that the provision of sub-paragraph (b) should be drafted as follows:

"(b) the third party may exercise against the principal the rights which he has against the agent, subject to all the defences which the agent may set up against the third party and against the principal and which the principal may set up against the agent, where the agent has not fulfilled or is not in a position to fulfil his obligations to the third party."

Paragraphs (2) and (4)

UNION OF SOVIET SOCIALIST REPUBLICS (CONF.6/3 Add.1, page 1)

Commercial activity with foreign countries is organised in the USSR in such a way that international contracts for the sale and purchase of goods are concluded by entities specialised in foreign trade in their own name and under their own responsibility whereas the consumers and the producers of the goods which are the subject of international contracts of sale and in some cases those who pay the price inside the country are other organisations. In many cases

these other organisations cannot enter into direct relations with third parties for a number of reasons (above all, because of the provisions of national legislation which derive from the system itself for organising commercial relations with foreign countries). Therefore the requirement that the agent communicate to the third party the name of the principal is unjustified and could cause difficulties in the mutual relations between the parties.

In the light of the foregoing we deem it useful to consider the introduction at the end of Article 15, paragraphs (2) (b) and (4) of the draft of the following words: "unless it results from the contract with the third party that the agent himself is acting as a seller or buyer under the contract, that is to say acting as a principal".

The solution of the problem depends in this case on the way in which foreign trade is organised while the possibility of excluding the actions referred to in paragraphs (2) (b) and (4) of Article 15 of the draft by provisions in individual contracts is not a satisfactory solution of the problem.

An alternative to such an addition to Article 15 of the draft could lie in giving States parties to the Convention the right to make a reservation in respect of Article 15.

Paragraphs (4) and (5)

AUSTRALIA (CONF.6/C.1/W.P.37)

Paragraph (4) should be deleted.

Comment:

Although an obligation is imposed by this paragraph there is no sanction for the obligation. As a matter of principle obligations without sanctions are undesirable.

NETHERLANDS (CONF.6/3 Add.2, page 4)

Proposal: To read paragraphs (4) and (5) as follows:

"(4) In the case mentioned in paragraph (2) under (a) the agent shall communicate the name of the third party to the principal;

(5) In the case mentioned in paragraph (2) under (b) the agent shall communicate the name of the principal to the third party.

Comments:

The rights of the principal and the third party according to the second paragraph of this article do not have much practical value for the agent may

refuse to disclose the name of the third party or the principal. The fact that the duty of the agent to disclose these names may be difficult to enforce in certain cases is no justification for the proposed arbitrary limitation of that duty.

Paragraphs (6) and (7)

NETHERLANDS (CONF.6/3 Add.2, page 4)

We suggest deleting these paragraphs as they are not strictly necessary and may raise more problems than they solve. It is not quite clear what kind of cases would come under paragraph 6; those cases would anyway be very scarce. Paragraph (7) seems superfluous in view of Article 5, paragraph (2). Both paragraphs leave open the question if the fact that the principal may not exercise his rights, due to the circumstances referred to in paragraph (6) or the lack of instructions from the principal referred to in paragraph (7), would affect the rights of the third party to exercise his rights against the principal.

CZECHOSLOVAKIA (CONF.6/C.1/W.P.5)

Revise paragraph (7) of Article 15 to read as follows:

"(7) An agent may agree with the third party that the provisions of paragraph (2) of this Article shall not apply".

Article 16

COSTA RICA (CONF.6/3, page 7)

Article 16 lays down no limits for notification by the principal in those cases where the agent acts without or in excess of his authority; this might create uncertainty by perpetuating a situation where the contract of international sale was ineffective from the outset.

CZECHOSLOVAKIA (CONF.6/C.1/W.P.6)

Revise Article 16 to read as follows:

"(1) Where the agent acts without authority the principal may ratify his acts without undue delay after he took notice of this act. The ratification made later may be refused, without undue delay, by the third party.

(2) Where the agent acts outside the scope of his authority the principal may declare his disapproval without undue delay after he took notice of

the act; otherwise he is considered to have ratified the act of the agent. He may, too, at the same time notify his ratification of this act. If the disapproval has not been declared or the act has been expressly ratified later by the principal the third party may refuse, without undue delay, to be bound to the principal.

(3) If at the time of the act of the agent the third party neither knew nor ought to have known of the lack of authority the third party may refuse to be bound to the principal at any time before ratification. If, however, the third party knew or ought to have known of the lack of authority of the agent, he may not refuse to become bound to the principal before the expiration of the time specified in paragraphs (1) or (2)."

The present paragraphs (2), (4), (5), (6), (7) should be transferred to new paragraphs (4), (5), (6), (7), (8).

Second sentence of new paragraph (8) (old (7)) should read:

* "It may be express or may be such that it may be inferred with reasonable certainty from the acting of the principal or from the circumstances of the case."

Paragraph (1)

PEOPLE'S REPUBLIC OF THE CONGO (CONF.6/3, page 5)

Any reference to the contract of commission should be excluded from the Convention.

Article 16, paragraph (1) would then be reformulated as follows:

"An act by an agent who acts without authority or who acts outside the scope of his authority may be ratified by the principal. In this event it produces the same effects as if it had initially been carried out with authority".

Paragraph (2)

NORWAY (CONF.6/3, page 12)

The present text of paragraph (2) will give the principal a unilateral advantage in making it possible for him to speculate on the market before deciding on ratification. Therefore, the third party should be given a right to refuse to accept a ratification which is given unduly late. The paragraph may be drafted as follows:

"(2) Where, at the time of the act by the agent, the third party neither

knew nor ought to have known of the lack of authority, [*but this later comes to his attention,*] he shall not be bound to the principal if, at any time before ratification, he gives notice of his refusal to be bound by a ratification. *Even after ratification, if this has been given unduly late, the third party may refuse to accept it by prompt notice to the principal, provided that the contract has not already been performed, wholly or partly. Where, however, the third party knew or ought to have known of the lack of authority of the agent, he may not specify."*

Transfer the provision of paragraph (3) to paragraph (1) as a new second sentence and the provisions of paragraph (7) to the vacant place as a new paragraph (3).

It is proposed that paragraph (4) read as follows:

"(4) Ratification shall take effect when *notice of it is received by [reaches]* the third party or comes to *his attention by any other way.* Once effective it may not be revoked."

Article 17

Paragraph (1)

CZECHOSLOVAKIA (CONF.6/C.1/W.P.7)

Revise paragraph (1) of Article 17 to read as follows:

"(1) Where the agent acts without authority or acts outside the scope of his authority and his act has not been ratified by the principal the third party may claim from the agent either performance or damages including loss of profit."

Paragraph (2)

NORWAY (CONF.6/3, page 13)

Paragraph (2) should read as follows:

"(2) The agent shall, however, not be liable if

(a) *the principal is bound to the third party under Article 14, paragraph (2), or*

(b) *the third party was aware or could not have been unaware of the lack of authority or that the agent was exceeding his authority."*

Note:

The situation of apparent authority in Article 14 (2) is covered by the

description in paragraph (1) of the present article, but the agent should not be liable to the third party in such a case (paragraph (2) (a)). In paragraph (2) it is further suggested under (b) to lighten the burden on the third party somewhat in relation to an agent who may not be acting in good faith.

Proposed new Article 17bis

NORWAY (CONF.6/3, page 14)

Add the following as a new Article 17bis:

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

Note:

See Article 15, paragraphs (4) and (5), Article 16, paragraph (2). It is "otherwise expressly provided" in Article 15, paragraph (3), and Article 16, paragraph (4) (and also in Article 21). The proposed provision is modelled on Article 27 of the Vienna Convention of 1980.

CHAPTER IV – TERMINATION OF THE AUTHORITY OF THE AGENT

Article 18

PEOPLE'S REPUBLIC OF THE CONGO (CONF.6/3, page 5)

Since the person of the principal or of the agent may continue in their respective heirs, the death of either of them should not be a ground for terminating the authority, with the consequence that sub-paragraph (d) would be superfluous.

COSTA RICA (CONF.6/3, page 7)

Article 18 provides that the authority of the agent is terminated when the principal loses his capacity to act. In our view this should be the case until the necessary legal representative (curador) of the incapable person has been appointed and accepted his functions.

NORWAY (CONF.6/3, page 14)

It is proposed that paragraph (d) read as follows:

“(d) when, under the applicable law,

(i) *the agent is dead or has otherwise ceased to exist or has lost his capacity to act;*

(ii) *the principal is dead or has otherwise ceased to exist or has lost his capacity to act, provided that personal performance by him is essential.*”

Note:

Death may in case of disappearance be declared subject to certain conditions under the applicable law.

The principal's death or loss of capacity should not automatically and in general terminate the authority, but only when his *personal* performance is essential, see previous draft Article 20 (a). His assets as well as the production and service capacity of his enterprise will not in general come to an end with his death. Regardless of whether his enterprise is organised as a personal firm or as a corporate entity, it will generally be in the interest of his estate and the enterprise that authority previously given shall not be automatically and instantly terminated by the owner's death.

TURKEY (CONF.6/C.1/W.P.17)

Article 18 lists a number of cases where the authority of the agent is terminated.

The authority can be terminated by an agreement between the principal and the agent. The completion of the transaction is another ground of termination. Furthermore, the authority of the agent is terminated on revocation of the principal or the renunciation by the agent.

Paragraph (d) of Article 18 deals with the problem of termination of the authority of the agent when the principal or under the applicable law the agent dies or ceases to exist or loses his capacity to act.

In the case of the death of the principal, there are two approaches with regard to the termination of the authority of the agent: (1) According to some national laws (BGB par. 672 and HGB par. 52; Austrian Commercial Code, par. 52; Spanish Commercial Code, Art. 290), the authority of the agent continues in spite of the death of the principal. The obligations of the principal are assumed by his heirs. (2) Some other national laws, on the other hand, hold that the death of the principal terminates the agency, either immediately (Art. 260 of the Civil Code of the USSR; Austrian Civil Code, par. 1022) or

when notice of the fact has reached the agent or third party, as the case may be (French Code civil, Arts. 2008 and 2009; Italian Civil Code, Arts. 1396 and 1278; Brazilian Civil Code, Art. 1321; Swiss Code of Obligations, Arts. 35, 37; Turkish Civil Code of Obligations, Arts. 35 and 37). (3) The 1972 draft has adopted an intermediate solution that the authority (in the draft "the contract of agency") continues, unless personal performance by the (original) principal was an essential part of the contract.

In the case of the death of the principal we think that the second solution would be more appropriate because of the inherently personal nature of agency contracts and the importance of confidence and personal performance.

Furthermore, we propose that the same solution should be adopted in the case of the principal's or the agent's loss of capacity to act.

Articles 18 and 19

NETHERLANDS (CONF.6/3 Add.2, page 4)

Proposal: Replace these two articles by one article reading:

"The authority of the agent is terminated when the applicable law so provides as a consequence of any agreement between the principal and the agent, or otherwise."

Comments:

The question of the termination of the authority dealt with in these articles is primarily of interest in the internal relation between principal and agent, to which the convention does not apply. The most difficult questions e.g. the possibility of an irrevocable power of attorney, the possibility for the principal and the agent to change legal causes of termination and the consequences of bankruptcy, have already been left to national law. Under these circumstances there seems to be little object in trying to agree on a kind of minimum list. It would seem sufficient to give some examples in the explanatory memorandum.

HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW (CONF.6/4, page 3)

Article 18 of the draft under consideration is illogical: it deals with the termination of the agent's authority for the purposes of the Convention, even though the latter does not deal with the relations between the agent and the principal. Yet, the termination of the agent's authority can only depend upon the internal relations between the agent and the principal. This is moreover clear from Article 18 which refers to the *agreement* between the principal and

the agent, and to revocation by the principal or renunciation by the agent, "whether or not this is consistent with the terms of their agreement".

Since the draft under consideration does not deal with the internal relations between the agent and the principal, Article 18 should be deleted. As to Article 19, its drafting should be tightened up and it should refer more directly to the agreement between the principal and the agent. Article 19 should therefore be amended as follows:

"The authority of the agent is terminated when the agreement between the principal and the agent or the applicable law so provides".

Articles 18 and 20

FINLAND AND SWEDEN (CONF.6/C.1/W.P.38)

Replace Articles 18 and 20 by a new Article 18:

"(1) The authority of the agent is terminated in relation to the third party:

(a) if the authority has been revoked or renounced and this fact has been made known in the same way as the establishment of the authority;

(b) if the principal or the agent loses his capacity to act.

(2) Even if this is not the case, the authority is terminated in relation to the third party, if he had notice of the termination or otherwise knew or ought to have known of the termination or the facts which caused it."

Reasons:

Article 18 as it now stands refers to the internal relationship between principal and agent. Our draft Convention, though focusing on the external relationship, contains no rule on the legal effects of revocation in relation to third parties, the rule in Article 20 on good faith excepted.

Under most legal systems, authority can be terminated in relation to third parties by revocation or renunciation, as long as the revocation or the renunciation has been made known in the same way as the establishment of the authority. It is also a generally accepted rule that authority always can be terminated by notice to the third party concerned, who is then not any longer *bona fide*. The authority is also terminated in relation to the third party when he, for some other reason, knows or ought to know that the authority of the agent is terminated. This uniformity, which already exists, should be codified in the draft Convention and is thus reflected in this new Article 18.

The rules set a fair balance between the necessity in modern trade to protect third parties in good faith and the natural interest of the principal to be able to put an end, rapidly and effectively, to an agency relationship, also in

so far as the external effects are concerned.

Paragraph (1) (a) corresponds partly to Article 18 (d).

The internal agency relationship is intentionally left outside Chapter IV.

Article 19

PEOPLE'S REPUBLIC OF THE CONGO (CONF.6/3, page 5)

Concerning the reference in Article 19 of the Convention to the applicable law, it would, with a view to increasing the degree of unification of the rules on the matters governed by the Convention, be desirable to delete Article 19 and consequently to lengthen the list of legal situations in which the agent's authority must be considered as having terminated.

NORWAY (CONF.6/3, page 15)

It is proposed that this article read as follows:

"The authority of the agent is also terminated when the applicable law so provides, in particular:

(a) *in case of bankruptcy or the like, or*

(b) *when the transaction or transactions for which the authority was created or their performance become impossible or illegal."*

Note:

It seems useful to indicate some possible grounds for termination of the authority provided by the applicable law. In particular this seems desirable in relation to bankruptcy, which might otherwise be thought to be governed by Article 18 (d).

TURKEY (CONF.6/C.1/W.P.18)

According to paragraph (2) of Article 32 of the 1972 draft, "a contract of agency is terminated where the obligations of the principal can no longer be carried out by reason of bankruptcy, subject to any claim for damages resulting from such termination".

Furthermore, paragraph (2) of Article 33 provided that a contract of agency is terminated where the obligations of the agent can no longer be carried out by reason of bankruptcy, subject to any claim for damages resulting from such termination.

In view of the widely differing rules in different legal systems as to the effects of bankruptcy on authority, the draft Convention lays down the rule

in Article 19.

This article provides that "the authority of the agent is also terminated when the applicable law so provides".

We are of the opinion that this article lays down a reasonable solution with regard to the effects of bankruptcy. However, on the other hand we think that the draft Convention does not need an independent article like Article 19 on bankruptcy as one of the grounds of termination of the authority of the agent.

As is known, the grounds of termination of the authority of the agent are listed in Article 18. Article 19 is an extension of the previous article. Therefore, we propose that Article 19 should be deleted from the text and inserted in Article 18 as paragraph (e).

Articles 20 and 21

PEOPLE'S REPUBLIC OF THE CONGO (CONF.6/3, page 6)

To the extent that the fact that the authority has terminated has effects on a third party who knew or ought to have known of this fact, or of the circumstances which caused it, a second paragraph drafted in the following manner should be added to Article 20 of the Convention:

"In such cases, the principal is not bound by the acts of the agent".

Article 21 states that termination of the authority has effect upon the third party as soon as the agent has notice of it, even if the third party has no notice of it. Does not this provision contradict Article 20 which provides that the termination of the authority shall not affect the third party unless he knew or ought to have known of the termination or the facts which caused it?

We believe that Article 21 could be deleted and Article 20, which is more logical, maintained.

MONGOLIAN PEOPLE'S REPUBLIC (CONF.6/C.1/W.P.40)

The time when the agent is to be considered as having received notice should be better defined.

In this connection, our delegation proposes the following formulation:

"Where the third party knows of the authority of the agent only from the agent, without any confirmation by the conduct of the principal, termination of the authority has effect upon the third party as soon as the agent has notice of it *in writing from the principal*, even if the third party

has no notice of it.

The time when the agent is to be considered as having received notice is to be the date of postage of this notice as determined by the stamp of the post office serving the place of business of the principal."

TURKEY (CONF.6/C.1/W.P.19)

Article 20 of the draft Convention lays down a general rule to the effect that termination of authority shall not affect the third party, unless he knew or ought to have known of the termination or the facts which caused it.

As is known, this article constitutes an extension of Article 35 of the 1972 draft.

On the other hand, Article 21 of the draft Convention deals with the cases where the third party knows of the authority of the agent only from the agent, without any confirmation by the conduct of the principal. Termination of the authority has effect upon the third party as soon as the agent has notice of it, even if the third party has not notice of it.

This provision, as is known, corresponds to Article 36 of the 1972 draft.

In the 1972 draft, Article 35 stated that revocation cannot be set up against the third party if he did not know about it. The third party could therefore, notwithstanding this renunciation or revocation, invoke all the effects of the agency relationship (and in particular Articles 25 and 27). This need to inform the third party is known to many national laws (French Code civil, Art. 2005; Swiss Code of Obligations, Art. 34; Turkish Code of Obligations, Art. 34 etc.).

However, in cases where there is a special procedure aimed at ensuring that the powers of the agent are made public, the carrying out of this procedure (such as, for example, BGB par. 176) is sufficient even if the third party does not know about it (sub-paragraphs (a) and (b)).

As is known, Article 36 of the 1972 draft introduced an important exception to this rule. Where the third party only knew of the agent's authority from the agent and nothing is done by the principal to confirm this, in other words, when the third party has not questioned the existence and extent of the agent's authority, revocation by the principal has effect as soon as the agent has notice of it, even the third party does not know about it. Thus, as is seen, the principal disappears completely from the scene. If, in spite of revocation, the agent continues to act, there will be no relationship established between the principal and the third party as the agent has no authority.

As is stated in the Explanatory Report (paragraph 106), Article 21 seeks to protect the principal. The Explanatory Report points out that the principal in many cases will not know who the third party is and can only rely on the agent to communicate to the third party information regarding the termina-

tion of authority. If therefore the agent continues to act as though he has authority, the principal should not be bound and the agent should be liable to the third party for breach of warranty of authority.

We are of the belief that Article 21 protects the principal too much. On the other hand, we think that it contradicts Article 20.

As is pointed out in the Explanatory Report (paragraph 106), Article 21 endeavours to protect the reliance of the principal. We believe that the reliance of the third party also deserves protection. Article 21 leaves the third party alone, under some circumstances, with his own fate.

On the other hand we observe that Article 21 contradicts Article 20.

As is known, Article 20 provides that "the termination of the authority shall not affect the third party, unless he knew or ought to have known of the termination or the facts which caused it".

There is no doubt that this provision grants protection to the third party. (However, it should not be forgotten that the words "or ought to have known" lessen to some extent this protection).

On the other hand, Article 21 provides that where the third party knows of the authority of the agent only from the agent, without any confirmation by the conduct of the principal, termination of authority has effect upon the third party as soon as the agent has notice of it, even though the third party has no notice of it.

We are of the belief that there is a contradiction between these two provisions. Therefore, we propose that Article 21 should be deleted from the draft Convention.

Article 22

PEOPLE'S REPUBLIC OF THE CONGO (CONF.6/3, page 6)

In Article 22 the word "authorised" should be replaced by "empowered" for the reasons set out above concerning the notion of "authorisation".

CHAPTER V — FINAL PROVISIONS

New Article 23 bis

NORWAY (CONF.6/C.2/W.P.3)

Introduce a new article 23 bis:

"This Convention does not prevail over any international agreement

which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the principal or the agent on the one side and the third party on the other have their places of business in States parties to such agreement."

Comment:

1. The proposed article is identical with Article 90 of the Vienna Convention, except for the same change of the wording "parties" as has already been introduced in Articles 5 and 7 better to cover the tripartite relation.

2. Its purpose is mainly to allow for regional unification that may not be covered by reservations under Articles 25 and 26. The existence of such a provision may for some States facilitate the ratification of the Convention. It may also make Article 30 of the draft more acceptable to many delegations.

3. We have been informed that the reason why a provision similar to Article 90 of the Vienna Convention was not included in the draft final provisions was a fear that it might lead to a collision with the Hague Convention on the law applicable to agency. In our view such a fear is groundless, as the two conventions do not deal with the same subject. By ratifying the present Convention a State obliges itself to introduce in its law certain substantive rules on special cases of agency relations. But it does not oblige itself to apply its own law, and it is not therefore precluded from applying the law of another State, if that follows from its rules of private international law, whether or not this is founded on the ratification of the Hague Convention. If it has ratified the Hague Convention, this will probably lead to the application of the law of the agent's country. If that State has not ratified the present Convention, the present Convention will of course not be applied. But this cannot be described as a "collision" between the two Conventions.

Article 25

AUSTRALIA (CONF.6/3, page 1) (5)

Article 25 of the draft agency Convention is not sufficient in itself to meet Australian needs. A form of federal clause which would be more appropriate in the Australian context is to be found in Article 11 of the 1956 Recovery Abroad of Maintenance Convention. The text set out below is modelled closely on that clause. The clause would be in addition to the proposed Article 25.

(5) For a later proposal by Australia, under the title Article 28 bis, see page 110 below.

Inclusion of such a clause is desired to recognise that the Convention would in Australia operate in a context in which the exercise of powers is distributed or shared between the several Governments of the Federation.

TEXT:

"In the case of a Federal or non-unitary State, the following provisions shall apply:

(a) with respect to those articles of this Convention that come within the legislative jurisdiction of the federal authority, the obligations of the Federal Government shall to this extent be the same as those of Contracting States which are not Federal States;

(b) with respect to those articles of this Convention that come within the legislative jurisdiction of constituent States or provinces which are not, under the constitutional system of the Federation bound to take legislative action, the Federal Government shall bring such articles with a favourable recommendation to the notice of the appropriate authorities of constituent States or provinces at the earliest possible moment;

(c) a Federal State Party to this Convention shall, at the request of any other Contracting State transmitted through the Depositary Government supply a statement of the law and practice of the Federation and its constituent units in regard to any particular provisions of this Convention, showing the extent to which effect has been given to that provision by legislative or other action."

Article 26

NORWAY (CONF.6/C.2/W.P.3)

In Article 26, alternative II paragraphs (1) and (2) the words:

"when the third party and the principal or the agent, as the case may be,"

to be *substituted* for:

"when the principal and the third party".

Comment:

As according to Article 2, paragraph (2) the diversity of commercial domicile of the *agent* and the third party may be the decisive requirement for the applicability of the Convention, this should be taken into account also in the drafting of Article 26.

Article 28 bis

AUSTRALIA (CONF.6/C.2/W.P.1) (6)

Add a new Article 28 bis as follows:

"Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 25 shall carry no implication as to the internal distribution of powers within that State."

Comment:

1. This proposal is in lieu of the Australian proposal contained in CONF. 6/3 entitled "Observations and Proposals by Governments on the Draft Convention."

2. It follows identical provisions contained in Article 41 of the Convention on the Civil Aspects of International Child Abduction and Article 27 of the Convention on International Access to Justice, both of which were adopted at the 14th Session of The Hague Conference in October, 1980.

3. The proposed article does not qualify in any way the obligations of a federal Contracting State under the Convention, but does nevertheless recognise that in federal States constitutional powers are shared between the central and constituent state authorities.

Proposed new Article 28 bis (7)

CZECHOSLOVAKIA (CONF.6/C.1/W.P.8)

Add a new Article 28 bis as follows:

"Any State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by paragraph (1) (b) of Article 2 of this Convention."

(6) See also above, page 108, the Australian proposal in connection with Article 25. The text was forwarded by the Final Clauses Committee to the Conference as Article 25.

(7) This provision has no relation to the Australian proposal for a new Article 28 bis above. In its revised form it was submitted to the Conference by the Final Clauses Committee as Article 28.

Article 30

UNION OF SOVIET SOCIALIST REPUBLICS (CONF.6/3 Add.1, page 2)

It would be useful to consider whether Contracting States should be permitted to make reservations in respect of individual provisions of the Convention, that is to say to delete Article 30 of the draft Convention. Such a solution of the question of reservations could bring about a situation which would allow a greater number of States to sign, ratify, accept or accede to the Convention.

Article 32

FRANCE (CONF.6/C.2/W.P.6)

"This Convention applies [to situations in course] when the offer of sale or purchase is made by the agent on or after the date when the Convention enters into force in respect of the Contracting State referred to in Article 2, paragraph (1)."

Comments:

The making of the offer is proposed as the criterion for the application of the Convention, as being the most precise occurrence as well as the shortest in time able to be identified in the conclusion of the contracts.

1) For this reason, it is preferable to:

— the authorisation, which concerns only relations between principal and agent and which concerns only contractual representations, to the exclusion of the case covered by Article 14.

— acts, behaviour or events which are purely factual and difficult to ascertain and identify.

2) It is also preferable as it ties the application of the Convention to an *act of the agent*; this is necessary since the accession of *the agent's State* to the Convention is the connecting factor adopted by Article 2 of the Convention.

NORWAY (CONF.6/C.2/W.P.2)

Replace the text of Article 32 contained in paper Study XIX — Doc. 64, by the following:

"This Convention applies when the acts of the agent occur on or after the date when the Convention enters into force in respect of the Contracting State referred to in either sub-paragraph (a) or sub-paragraph (b) of

Article 2, paragraph (1)."

Comment:

1. The proposal suggests that the temporal connecting factor should be the *acts of the agent* in all cases, and not only in the cases of unauthorised acts, as provided in the draft prepared by the UNIDROIT Secretariat.

2. Such a solution allows for a notable simplification of the article.

3. It should also be pointed out that if the authorisation of the agent by the principal is made the temporal connecting factor, it will tend to postpone the effect of the Convention in the not infrequent cases where authority has been given for an indefinite period.

NORWAY (CONF.6/C.2/W.P.4)

(Revised proposal for the text of Article 32)

"This Convention applies only when the acts of the agent by which he concludes or purports to conclude the contract of sale, occur on or after the date when the Convention enters into force in respect of the Contracting State referred to in either sub-paragraph (a) or sub-paragraph (b) of Article 2, paragraph (1)."

Proposed new Article X (8)

BULGARIA, CZECHOSLOVAKIA, HUNGARY, MONGOLIAN PEOPLE'S REPUBLIC, ROMANIA AND THE UNION OF SOVIET SOCIALIST REPUBLICS (CONF.6/C.2/W.P.9)

"All Contracting States, the foreign trade of which is carried on by specially authorised organisations may at any time declare, in respect of the application of Article 15, paragraphs (2) (b) and (4), that if the *fore-said* organisations carry on business both as buyers and sellers in the international trade sector, then they may not be treated as agents."

FRANCE (CONF.6/C.2/W.P.10)

"Any Contracting State the foreign trade of which as a whole is carried on by State organisations may, at the time of signature, ratification, acceptance, approval or accession, declare that the organisations, a list of which is annexed by the said State, operate, in their domestic relations, as sellers or buyers and may not be treated as agents for the application of Article 15, paragraphs (2) (b) and (4)."

(8) The text of this provision as submitted by the Final Clauses Committee to the Conference was numbered Article 29.

Final Resolution

PROPOSAL BY THE PRESIDENT OF THE CONFERENCE (CONF.6/C.2/W.P.8)

"FINAL RESOLUTION ADOPTED BY THE DIPLOMATIC CONFERENCE FOR THE ADOPTION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS

The Diplomatic Conference for the adoption of a Convention on Agency in the International Sale of Goods; convened in Geneva from 31 January to

GRATEFUL to the Government of Switzerland for having invited the Conference to Switzerland and especially to the city of Geneva for its generous hospitality,

AGREES that the further development of international rules relating to the relations between principal and agent in agency in the international sale of goods would be an important contribution to the development of international trade,

REQUESTS the International Institute for the Unification of Private Law (UNIDROIT), which was responsible for the preparation of the adopted Convention and under the auspices of which this Conference was convened, to consider the possibility of elaborating rules on a global or regional level governing the relations between principal and agent in the international sale of goods."

**TEXTS SUBMITTED BY THE DRAFTING COMMITTEE
TO THE COMMITTEE OF THE WHOLE AND TO THE
FINAL CLAUSES COMMITTEE (1)**

**CONVENTION ON AGENCY IN THE INTERNATIONAL
SALE OF GOODS**

PREAMBLE

THE STATES PARTIES TO THIS CONVENTION,

**DESIRING to establish common provisions concerning agency
in the international sale of goods,**

**BEARING IN MIND the objectives of the United Nations Conven-
tion on Contracts for the International Sale of Goods,**

**CONSIDERING that the development of international trade
on the basis of equality and mutual benefit is an important element
in promoting friendly relations among States, bearing in mind the
New International Economic Order,**

**BEING OF THE OPINION that the adoption of uniform rules
which govern agency in the international sale of goods and take into
account the different social, economic and legal systems would
contribute to the removal of legal barriers in international trade and
promote the development of international trade,**

HAVE AGREED as follows:

(1) Articles 1 to 22 (contained in CONF.6/D.C.1 and 3), were referred to the Committee of the Whole and the Preamble and Articles 23 to 33 (contained in CONF.6/D.C.4) to the Final Clauses Committee.

CHAPTER I - SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1

(1) This Convention applies where one person, the agent, has authority or purports to have authority on behalf of another person, the principal, to conclude a contract of sale of goods with a third party.

(2) It governs not only the conclusion of such a contract by the agent but also any act undertaken by him for the purpose of concluding that contract or in relation to its performance.

(3) It is concerned only with relations between the principal or agent on the one hand, and the third party on the other.

(4) It applies irrespective of whether the agent acts in his own name or in that of the principal.

Article 2

(1) This Convention applies only where the principal and the third party have their places of business in different States and:

(a) the agent has his place of business in a Contracting State or

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

(2) Where ["at the time of contracting"], the third party neither knew nor ought to have known that the agent was acting as an agent, the Convention only applies if the agent and the third party had their places of business in different States and if the requirements of paragraph 1 are satisfied.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract of sale is to be taken into consideration in determining the application of this Convention.

Article 3

(1) This Convention does not apply to:

- (a) the agency of a dealer on a stock, commodity or other exchange;
- (b) the agency of an auctioneer;
- (c) agency by operation of law in family law, in the law of matrimonial property, or in the law of succession;
- (d) agency arising from statutory or judicial authorisation to act on behalf of a person without capacity to act;
- (e) agency by virtue of a decision of a judicial or quasi-judicial authority or subject to the direct control of such an authority [or by virtue of an appointment by creditors].

(2) Nothing in this Convention affects any rule of law for the protection of consumers.

Article 4

For the purpose of this Convention:

(a) an organ, officer or partner of a corporation, association, partnership or other entity, whether or not possessing legal personality, shall not be regarded as the agent of that entity in so far as, in the exercise of his functions as such, he acts by virtue of an authority conferred by law or by the constitutive documents of that entity;

(b) a trustee shall not be regarded as an agent of the trust, of the person who has created the trust, or of the beneficiaries.

Article 5

The third party may agree with the principal or with the agent to exclude [as between themselves] the application of this Convention or, subject to Article 11, derogate from or vary the effect of any of its provisions.

Article 6

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and, the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 7

(1) The principal or the agent on the one hand and the third party on the other are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) They are considered, unless otherwise agreed, to have impliedly made applicable to their relations any usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to agency relations of the type involved in the particular trade concerned.

Article 8

For the purpose of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract of sale, having regard to the circumstances known to or contemplated by the parties [at the time of contracting];

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

CHAPTER II — ESTABLISHMENT AND SCOPE OF THE AUTHORITY
OF THE AGENT

Article 9

(1) The authorisation of the agent by the principal may be express or implied.

(2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authorisation was given.

Article 10

The authorisation need not be given in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Article 11

(1) Any provision of Article 10, Article 16 or Chapter IV which allows an authorisation, a ratification, or a termination of authority to be made in any form other than in writing does not apply where the principal or the agent has his place of business in a Contracting State which has made a declaration under Article X. (1) The parties may not derogate from or vary the effect of this paragraph.

(2) With regard to authorisation, paragraph 1 applies only if the third party knew or ought to have known:

(a) that the agent was acting as an agent, and

(b) that the principal or the agent had his place of business in a Contracting State which has made a declaration under Article X.

Article 12
(deleted)

(1) See Article 27 below.

CHAPTER III — LEGAL EFFECTS OF ACTS CARRIED OUT
BY THE AGENT

Article 13

Where an agent acts on behalf of a principal within the scope of his authority, the acts of the agent shall directly bind the principal and the third party to each other, unless the third party neither knew nor ought to have known that the agent was acting as an agent, or it follows from the circumstances of the case, for example by reference to a contract of commission, that the agent undertakes to bind himself only.

[Where an agent acts on behalf of a principal within the scope of his authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly bind the principal and the third party to each other, unless it follows from the circumstances of the case, for example by reference to a contract of commission, that the agent undertakes to bind himself only.]

Article 15

(1) Where the agent acts on behalf of a principal within the scope of his authority, his acts shall bind only the agent and the third party:

(a) if the third party neither knew nor ought to have known that the agent was acting as an agent, or

(b) if it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent undertakes to bind only himself.

(2) Nevertheless:

(a) Where the agent, whether by reason of the third party's failure of performance or for any other reason, fails to fulfil or is not in a position to fulfil his obligations, the principal may exercise against the third party the rights acquired on the principal's behalf by the agent, subject to any defences which the third party may set up against the agent;

(b) Where the agent fails to fulfil or is not in a position to fulfil his obligations to the third party, the third party may exercise against the principal the rights which the third party has against the agent, subject to any defences which the agent may set up against the third party and which the principal may set up against the agent;

(3) The rights under paragraph 2 may only be exercised if notice of intention to exercise them is given to the agent and the third party or principal, as the case may be. As soon as the third party or principal has received such notice, he may no longer free himself from his obligations by dealing with the agent.

(4) Where the agent is unable to fulfil his obligations to the third party because the principal has not fulfilled his obligations, the agent shall communicate the name of the principal to the third party.

(5) Where the third party fails to fulfil his obligations under the contract to the agent, the latter shall communicate the name of the third party to the principal.

(6) The principal may not exercise against the third party the rights acquired on his behalf by the agent if it appears from the circumstances of the case that the third party, had he known the principal's identity [at the time of contracting], would not have entered into the contract.

(7) An agent may, in accordance with the express or implied instructions of the principal, agree with the third party to derogate from or vary the effect of paragraph 2.

Article 14

(1) Where an agent acts without authority or acts outside the scope of his authority, his acts do not bind the principal and the third party to each other.

(2) Nevertheless, where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not

invoke against the third party the lack of authority of the agent.

Article 16

(1) An act by an agent who acts without authority or who acts outside the scope of his authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority.

(2) Where, at the time of the act by the agent, the third party neither knew nor ought to have known of the lack of authority, he shall not be liable to the principal if, at any time before ratification, he gives notice of his refusal to become bound by a ratification. Where the principal ratifies but does not do so within a reasonable time, the third party may refuse to be bound by the ratification if he promptly notifies the principal.

(2bis) Where, however, the third party knew or ought to have known of the lack of authority of the agent, the third party may not refuse to become bound by a ratification before the expiration of any time agreed for ratification or, failing agreement, such reasonable time as the third party may specify.

(3) The third party may refuse to accept a partial ratification.

(4) Ratification shall take effect when notice of it reaches the third party or the ratification otherwise comes to his attention. Once effective it may not be revoked.

(5) Ratification is effective notwithstanding that the act itself could not have been effectively carried out at the time of ratification.

(6) If the act has been carried out on behalf of a corporation or other legal person before its creation, ratification is effective only if allowed by the law of the State governing its creation.

(7) Ratification is subject to no requirements as to form. It may be express or may be inferred from the conduct of the principal.

Article 17

(1) An agent who acts without authority or who acts outside the scope of his authority shall, failing ratification, be liable to pay the third party such compensation as will place the third party in the same position as he would have been in if the agent had acted with authority and within the scope of his authority.

(2) The agent shall not be liable, however, if the third party knew or ought to have known that the agent had no authority or was acting outside the scope of his authority.

CHAPTER IV – TERMINATION OF THE AUTHORITY OF THE AGENT

Article 18

As far as the third party is concerned, the authority of the agent is terminated:

(a) when this follows from any agreement between the principal and the agent;

(b) on completion of the transaction or transactions for which the authority was created;

(c) on revocation by the principal or renunciation by the agent, whether or not this is consistent with the terms of their agreement.

Article 19

The authority of the agent is also terminated when the applicable law so provides.

Article 20

The termination of the authority shall not affect the third party unless he knew or ought to have known of the termination or the facts which caused it.

Article 21

Where the third party knows of the authority of the agent only from the agent, without any confirmation by the conduct of the principal, termination of the authority has effect upon the third party as soon as the agent has notice of it, even if the third party has no notice of it.

Article 22

Notwithstanding the termination of the authority, the agent remains authorised to perform on behalf of the principal or his successors the acts which are necessary to prevent damage to their interests.

CHAPTER V – FINAL PROVISIONS

Article 23

The Government of Switzerland is hereby designated as the depositary for this Convention.

Article 24

(1) This Convention is open for signature at the concluding meeting of the Diplomatic Conference on Agency in the International Sale of Goods and will remain open for signature by all States at Berne until 31 December 1983.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Government of Switzerland.

Article 25

(1) If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

* (2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph 1 of this article, the Convention is to extend to all territorial units of that State.

Article 25 bis

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 25 shall carry no implication as to the internal distribution of powers within that State.

Article 26

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply where

the principal and the third party or, in the case referred to in paragraph 2, the agent and the third party have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply where the principal and the third party or, in the case referred to in paragraph 2, the agent and the third party have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph 1, provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

Article 27

A Contracting State whose legislation requires authorisation, ratification, or termination of authority to be made in or evidenced by writing in all cases governed by the Convention may at any time make a declaration in accordance with Article 11 that any provision of Article 10, Article 16 or Chapter IV which allows an authorisation, a ratification or a termination of authority to be other than in writing, does not apply where the principal or the agent has his place of business in that State.

Article 28 bis

A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Article 2, paragraph 1(b).

Article 28 ter

(1) A Contracting State may at any time declare that it will

expand the application of this Convention to cases specified in the declaration.

(2) Such declaration may, in particular, provide that the Convention shall apply to:

(a) Contract other than a contract of sale;

(b) Cases where the places of business mentioned in Article 2, paragraph 1 are not situated in Contracting States.

Article X

A Contracting State the foreign trade of which is carried on by specially authorised organisations may at any time declare that, if such organisations act either as buyers or sellers in foreign trade, all these organisations or the organisations-specified in the declaration shall not be considered as agents for the purposes of Article 15, paragraph 2 (b) and 4, in their relations with other organisations having their place of business in the same State.

Article 29

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. *Reciprocal unilateral declarations* under Article 26 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing

addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under Article 26 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that article.

Article 30

No reservations are permitted except those expressly authorised in this Convention.

Article 31

(1) This Convention enters into force on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article 32

This Convention applies when the agent offers to sell or purchase or accepts an offer of sale or purchase on or after the date when the Convention enters into force in respect of the Contracting State referred to in Article 2, paragraph 1.

Article 33

(1) A Contracting State may denounce this Convention by a

formal notification in writing to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised by their respective Governments, have signed this Convention.

DONE AT GENEVA this day of February, one thousand nine hundred and eighty three, in a single original, of which the English and French texts are equally authentic.

REPORT OF THE COMMITTEE OF THE WHOLE TO THE CONFERENCE (1)

1. The Committee of the Whole held twenty sessions between 1 and 12 February at which it examined the draft Convention on Agency in the International Sale of Goods which had been prepared by a Unidroit committee of governmental experts (Study XIX — Doc. 63).

2. Mr P. Widmer (Switzerland), who had been appointed Chairman of the Committee of the Whole by the Conference under Rule 6 of its Rules of Procedure, chaired all the sessions of the Committee.

3. Acting under Rule 50 of the Rules of Procedure, the Committee elected Mr M. Cuker (Czechoslovakia) and Mr F. Hafez (Egypt) as its first and second Vice-Chairmen and it also entrusted the functions of Rapporteur to the Secretary-General of the Conference, Mr M. Evans (Unidroit).

4. At its final session, the Committee of the Whole adopted, on second reading, the following text of Articles 1 to 21 (Chapters I to IV) of the draft Convention on Agency in the International Sale of Goods. (2)

REPORT OF THE FINAL CLAUSES COMMITTEE TO THE CONFERENCE (3)

1. The Final Clauses Committee held six meetings on 3, 4, 8, 9, 10 and 12 February at which it examined the draft Final

(1) The Report of the Committee of the Whole was contained in CONF. 6/C.1/Doc.1.

(2) For the text, see below, pages 133 to 141.

(3) The Report of the Final Clauses Committee was contained in CONF. 6/C.2/Doc.1.

Provisions prepared by the Unidroit Secretariat (Study XIX – Doc. 64), as well as proposals for a preamble to the draft Convention. Representatives of 30 States participated in the work of the Committee, namely representatives of:

Angola, Australia, Austria, Bulgaria, Canada, Cape Verde, China, Czechoslovakia, Finland, France, Germany (Federal Republic of), Holy See, India, Japan, Liechtenstein, Mexico, Mongolian People's Republic, Morocco, Netherlands, Norway, Portugal, Republic of Korea, Romania, Spain, Sweden, Switzerland, Turkey, Union of Soviet Socialist Republics, United Kingdom and United States of America.

The representative of one State, Indonesia, attended the Final Clauses Committee as an observer.

Following consultations among the members of the Committee, Mr L. Sevón (Finland) was elected Chairman of the Committee.

2. In respect of Article 25 the representative of Australia made the following statement:

"The Australian proposal for an Article 25 replaces one that was earlier set out in document Conf.6/3.

Other delegations have indicated to my delegation that they feel some concern that the earlier proposal, providing as it did for the obligations of a Federal State to be qualified, would be inappropriate for a Convention containing a uniform law.

The present proposal takes account of that concern. It does not provide for any qualification of the obligations of a Federal State. I want to make that point very clearly. It does not qualify the obligations of Federal States, which remain precisely the same as those of unitary States.

What the proposal does do is to provide some recognition in a harmless way of the fact that within federations constitutional powers are shared.

The proposed provision is not novel. It has been taken from two Hague Conventions adopted in 1980 – namely Article 41 of the Convention on the Civil Aspects of International Child Abduction and Article 27 of the Convention on International Access to Justice.

The key words of the proposed article are 'shall carry no im-

plication as to the internal powers within that State'.

Some delegations might question whether, even without the proposed clause, the mere becoming a party to this Convention could have any implications in regard to the internal distribution of power within a federation. Other delegations may feel that in any event any such implications are matters of only domestic concern. I do not want to take the time of the Committee responding to these points in depth.

My case, in support of the proposal, rests upon the following propositions:

(1) International Conventions, such as the present one, do raise for some federations important questions concerning the apportionment of powers between the central and other governments of the federation.

(2) The inclusion of a provision along the lines of the proposed Article 25 is seen by my country at least as helping to deal with those questions.

(3) The provision provides this assistance without in any way adversely affecting the interests of other States which become parties to the Convention.

(4) The provision will thus help towards getting as many countries as possible to ratify the Convention and this in itself is a desirable objective.

One other matter to which I must refer is that the proposed clause will in no way affect the operation of Article 24, which this Committee adopted yesterday. Article 24, as we heard yesterday, meets the needs of some federations in a particular way. My delegation supported the article, but in doing so made it clear that it did not meet any need of my country.

We hope other delegations will be able to see their way clear to supporting the present proposal, which is designed to meet a need of my country and which will in no way affect the operation of Article 24."

Also in respect of Article 25, the representative of Canada made the following statement:

"The delegate of Canada stated that his delegation understood

the desire of Australia to make provision in the Convention for its particular domestic requirements. Canada wished to avoid establishing technical impediments which might make it difficult for a State to become party to the Convention for reasons unrelated to the substantive provisions of the new law on Agency.

Having regard to the sensitivity of the Federal State clause for Canada's participation in private law Conventions generally, Canada wished to clarify its understanding of the position which would result if the proposed Article 25 were to be adopted. It is the Canadian understanding that whatever meaning the Australian proposal may be given, it does not qualify Article 24 and does not affect in any way, either as to form or substance, the purpose or effect of the Federal State clause that is contained in Article 24. If that understanding is shared by the Committee, Canada would accede to whatever decision the majority of the Committee takes on the Australian proposal."

3. At its final meeting the Final Clauses Committee adopted, on second reading, the following text of a draft Preamble and draft Final Provisions. (4)

(4) For the texts, see below, page 133 and pages 141 to 146.

**DRAFT ARTICLES OF THE CONVENTION AND OF
THE FINAL CLAUSES SUBMITTED TO THE CONFERENCE**

**CONVENTION ON AGENCY IN THE INTERNATIONAL
SALE OF GOODS**

PREAMBLE

THE STATES PARTIES TO THIS CONVENTION,

DESIRING to establish common provisions concerning agency in the international sale of goods,

BEARING IN MIND the objectives of the United Nations Convention on Contracts for the International Sale of Goods,

CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States, bearing in mind the New International Economic Order,

BEING OF THE OPINION that the adoption of uniform rules which govern agency in the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

HAVE AGREED as follows:

CHAPTER I — SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1

(1) This Convention applies where one person, the agent, has authority or purports to have authority on behalf of another per-

son, the principal, to conclude a contract of sale of goods with a third party.

(2) It governs not only the conclusion of such a contract by the agent but also any act undertaken by him for the purpose of concluding that contract or in relation to its performance.

(3) It is concerned only with relations between the principal or the agent on the one hand, and the third party on the other.

(4) It applies irrespective of whether the agent acts in his own name or in that of the principal.

Article 2

(1) This Convention applies only where the principal and the third party have their places of business in different States and:

(a) the agent has his place of business in a Contracting State, or

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

(2) Where, at the time of contracting, the third party neither knew nor ought to have known that the agent was acting as an agent, the Convention only applies if the agent and the third party had their places of business in different States and if the requirements of paragraph 1 are satisfied.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract of sale is to be taken into consideration in determining the application of this Convention.

Article 3

(1) This Convention does not apply to:

(a) the agency of a dealer on a stock, commodity or other exchange;

(b) the agency of an auctioneer;

(c) agency by operation of law in family law, in the law

of matrimonial property, or in the law of succession;

(d) agency arising from statutory or judicial authorisation to act for a person without capacity to act;

(e) agency by virtue of a decision of a judicial or quasi-judicial authority or subject to the direct control of such an authority.

(2) Nothing in this Convention affects any rule of law for the protection of consumers.

Article 4

For the purposes of this Convention:

(a) an organ, officer or partner of a corporation, association, partnership or other entity, whether or not possessing legal personality, shall not be regarded as the agent of that entity in so far as, in the exercise of his functions as such, he acts by virtue of an authority conferred by law or by the constitutive documents of that entity;

(b) a trustee shall not be regarded as an agent of the trust, of the person who has created the trust, or of the beneficiaries.

Article 5

The third party may agree with the principal or with the agent to exclude as between themselves the application of this Convention or, subject to Article 11, derogate from or vary the effect of any of its provisions.

Article 6

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity

with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 7

(1) The principal or the agent on the one hand and the third party on the other are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) They are considered, unless otherwise agreed, to have impliedly made applicable to their relations any usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to agency relations of the type involved in the particular trade concerned.

Article 8

For the purposes of this Convention:

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract of sale, having regard to the circumstances known to or contemplated by the parties at the time of contracting;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

CHAPTER II – ESTABLISHMENT AND SCOPE OF THE AUTHORITY OF THE AGENT

Article 9

(1) The authorisation of the agent by the principal may be express or implied.

(2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authorisation was given.

Article 10

The authorisation need not be given in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Article 11

(1) Any provision of Article 10, Article 15 or Chapter IV which allows an authorisation, a ratification or a termination of authority to be made in any form other than in writing does not apply where the principal or the agent has his place of business in a Contracting State which has made a declaration under Article 27. The parties may not derogate from or vary the effect of this paragraph.

(2) With regard to authorisation, paragraph 1 applies only if the third party knew or ought to have known:

(a) that the agent was acting as an agent, and

(b) that the principal or the agent had his place of business in a Contracting State which has made a declaration under Article 27.

CHAPTER III: LEGAL EFFECTS OF ACTS CARRIED OUT
BY THE AGENT

Article 12

Where an agent acts on behalf of a principal within the scope of his authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly bind the principal and the third party to each other, unless it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent undertakes to bind himself only.

Article 13

(1) Where the agent acts on behalf of a principal within the

scope of his authority, his acts shall bind only the agent and the third party if:

(a) the third party neither knew nor ought to have known that the agent was acting as an agent, or

(b) it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent undertakes to bind himself only.

(2) Nevertheless:

(a) where the agent, whether by reason of the third party's failure of performance or for any other reason, fails to fulfil or is not in a position to fulfil his obligations to the principal, the principal may exercise against the third party the rights acquired on the principal's behalf by the agent, subject to any defences which the third party may set up against the agent;

(b) where the agent fails to fulfil or is not in a position to fulfil his obligations to the third party, the third party may exercise against the principal the rights which the third party has against the agent, subject to any defences which the agent may set up against the third party and which the principal may set up against the agent.

(3) The rights under paragraph 2 may be exercised only if notice of intention to exercise them is given to the agent and the third party or principal, as the case may be. As soon as the third party or principal has received such notice, he may no longer free himself from his obligations by dealing with the agent.

(4) Where the agent fails to fulfil or is not in a position to fulfil his obligations to the third party because of the principal's failure of performance, the agent shall communicate the name of the principal to the third party.

(5) Where the third party fails to fulfil his obligations under the contract to the agent, the agent shall communicate the name of the third party to the principal.

(6) The principal may not exercise against the third party the rights acquired on his behalf by the agent if it appears from the circumstances of the case that the third party, had he known the prin-

principal's identity, would not have entered into the contract.

(7) An agent may, in accordance with the express or implied instructions of the principal, agree with the third party to derogate from or vary the effect of paragraph 2.

Article 14

(1) Where an agent acts without authority or acts outside the scope of his authority, his acts do not bind the principal and the third party to each other.

(2) Nevertheless, where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

Article 15

(1) An act by an agent who acts without authority or who acts outside the scope of his authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority.

(2) Where, at the time of the agent's act, the third party neither knew nor ought to have known of the lack of authority, he shall not be liable to the principal if, at any time before ratification, he gives notice of his refusal to become bound by a ratification. Where the principal ratifies but does not do so within a reasonable time, the third party may refuse to be bound by the ratification if he promptly notifies the principal.

(3) Where, however, the third party knew or ought to have known of the lack of authority of the agent, the third party may not refuse to become bound by a ratification before the expiration of any time agreed for ratification or, failing agreement, such reasonable time as the third party may specify.

(4) The third party may refuse to accept a partial ratification.

(5) Ratification shall take effect when notice of it reaches the

third party or the ratification otherwise comes to his attention. Once effective, it may not be revoked.

(6) Ratification is effective notwithstanding that the act itself could not have been effectively carried out at the time of ratification.

(7) Where the act has been carried out on behalf of a corporation or other legal person before its creation, ratification is effective only if allowed by the law of the State governing its creation.

(8) Ratification is subject to no requirements as to form. It may be express or may be inferred from the conduct of the principal.

Article 16

(1) An agent who acts without authority or who acts outside the scope of his authority shall, failing ratification, be liable to pay the third party such compensation as will place the third party in the same position as he would have been in if the agent had acted with authority and within the scope of his authority.

(2) The agent shall not be liable, however, if the third party knew or ought to have known that the agent had no authority or was acting outside the scope of his authority.

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(b) on completion of the transaction or transactions for which the authority was created;

(c) on revocation by the principal or renunciation by the agent, whether or not this is consistent with the terms of their agreement.

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The termination of the authority shall not affect the third party unless he knew or ought to have known of the termination or the facts which caused it.

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tional Sale of Goods and will remain open for signature by all States at Berne until 31 December 1983.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Government of Switzerland.

Article 24

(1) If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph 1 of this Article, the Convention is to extend to all territorial units of that State.

Article 25

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signa-

ture or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 24 shall carry no implication as to the internal distribution of powers within that State.

Article 26

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply where the principal and the third party or, in the case referred to in Article 2, paragraph 2, the agent and the third party have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply where the principal and the third party or, in the case referred to in Article 2, paragraph 2, the agent and the third party have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph 1, provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

Article 27

A Contracting State whose legislation requires an authorisation, ratification or termination of authority to be made in or evidenced by writing in all cases governed by this Convention may at any time make a declaration in accordance with Article 11 that any provision of Article 10, Article 15 or Chapter IV which allows an authorisation, ratification or termination of authority to be other than in writing, does not apply where the principal or the

agent has his place of business in that State.

Article 28

A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Article 2, paragraph 1 (b).

Article 29

A Contracting State the foreign trade of which is carried on by specially authorised organisations may at any time declare that, in cases where such organisations act either as buyers or sellers in foreign trade, all these organisations or the organisations specified in the declaration shall not be considered, for the purposes of Article 15, paragraphs 2 (b) and 4, as agents in their relations with other organisations having their place of business in the same State.

Article 30

(1) A Contracting State may at any time declare that it will apply the provisions of this Convention to specified cases falling outside its sphere of application.

(2) Such declaration may, for example, provide that the Convention shall apply to:

(a) contracts other than contracts of sale of goods;

(b) cases where the places of business mentioned in Article 2, paragraph 1, are not situated in Contracting States.

Article 31

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry

into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under Article 26 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under Article 26 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that Article.

Article 32

No reservations are permitted except those expressly authorised in this Convention.

Article 33

(1) This Convention enters into force on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article 34

This Convention applies when the agent offers to sell or purchase or accepts an offer of sale or purchase on or after the date when the Convention enters into force in respect of the Contracting State referred to in Article 2, paragraph 1.

Article 35

(1) A Contracting State may denounce this Convention by a formal notification in writing to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised by their respective Governments, have signed this Convention.

DONE AT GENEVA this day of February, one thousand nine hundred and eighty three, in a single original, of which the English and French texts are equally authentic.

PROPOSALS AND AMENDMENTS
SUBMITTED TO THE CONFERENCE (1)

Article 1

CZECHOSLOVAKIA, FINLAND, NETHERLANDS, NORWAY, SWEDEN, TURKEY
AND UNITED STATES OF AMERICA (CONF.6/W.P.2)

Paragraph (1)

"This Convention applies where one person, the agent, has the authority to act, acts or purports to act on behalf of another person, the principal, for the purpose of concluding a contract of sale with a third party."

Article 5

AUSTRALIA (CONF.6/W.P.1)

In lieu of Article 5 as adopted by Committee I, substitute the following (as Article 5):

"The principal, or an agent acting in accordance with express or implied instructions of the principal, may agree with the third party to exclude the application of this Convention or derogate from or vary the effect of any of its provisions."

Comment:

1. Discussion in Committee I in relation to Article 15 (7) disclosed that that paragraph may be inconsistent with Article 5.
2. The difficulty with Article 5 as presently drafted is that it makes no allowance at all for an agent to enter into an arrangement with the third party which will also bind the principal to vary or exclude the Convention. In a Convention dealing with agency it would be anomalous to require the principal to enter into any such arrangement personally.
3. The principal should have his rights protected but it should be sufficient to require that any arrangement to exclude or vary the Convention, if

(1) Contained in CONF.6/W.P.1-10.

not made by the principal, should be made by his agent in accordance with his express or implied instructions.

4. If the provision now proposed is included as Article 5, the need for Article 15 (7) may be open to doubt. However, for the sake of clarity, it may be desirable to retain Article 15 (7).

CZECHOSLOVAKIA (CONF.6/W.P.4)

Delete the words "as between themselves".

Article 9

BULGARIA (CONF.6/W.P.6)

Paragraph (1)

Delete the words "or implied".

Article 11

ROMANIA (CONF.6/W.P.8)

Paragraph (2)

Replace Article 11, paragraph (2) of the present draft by Article 11, paragraph (2) of the draft prepared by the UNIDROIT Committee of Governmental Experts (1981), that is to say:

"Article 11

(2) Any provision of Article 9 or Article 16 of this Convention that allows an authorisation or a ratification to be otherwise than express does not apply where the principal has his place of business in a Contracting State which has made a declaration under Article Y of this Convention."

Article Y must, in consequence, also remain in the draft.

Commentary:

1. The law of our country, like that of others, lays down that the agent's authorisation, as well as ratification of his acts, *must be express*.
2. It is necessary to know for certain whether or not the principal *actually had the intention* to authorise the agent, or to ratify his acts. This aspect is very important in the commercial relations of the foreign trade organisations

of our country.

3. It is, likewise, necessary to reach a *compromise* between different legal systems, by working out texts acceptable to the largest possible number of countries, so that the possibility of making reservations be maintained for those countries which require express declarations.

Article 25 bis (2)

CZECHOSLOVAKIA AND NORWAY (CONF.6/W.P.7)

Add a new article 25 bis: (2)

"This Convention does not prevail over any international agreement which has already been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the principal or the third party or, in the case referred to in Article 2, paragraph (2), the agent and the third party have their places of business in States parties to such agreement."

Comment:

1. The proposed article is identical with Article 90 of the Vienna Convention, except for the same change of the wording "parties" as has already been introduced in Articles 5 and 7 better to cover the tripartite relation.

2. Its purpose is mainly to allow for regional unification that may not be covered by reservations under Article 26. The existence of such provision may for some States facilitate the ratification of the Convention. It may also make Article 32 of the Draft more acceptable to many delegations.

3. We have been informed that the reason why a provision similar to Article 90 of the Vienna Convention was not included in the Draft final provisions, was a fear that it might lead to a collision with the Hague Convention on the law applicable to agency. In our view such a fear is groundless, as the two conventions do not deal with the same subject. By ratifying the present Convention a State obliges itself to introduce in its law certain substantive rules on special cases of agency relations. But it does not oblige itself to apply its own law, and is not therefore precluded from applying the law of another State, if that follows from its rules of private international law, whether or not this is founded on the ratification of the Hague Convention. If it *has* ratified the Hague Convention, this will probably lead to the application of the law of the agent's country. If that State has not ratified the present Convention, the present Convention will of course not be applied. But this can not be described as a "collision" between the two Conventions.

(2) Subsequently corrected to read "22 bis".

Article 29

FRANCE (CONF.6/W.P.10)

"A Contracting State the foreign trade of which is *wholly* carried on . . ." (the rest of the text would remain unchanged).

Article 30

UNITED KINGDOM (CONF.6/W.P.9)

Add at the end:

"(c) cases where the agent neither has authority nor purports to have authority to act on the principal's behalf."

Comment:

This proposal is intended to enable Contracting States to apply the Convention to cases where an undisclosed principal or commission agent acts without authority.

Article 33

AUSTRIA, CZECHOSLOVAKIA, FINLAND, SWITZERLAND AND UNITED STATES OF AMERICA (CONF.6/W.P.5)

Paragraphs (1) and (2)

Replace the words "tenth instrument" by the words "fifth instrument".

Annex

PROPOSAL BY THE PRESIDENT OF THE CONFERENCE (CONF.6/W.P.3)

FINAL RESOLUTION ADOPTED BY THE UNIDROIT DIPLOMATIC
CONFERENCE FOR THE ADOPTION OF THE DRAFT CONVENTION ON
AGENCY IN THE INTERNATIONAL SALE OF GOODS

The Diplomatic Conference for the adoption of a Convention on Agency in the International Sale of Goods, convened in Geneva from 31 January to 17 February 1983,

AGREES that the further development of international rules relating to the relations between principal and agent in agency in the international sale of goods would be an important contribution to the development of international trade,

REQUESTS the International Institute for the Unification of Private Law (Unidroit), which was responsible for the preparation of the adopted Convention and under the auspices of which this Conference was convened, to consider the possibility of elaborating rules on a global or regional level governing the relations between principal and agent in the international sale of goods.

REPORT OF THE CREDENTIALS COMMITTEE TO THE CONFERENCE (1)

In accordance with Rule 4 of the Rules of Procedure of the Conference, following consultations with the Heads of Delegations, the Conference appointed a Credentials Committee on 3 February, comprising representatives of the following Governments:

Angola, Bulgaria, Japan, Switzerland and the United States of America.

The Committee met twice on 9 and 14 February, its meetings being attended by the following representatives:

Ms M. do C. MEDINA (Angola)

Mr B. POPOV (Bulgaria)

Mr I. TERADA (Japan)

Mr H. HAUSHEER (9 February) and Mr P. WIDMER (14 February) (Switzerland)

Mr P.H. PFUND and Mr G.T. DEMPSEY (United States of America)

In accordance with Rule 50 of the Rules of Procedure of the Conference it fell to the Committee to elect its own Chairman. On a proposal by the representative of Japan, seconded by the representatives of Angola and Bulgaria, the representative of Switzerland was elected Chairman.

The credentials of the delegations of the following States, transmitted to the Secretary-General of the Conference in accordance with Rule 3 of the Rules of Procedure, were examined and, subject to certain objections set out below, found to be in due and proper form, the Committee having decided that, under the Rules of Procedure, its competence only extended to the examination of the credentials of delegations from the point of view of their compliance with the formal requirements of the Rules of Procedure and did not entitle it to take a decision based on political issues, which might later form the subject of declarations that could be made in the Conference proper:

(1) The Report of the Credentials Committee was contained in CONF. 6/5.

Afghanistan; Angola; Australia; Austria; Belgium; Benin; Bulgaria; Canada; Cape Verde; Chile; China; Congo; Czechoslovakia; Egypt; Finland; France; Germany, Federal Republic of; Ghana; Guatemala; Holy See; Hungary; India; Iraq; Italy; Ivory Coast; Japan; Kenya; Korea; Liechtenstein; Mexico; Mongolian People's Republic; Morocco; Netherlands; Nicaragua; Norway; Pakistan; Philippines; Portugal; Romania; South Africa; Spain; Sweden; Switzerland; Turkey; Union of Soviet Socialist Republics; United Arab Emirates; United Kingdom; United States of America; Yugoslavia.

The Committee noted that the following States were represented at the Conference by observers:

Brazil; Colombia; Ecuador; El Salvador; Indonesia; Madagascar; Qatar; Saudi Arabia; Venezuela.

The representative of Angola stated that her Government objected to the participation of the delegation of South Africa in the Conference. She stated that this was the second time that her delegation had had occasion to make this objection at a Unidroit diplomatic Conference, the first having been on the occasion of the diplomatic Conference for the adoption of the draft Convention providing a Uniform Law on Agency of an International Character in the Sale and Purchase of Goods held in Bucharest in 1979.

She stated that, in objecting to the participation of the delegation of South Africa, she was expressing the feelings of all the African States represented at the Conference. She pointed out that the Government of South Africa was no longer admitted to conferences organised by the United Nations and its specialised agencies.

The reason for this, she explained, was that the South African regime had elevated racism into an article of faith, in the process becoming the cruellest regime in the world in terms of the internal repression practised by it which, in her opinion, amounted to a crime against humanity, given that 20 million people in that country were oppressed and discriminated against on the ground of race.

She argued that in this forum it was necessary to act coherently with the stance adopted in other international bodies. It was therefore the submission of her Government that, whilst it had nothing against the people of South Africa as a whole, stressing

what a great country South Africa was when viewed independently of the regime in power at the moment, nor, on a personal level, against the individual representatives of South Africa at the present Conference, it would be a source of shame if the present Government of South Africa were allowed to take its seat at the present Conference.

She added that her country had suffered as a result of the state of war imposed on it by the Government of South Africa, whose army had occupied large tracts of her country and regularly engaged in sabotage directed at her country. Her country was not the only country in this position, she stated, referring to the situation in Mozambique and other Southern African countries.

In appealing to the delicacy of the Committee in this matter, she reminded it of the grave responsibility it bore. She admitted that, when South Africa had become a member State of Unidroit, it was not then a racist country and she understood that the invitation extended to the Government of South Africa was extended on the basis of that membership. However, now that the internal structure of that country was racist, she argued that this was a matter which could not be treated with indifference. She stressed that the present Government of South Africa was not representative of the majority of the people of that country. For the aforesaid reasons she was unable to accept the credentials of the delegation of South Africa from a formal point of view and stated that this was a question which fell within the competence of the Conference.

The representative of Bulgaria stated that, on behalf of the Socialist countries represented at the Conference, his delegation supported the objections raised by the representative of Angola with regard to the participation of South Africa in this Conference.

The Chairman of the Committee took note of the statements made by the representative of Angola and the representative of Bulgaria, while nevertheless insisting that the task of the Committee was restricted to the examination of the credentials of delegations from the point of view of their compliance with the formal requirements of the Rules of Procedure. He was supported in this view by the representatives of the United States of America and Japan. The representative of Japan took the view that the Conference was of a technical, legal nature and not of a political nature and that it

was therefore not competent to discuss the matter raised by the representative of Angola. He was supported in this view by the Chairman of the Committee and the representative of the United States of America.

The Committee proposed that the Conference take note of this report.

**FINAL ACT OF THE DIPLOMATIC CONFERENCE
FOR THE ADOPTION OF THE UNIDROIT
DRAFT CONVENTION ON AGENCY
IN THE INTERNATIONAL SALE OF GOODS**

1. — Pursuant to the Final Resolution adopted by the Diplomatic Conference for the adoption of a Convention providing a Uniform Law on Agency of an International Character in the Sale and Purchase of Goods, held in Bucharest from 28 May to 13 June 1979, the Governing Council of the International Institute for the Unification of Private Law (Unidroit) convened a committee of governmental experts to continue the work begun at Bucharest. On 13 November 1981, this Committee approved the text of a draft Convention which was transmitted to the Government of Switzerland for submission to a diplomatic Conference.

2. — The Diplomatic Conference for the adoption of the Unidroit draft Convention on Agency in the International Sale of Goods was held in Geneva, Switzerland from 31 January to 17 February 1983.

3. — Representatives of 49 States participated in the Conference, namely representatives of:

the Democratic Republic of Afghanistan; the People's Republic of Angola; the Commonwealth of Australia; the Republic of Austria; the Kingdom of Belgium; the People's Republic of Benin; the People's Republic of Bulgaria; Canada; the Republic of Cape Verde; the Republic of Chile; the People's Republic of China; the People's Republic of the Congo; the Czechoslovak Socialist Republic; the Arab Republic of Egypt; the Republic of Finland; the French Republic; Germany, Federal Republic of; the Republic of Ghana; the Republic of Guatemala; Holy See; the Hungarian People's Republic; the Republic of India; the Republic of Iraq; the Italian Republic; the Republic of the Ivory Coast; Japan; the Republic of Kenya; the Principality of Liechtenstein; the United Mexican States; the

Mongolian People's Republic; the Kingdom of Morocco; the Kingdom of the Netherlands; the Republic of Nicaragua; the Kingdom of Norway; the Islamic Republic of Pakistan; the Republic of the Philippines; the Portuguese Republic; Republic of Korea; the Socialist Republic of Romania; the Republic of South Africa; the Spanish State; the Kingdom of Sweden; the Swiss Confederation; the Republic of Turkey; Union of Soviet Socialist Republics; United Arab Emirates; United Kingdom of Great Britain and Northern Ireland; United States of America; the Socialist Federal Republic of Yugoslavia.

4. — Nine States sent observers to the Conference, namely:

the Federative Republic of Brazil; the Republic of Colombia; the Republic of Ecuador; the Republic of El Salvador; the Republic of Indonesia; the Democratic Republic of Madagascar; the State of Qatar; the Kingdom of Saudi Arabia; the Republic of Venezuela.

5. — The following intergovernmental organisations were represented by observers at the Conference:

Council for Mutual Economic Assistance
European Free Trade Association
Hague Conference on Private International Law
International Trade Centre/United Nations Conference on Trade and Development — General Agreement on Tariffs and Trade
United Nations Commission on International Trade Law
United Nations Conference on Trade and Development
United Nations / Economic Commission for Europe

6. — The Conference elected Mr K. Grönfors (Sweden) as President.

7. — The Conference elected as Vice-Presidents the following representatives:

Mr M. J. Bonell (Italy)
Mr A. Fajardo - Maldonado (Guatemala)
Mr D. Kimbembé (Congo)
Mr O.V. Koschevnikov (U.S.S.R.)
Mr C. Liu (China)

8. — The following committees were set up by the Conference:

Steering Committee

- Chairman:* The President of the Conference
Members: The President and the Vice-Presidents of the Conference and the Chairman of the Committee of the Whole.
- In addition the Chairman of the Final Clauses Committee, the Chairman and the Vice-Chairman of the Drafting Committee, the Secretary-General of the Conference and the Commissary-General of the Conference participated in the work of the Steering Committee, on the invitation of the Chairman.

Committee of the Whole

- Chairman:* Mr P. Widmer (Switzerland)
First Vice-Chairman: Mr M. Cuker (Czechoslovakia)
Second Vice-Chairman: Mr F.H. Hafez (Egypt)

Final Clauses Committee

- Chairman:* Mr L. Sevon (Finland)

Drafting Committee

- Chairman:* Mr E.A. Farnsworth (U.S.A.)
Vice-Chairman: Mr A. Duchek (Austria)
Members: Austria, Chile, Congo, Czechoslovakia, France, Ghana, Japan, Netherlands, Norway, U.S.S.R., United Kingdom, U.S.A.

Credentials Committee

- Chairman:* Mr H. Haushcer (Switzerland)
Members: Angola, Bulgaria, Japan, Switzerland, U.S.A.

9. — The Secretary-General of the Conference was Mr M. Evans, Deputy Secretary-General of Unidroit, who also discharged the duties of Rapporteur to the Committee of the Whole. The Commissary-General of the Conference was Mr G. Bärlocher of the Federal Department of Foreign Affairs of Switzerland.

10. — The basic working papers of the Conference were the draft Convention on Agency in the International Sale of Goods (Study XIX — Doc. 63), adopted by the committee of governmental experts which met in Rome from 2 to 13 November 1981, with an accompanying Explanatory Report prepared by the Unidroit Secretariat; the draft final provisions and explanatory notes thereon prepared by the Unidroit Secretariat (Study XIX — Doc. 64), together with the observations and proposals by Governments and international organisations on the draft Convention (CONF. 6/3 and Add. 1 and 2 and CONF. 6/4).

11. — The Conference assigned to the Committee of the Whole the first and second readings of Chapters I - IV of the draft Convention. The Conference assigned to the Final Clauses Committee the first and second readings of Chapter V of the draft Convention and the draft Preamble.

12. — On the basis of the deliberations recorded in the summary records of the Conference (CONF. 6/S.R.1-8), the summary records of the Committee of the Whole (CONF. 6/C.1/S.R.1-20) and its report (CONF. 6/C.1/Doc.1) and the report of the Final Clauses Committee (CONF. 6/C.2/Doc.1), the Conference drew up the CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS.

13. — The Convention on Agency in the International Sale of Goods, the text of which is annexed to this Final Act (Annex 1), was adopted by the Conference on 15 February 1983 and was opened for signature at the closing session of the Conference on 17 February 1983. It will remain open for signature in Berne, Switzerland until 31 December 1984. It was also opened for accession on 17 February 1983.

14. — The Convention is deposited with the Government of Switzerland.

15. — A Final Resolution, the text of which is also annexed to this Final Act (Annex II), was adopted by the Conference on 15 February 1983.

IN WITNESS WHEREOF the representatives,

GRATEFUL to the Government of Switzerland for having invited the Conference to Switzerland and especially to the Republic and Canton of Geneva and the City of Geneva for their generous hospitality,

HAVE SIGNED this Final Act.

DONE at Geneva, this seventeenth day of February, one thousand nine hundred and eighty-three, in a single copy in the English and French languages, each text being equally authentic.

President

Secretary-General

Annex I

CONVENTION ON AGENCY IN THE INTERNATIONAL
SALE OF GOODS

THE STATES PARTIES TO THIS CONVENTION,

DESIRING to establish common provisions concerning agency in the international sale of goods,

BEARING IN MIND the objectives of the United Nations Convention on Contracts for the International Sale of Goods,

CONSIDERING that the development of international trade on the basis of equality and mutual benefit is an important element in promoting friendly relations among States, bearing in mind the New International Economic Order,

BEING OF THE OPINION that the adoption of uniform rules which govern agency in the international sale of goods and take into account the different social, economic and legal systems would contribute to the removal of legal barriers in international trade and promote the development of international trade,

HAVE AGREED as follows :

CHAPTER I — SPHERE OF APPLICATION AND
GENERAL PROVISIONS*Article 1*

(1) This Convention applies where one person, the agent, has authority or purports to have authority on behalf of another per-

son, the principal, to conclude a contract of sale of goods with a third party.

(2) It governs not only the conclusion of such a contract by the agent but also any act undertaken by him for the purpose of concluding that contract or in relation to its performance.

(3) It is concerned only with relations between the principal or the agent on the one hand, and the third party on the other.

(4) It applies irrespective of whether the agent acts in his own name or in that of the principal.

Article 2

(1) This Convention applies only where the principal and the third party have their places of business in different States and :

(a) the agent has his place of business in a Contracting State, or

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

(2) Where, at the time of contracting, the third party neither knew nor ought to have known that the agent was acting as an agent, the Convention only applies if the agent and the third party had their places of business in different States and if the requirements of paragraph 1 are satisfied.

(3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract of sale is to be taken into consideration in determining the application of this Convention.

Article 3

(1) This Convention does not apply to :

(a) the agency of a dealer on a stock, commodity or other exchange;

(b) the agency of an auctioneer;

(c) agency by operation of law in family law, in the law of

matrimonial property, or in the law of succession;

(d) agency arising from statutory or judicial authorisation to act for a person without capacity to act;

(e) agency by virtue of a decision of a judicial or quasi-judicial authority or subject to the direct control of such an authority.

(2) Nothing in this Convention affects any rule of law for the protection of consumers.

Article 4

For the purposes of this Convention :

(a) an organ, officer or partner of a corporation, association, partnership or other entity, whether or not possessing legal personality, shall not be regarded as the agent of that entity in so far as, in the exercise of his functions as such, he acts by virtue of an authority conferred by law or by the constitutive documents of that entity;

(b) a trustee shall not be regarded as an agent of the trust, of the person who has created the trust, or of the beneficiaries.

Article 5

The principal, or an agent acting in accordance with the express or implied instructions of the principal, may agree with the third party to exclude the application of this Convention or, subject to Article 11, to derogate from or vary the effect of any of its provisions.

Article 6

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity

with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.

Article 7

(1) The principal or the agent on the one hand and the third party on the other are bound by any usage to which they have agreed and by any practices which they have established between themselves.

(2) They are considered, unless otherwise agreed, to have impliedly made applicable to their relations any usage of which they knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to agency relations of the type involved in the particular trade concerned.

Article 8

For the purposes of this Convention :

(a) if a party has more than one place of business, the place of business is that which has the closest relationship to the contract of sale, having regard to the circumstances known to or contemplated by the parties at the time of contracting;

(b) if a party does not have a place of business, reference is to be made to his habitual residence.

CHAPTER II — ESTABLISHMENT AND SCOPE OF THE AUTHORITY OF THE AGENT

Article 9

(1) The authorisation of the agent by the principal may be express or implied.

(2) The agent has authority to perform all acts necessary in the circumstances to achieve the purposes for which the authorisation was given.

Article 10

The authorisation need not be given in or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

Article 11

Any provision of Article 10, Article 15 or Chapter IV which allows an authorisation, a ratification or a termination of authority to be made in any form other than in writing does not apply where the principal or the agent has his place of business in a Contracting State which has made a declaration under Article 27. The parties may not derogate from or vary the effect of this paragraph.

CHAPTER III — LEGAL EFFECTS OF ACTS CARRIED OUT
BY THE AGENT

Article 12

Where an agent acts on behalf of a principal within the scope of his authority and the third party knew or ought to have known that the agent was acting as an agent, the acts of the agent shall directly bind the principal and the third party to each other, unless it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent undertakes to bind himself only.

Article 13

(1) Where the agent acts on behalf of a principal within the scope of his authority, his acts shall bind only the agent and the third party if :

(a) the third party neither knew nor ought to have known that the agent was acting as an agent, or

(b) it follows from the circumstances of the case, for example by a reference to a contract of commission, that the agent

undertakes to bind himself only.

(2) Nevertheless :

(a) where the agent, whether by reason of the third party's failure of performance or for any other reason, fails to fulfil or is not in a position to fulfil his obligations to the principal, the principal may exercise against the third party the rights acquired on the principal's behalf by the agent, subject to any defences which the third party may set up against the agent;

(b) where the agent fails to fulfil or is not in a position to fulfil his obligations to the third party, the third party may exercise against the principal the rights which the third party has against the agent, subject to any defences which the agent may set up against the third party and which the principal may set up against the agent.

(3) The rights under paragraph 2 may be exercised only if notice of intention to exercise them is given to the agent and the third party or principal, as the case may be. As soon as the third party or principal has received such notice, he may no longer free himself from his obligations by dealing with the agent.

(4) Where the agent fails to fulfil or is not in a position to fulfil his obligations to the third party because of the principal's failure of performance, the agent shall communicate the name of the principal to the third party.

(5) Where the third party fails to fulfil his obligations under the contract to the agent, the agent shall communicate the name of the third party to the principal.

(6) The principal may not exercise against the third party the rights acquired on his behalf by the agent if it appears from the circumstances of the case that the third party, had he known the principal's identity, would not have entered into the contract.

(7) An agent may, in accordance with the express or implied instructions of the principal, agree with the third party to derogate from or vary the effect of paragraph 2.

Article 14

(1) Where an agent acts without authority or acts outside the scope of his authority, his acts do not bind the principal and the third party to each other.

(2) Nevertheless, where the conduct of the principal causes the third party reasonably and in good faith to believe that the agent has authority to act on behalf of the principal and that the agent is acting within the scope of that authority, the principal may not invoke against the third party the lack of authority of the agent.

Article 15

(1) An act by an agent who acts without authority or who acts outside the scope of his authority may be ratified by the principal. On ratification the act produces the same effects as if it had initially been carried out with authority.

(2) Where, at the time of the agent's act, the third party neither knew nor ought to have known of the lack of authority, he shall not be liable to the principal if, at any time before ratification, he gives notice of his refusal to become bound by a ratification. Where the principal ratifies but does not do so within a reasonable time, the third party may refuse to be bound by the ratification if he promptly notifies the principal.

(3) Where, however, the third party knew or ought to have known of the lack of authority of the agent, the third party may not refuse to become bound by a ratification before the expiration of any time agreed for ratification or, failing agreement, such reasonable time as the third party may specify.

(4) The third party may refuse to accept a partial ratification.

(5) Ratification shall take effect when notice of it reaches the third party or the ratification otherwise comes to his attention. Once effective, it may not be revoked.

(6) Ratification is effective notwithstanding that the act itself could not have been effectively carried out at the time of ratification.

(7) Where the act has been carried out on behalf of a corporation or other legal person before its creation, ratification is effective.

tive only if allowed by the law of the State governing its creation.

(8) Ratification is subject to no requirements as to form. It may be express or may be inferred from the conduct of the principal.

Article 16

(1) An agent who acts without authority or who acts outside the scope of his authority shall, failing ratification, be liable to pay the third party such compensation as will place the third party in the same position as he would have been in if the agent had acted with authority and within the scope of his authority.

(2) The agent shall not be liable, however, if the third party knew or ought to have known that the agent had no authority or was acting outside the scope of his authority.

CHAPTER IV — TERMINATION OF THE AUTHORITY OF THE AGENT

Article 17

The authority of the agent is terminated :

(a) when this follows from any agreement between the principal and the agent;

(b) on completion of the transaction or transactions for which the authority was created;

(c) on revocation by the principal or renunciation by the agent, whether or not this is consistent with the terms of their agreement.

Article 18

The authority of the agent is also terminated when the applicable law so provides.

Article 19

The termination of the authority shall not affect the third party unless he knew or ought to have known of the termination or the facts which caused it.

Article 20

Notwithstanding the termination of his authority, the agent remains authorised to perform on behalf of the principal or his successors the acts which are necessary to prevent damage to their interests.

CHAPTER V — FINAL PROVISIONS

Article 21

The Government of Switzerland is hereby designated as the depositary for this Convention.

Article 22

(1) This Convention is open for signature at the concluding meeting of the Diplomatic Conference on Agency in the International Sale of Goods and will remain open for signature by all States at Berne until 31 December 1984.

(2) This Convention is subject to ratification, acceptance or approval by the signatory States.

(3) This Convention is open for accession by all States which are not signatory States as from the date it is open for signature.

(4) Instruments of ratification, acceptance, approval and accession are to be deposited with the Government of Switzerland.

Article 23

This Convention does not prevail over any international agree-

ment which has already been or may be entered into and which contains provisions of substantive law concerning the matters governed by this Convention, provided that the principal and the third party or, in the case referred to in Article 2, paragraph 2, the agent and the third party have their places of business in States parties to such agreement.

Article 24

(1) If a Contracting State has two or more territorial units in which different systems of law are applicable in relation to the matters dealt with in this Convention, it may, at the time of signature, ratification, acceptance, approval or accession, declare that this Convention is to extend to all its territorial units or only to one or more of them, and may amend its declaration by submitting another declaration at any time.

(2) These declarations are to be notified to the depositary and are to state expressly the territorial units to which the Convention extends.

(3) If, by virtue of a declaration under this Article, this Convention extends to one or more but not all of the territorial units of a Contracting State, and if the place of business of a party is located in that State, this place of business, for the purposes of this Convention, is considered not to be in a Contracting State, unless it is in a territorial unit to which the Convention extends.

(4) If a Contracting State makes no declaration under paragraph 1 of this Article, the Convention is to extend to all territorial units of that State.

Article 25

Where a Contracting State has a system of government under which executive, judicial and legislative powers are distributed between central and other authorities within that State, its signature or ratification, acceptance or approval of, or accession to this Convention, or its making of any declaration in terms of Article 24 shall carry no implication as to the internal distribution of powers

within that State.

Article 26

(1) Two or more Contracting States which have the same or closely related legal rules on matters governed by this Convention may at any time declare that the Convention is not to apply where the principal and the third party or, in the case referred to in Article 2, paragraph 2, the agent and the third party have their places of business in those States. Such declarations may be made jointly or by reciprocal unilateral declarations.

(2) A Contracting State which has the same or closely related legal rules on matters governed by this Convention as one or more non-Contracting States may at any time declare that the Convention is not to apply where the principal and the third party or, in the case referred to in Article 2, paragraph 2, the agent and the third party have their places of business in those States.

(3) If a State which is the object of a declaration under the preceding paragraph subsequently becomes a Contracting State, the declaration made will, as from the date on which the Convention enters into force in respect of the new Contracting State, have the effect of a declaration made under paragraph 1, provided that the new Contracting State joins in such declaration or makes a reciprocal unilateral declaration.

Article 27

A Contracting State whose legislation requires an authorisation, ratification or termination of authority to be made in or evidenced by writing in all cases governed by this Convention may at any time make a declaration in accordance with Article 11 that any provision of Article 10, Article 15 or Chapter IV which allows an authorisation, ratification or termination of authority to be other than in writing, does not apply where the principal or the agent has his place of business in that State.

Article 28

A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will not be bound by Article 2, paragraph 1(b).

Article 29

A Contracting State, the whole or specific parts of the foreign trade of which are carried on exclusively by specially authorised organisations, may at any time declare that, in cases where such organisations act either as buyers or sellers in foreign trade, all these organisations or the organisations specified in the declaration shall not be considered, for the purposes of Article 13, paragraphs 2 (b) and 4, as agents in their relations with other organisations having their place of business in the same State.

Article 30

(1) A Contracting State may at any time declare that it will apply the provisions of this Convention to specified cases falling outside its sphere of application.

(2) Such declaration may, for example, provide that the Convention shall apply to:

- (a) contracts other than contracts of sale of goods;
- (b) cases where the places of business mentioned in Article 2, paragraph 1, are not situated in Contracting States.

Article 31

(1) Declarations made under this Convention at the time of signature are subject to confirmation upon ratification, acceptance or approval.

(2) Declarations and confirmations of declarations are to be in writing and to be formally notified to the depositary.

(3) A declaration takes effect simultaneously with the entry into force of this Convention in respect of the State concerned. However, a declaration of which the depositary receives formal notification after such entry into force takes effect on the first day of the month following the expiration of six months after the date of its receipt by the depositary. Reciprocal unilateral declarations under Article 26 take effect on the first day of the month following the expiration of six months after the receipt of the latest declaration by the depositary.

(4) Any State which makes a declaration under this Convention may withdraw it at any time by a formal notification in writing addressed to the depositary. Such withdrawal is to take effect on the first day of the month following the expiration of six months after the date of the receipt of the notification by the depositary.

(5) A withdrawal of a declaration made under Article 26 renders inoperative, as from the date on which the withdrawal takes effect, any reciprocal declaration made by another State under that Article.

Article 32

No reservations are permitted except those expressly authorised in this Convention.

Article 33

(1) This Convention enters into force on the first day of the month following the expiration of twelve months after the date of deposit of the tenth instrument of ratification, acceptance, approval or accession.

(2) When a State ratifies, accepts, approves or accedes to this Convention after the deposit of the tenth instrument of ratification, acceptance, approval or accession, this Convention enters into force in respect of that State on the first day of the month following the expiration of twelve months after the date of the deposit of its instrument of ratification, acceptance, approval or accession.

Article 34

This Convention applies when the agent offers to sell or purchase or accepts an offer of sale or purchase on or after the date when the Convention enters into force in respect of the Contracting State referred to in Article 2, paragraph 1.

Article 35

(1) A Contracting State may denounce this Convention by a formal notification in writing to the depositary.

(2) The denunciation takes effect on the first day of the month following the expiration of twelve months after the notification is received by the depositary. Where a longer period for the denunciation to take effect is specified in the notification, the denunciation takes effect upon the expiration of such longer period after the notification is received by the depositary.

IN WITNESS WHEREOF the undersigned plenipotentiaries, being duly authorised by their respective Governments, have signed this Convention.

DONE at Geneva this seventeenth day of February, one thousand nine hundred and eighty-three, in a single original, of which the English and French texts are equally authentic.

Annex II

FINAL RESOLUTION
ADOPTED BY THE DIPLOMATIC CONFERENCE
FOR THE ADOPTION OF THE UNIDROIT
DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL
SALE OF GOODS

The Diplomatic Conference for the adoption of a Convention on Agency in the International Sale of Goods, convened in Geneva from 31 January to 17 February 1983,

AGREES that the further development of international rules relating to the relations between principal and agent in agency in the international sale of goods would be an important contribution to the development of international trade,

REQUESTS the International Institute for the Unification of Private Law (Unidroit), which was responsible for the preparation of the adopted Convention and under the auspices of which this Conference was convened, to consider the possibility of elaborating rules on a global or regional level governing the relations between principal and agent in the international sale of goods.

Part Two

SUMMARY RECORDS

SUMMARY RECORDS OF THE MEETINGS OF THE CONFERENCE (PLENARY MEETINGS)

1st plenary meeting

Tuesday, 1 February 1983 at 10.25 a.m.

Temporary President: Mr BUSER
(Chancellor of the Swiss Federation)

President: Mr GRÖNFORS (Sweden)

CONF. 6/S.R.1

OPENING OF THE CONFERENCE

The TEMPORARY PRESIDENT gave the following address of welcome:

"Mr President of UNIDROIT,
Mr Secretary-General,
Ladies and Gentlemen, Delegates,

In the name of the Swiss Government, I have the privilege and pleasure to wish you a warm welcome to our country and to the beautiful city of Geneva which has often lent itself to initiatives by the international community aimed at developing and strengthening the bonds that unite us over and above all the differences of language, culture and law.

You all know that Switzerland benefits from a very special experience in the field of coexistence and cooperation between several peoples coming from different origins attached at the same time to their political unity and to their ethnic and linguistic peculiarities. Thus here we find ourselves in the French-speaking part of Switzerland and there is no one who, on exploring this city of Geneva, can doubt its very French character. Nor can anyone, on

comparing Geneva with cities in the German or Italian-speaking parts of Switzerland, fail to note the differences — both in the architecture as in the way of life. And it is with a certain pride, sometimes even with a touch of chauvinism, that each of the small republics that go to make up the Swiss Confederation, endeavours to safeguard its own character, its habits and its special customs.

All this variety has not, however, prevented us from living under the same law of obligations for a little over a hundred years in an area stretching from the edge of Lake Geneva (or Lake Léman as we call it here) to Lake Constance and from the edge of the Po plain to the banks of the Rhine — a law of obligations that in 1912 was incorporated into a single civil code. This is, perhaps, one of the main reasons why we have always followed the work of the International Institute for the Unification of Private Law in Rome with a particular interest and sympathy, the aims of the Institute being to promote at a worldwide level this same idea of a common law in which all share both by contributions and sacrifices in order finally to allow each to benefit in his own way.

It seems, in fact — just as happened at the end of the 19th century and at the beginning of the 20th — that we find ourselves today, on the threshold of the third millenium of our era, in a period of transition. It is certainly not an accident that after a period of relative stability in the field of civil law the need is being felt in many countries, whatever their legal tradition, to re-think and review in depth the institutions and the legal principles that govern us. In the course of this century, and as a result of a phenomenon called "the acceleration of history", our social and economic conditions have been subjected to radical transformations which affect our method of conceiving law and justice. I do not claim to judge the positive or negative aspects of this evolution. But one of its fundamental aspects that can be objectively perceived, and which also presents a striking analogy with the era of the birth of unified civil law in Switzerland, is certainly the fact that our planet — thanks to the modern means of communication — tends, in a manner of speaking, to shrink, to become a sort of spaceship in which we find ourselves collected close together, pressed one against the other and where the motto of Switzerland 'One for all, all for one' acquires the importance of a categorical imperative.

In other words, the whole world and the countries which make it up, are — by the force of circumstance — placed in a situation that can be compared to that of the Swiss Cantons of a century ago. Commercial exchanges have multiplied amazingly and have thus created legal relationships which have become universal in their network. It is thus natural — and here again the experience of our ancestors is being repeated at world level — that we feel the need to build a framework capable of accommodating these relationships by drawing together, as far as possible, the various legal systems involved and by overcoming certain obstacles which often prove to be more theoretical than real when one compares the practical results of different approaches to the same problem.

I believe that the draft Convention on Agency, which is here submitted to your critical but benevolent examination, represents a fine example of this spirit. Is not the very idea of agency the perfect legal expression of an intention to collaborate and communicate as it aims at crossing distances separating partners who wish to establish contractual ties between themselves?

You, yourselves, Ladies and Gentlemen, are participating in this Conference as representatives of your countries, authorised to involve them in this multilateral attempt at legal cooperation. Finally, and above all, the main concern of the authors of this draft — many of whom are with us here today (and I am not forgetting the members of the UNIDROIT Secretariat who have followed the many vicissitudes of this work over many years) — has been to reconcile the concepts, apparently so different, between the Common law, Anglo-Saxon in tradition, and Continental law — without mentioning, of course, systems belonging to civilisations even more ancient and distant that I am not familiar with. All these circumstances lead me to believe that the Diplomatic Conference, of which we are here celebrating the opening, is getting underway under an auspicious star.

It is with this in mind that I also wish to congratulate the international Organisation which is the main protagonist of this Conference: UNIDROIT. From the beginning of its work — to which Geneva is not a complete outsider as the Institute was founded under the auspices of the League of Nations — one of the main areas of the research carried out at the Villa Aldobran-

dini was the law of international sale. This work, in fact, led to the Conventions signed at The Hague in 1964, in particular ULIS which in turn served as the basis for the revised draft prepared by the United Nations Commission on International Trade Law. Many of you attended the completion of this great enterprise in Vienna in 1980, with the signing of the Convention on the International Sale of Goods.

In agreement with the Rome Institute, we felt that we should turn to advantage the new enthusiasm for the unification of private law resulting from the Vienna Conference to take another draft which belongs to the same field and whose origins also go back to the Thirties; the draft on which you have been called to work for the next 17 days. It has also had a long journey and has encountered obstacles along the way which at times seemed insurmountable. For this reason, it has been so amended and rearranged on more than one occasion that in consequence its aims are now less ambitious. I know that certain delegations regret this modesty. We are all the more grateful to them for joining us in spite of these reservations and in offering to cooperate with us in an undertaking which we all hope, even if it only represents a cautious step in the right direction, will encourage the international community to take others in the future.

Ladies and Gentlemen, by honouring us with your visit to Geneva in the middle of winter, you show an enthusiasm and courage that we appreciate at their face value, because Geneva, whilst famous for the charm of its countryside, the height of its water jet, the excellence of its gastronomy and its cosmopolitan atmosphere, is also famous for its icy, piercing winds. If you invest only a small part of your enthusiasm and courage in the work of this Conference, then its success is guaranteed. I wish you a successful Conference and a pleasant stay. I hereby declare the Conference open."

Mr MATTEUCCI (President of UNIDROIT) made the following reply to the opening address of the Temporary President:

"Mr Chancellor,

Ladies and Gentlemen,

Let me first of all, on behalf of the Organisation which I have

the honour to represent here to-day, extend our warm thanks to the Government of Switzerland for its generosity in acceding to our request that it invite the Governments concerned for the purpose of completing the examination of the draft uniform rules on agency in the international sale of goods, a task partially carried out at the Diplomatic Conference held in Bucharest in 1979.

This generosity is only the latest in the long line of acts of co-operation testifying to the keen interest shown by Switzerland in the activities of our Organisation ever since its foundation, in particular through the participation of eminent Swiss lawyers in the scientific direction of its work.

At the opening of the Bucharest Conference I sought to summarise the reasons which had led UNIDROIT to undertake a study of the feasibility of unification in the field of the law of agency as well as to outline the main features of the two preliminary drafts which emerged from the first stage in this work, containing respectively uniform rules on agency in private law relations of an international character and uniform rules on commission agency in the international sale or purchase of goods, subsequently merged in a single preliminary draft by a Committee of Governmental Experts. This historical background is filled out in the Explanatory Report annexed to the draft submitted to you here.

I shall therefore limit my words to bringing out the main amendments which UNIDROIT, advised by a small group of specialists representing the Common law, Civil and Socialist law systems, judged it necessary to make to the draft submitted to the Bucharest Conference so as to overcome the difficulties which had come to light during that Conference and the apparently insuperable character of which risked jeopardizing the success of the whole project.

These amendments, which were first examined by the UNIDROIT Governing Council and then laid before a Committee of Governmental Experts representing some 30 Governments, most of which had taken part in the Bucharest Conference, were deemed to constitute a valid basis for discussion at a further Diplomatic Conference for the adoption of the proposed Convention.

The most important of these amendments relate to the sphere of application of the Convention. It is on these that I propose to

concentrate my attention in this opening address. A glance at the travaux préparatoires of this draft shows what a transformation the definition of its sphere of application has undergone over the successive stages of the work thereon. The first draft, that of 1954, set out mainly to regulate relations between principal and third party, relations between principal and agent being left to one side: in respect of these relations the draft did no more than refer back to the agreements made between the two parties and the rules laid down by the applicable law, except for a few related provisions which covered them incidentally. On the other hand, the uniform rules were applicable to all contracts concluded through an agent and not only to sale contracts. In the second draft, dealing with commission agency, which was limited to commission agency in the sale or purchase of goods, it was not possible to exclude from the uniform rules certain relations between the principal and the commission agent. The reason why this exclusion was not possible in the case of commission agency lay in the fact that there is a "mandat" at the basis of this contract and that, on the other hand, the commission agent's duties vis-à-vis the principal cannot fail to have a bearing on the commission agent's relations with third parties. In the end, the Committee of Governmental Experts, on the basis of the observations submitted by the Governments consulted on the two drafts, altered the direction of the enquiry, pointing it rather towards a broader set of rules based on the principles common to both types of agency, set out in a single draft. It furthermore linked the entire set of rules governing the conclusion of contracts through agents to international sale.

This solution encountered difficulties during the Bucharest Conference, some delegations coming out against including provisions governing the relations between principal and agent in the Convention — these relations being regulated differently according to the type of agency and frequently by rules of a mandatory character — whereas other delegations advocated the inclusion of such provisions in the Convention and, what is more, in even more detailed form.

The small group of experts came down in favour of deleting the chapter dealing with internal relations as well as any other provision of the draft solely concerned with the relations between prin-

principal and agent, while suggesting that the UNIDROIT Secretariat should make a study of these internal relations, although bearing in mind that work on certain types of contract of agency had already reached a quite advanced stage in other international Organisations.

The draft laid before you here is that approved by the Committee of Governmental Experts convened by the Institute in November 1981. In it you will see that those provisions of the original draft solely concerned with internal relations, that is Chapter III, have disappeared completely and that some amendments have had to be made to certain provisions of other chapters so as to harmonise them with the new conception of the draft.

Still on the subject of the sphere of application of the uniform rules, a further limitation was suggested by the small group of experts regarding the notion of "agency" contemplated by the draft Convention. During the Bucharest Conference there was a tendency to broaden the notion of "agency" to the point of covering the activities of any agent, including those whose authority is limited simply to the conducting of negotiations on behalf of the principal. The small group of experts was of the opinion that such a broadening of the sphere of application, along the lines of the 1978 Hague Convention on the law applicable to agency, would have raised problems for the adoption of our draft Convention, because of the considerable differences existing on this score between the domestic law of the different States as well as the distinctions drawn by the domestic law of several States between the different categories of agent. It was accordingly proposed to restrict the sphere of application of the uniform rules to agents who have authority or purport to have authority *to conclude* on behalf of another person a contract for the international sale or purchase of goods with a third party, irrespective of whether the agent acts in his own name or in that of the principal.

Finally, the small group of experts, persuaded that the only chance of finalising a Convention lay in the establishment of a realistic sphere of application, taking account of the needs of international trade which first the 1964 Hague Conventions and then the 1980 Vienna Convention have sought to meet, reached the conclusion that the sphere of application of the draft Convention should be limited to those cases in which one person is authorised

or purports to be authorised to conclude a contract for the international sale or purchase of goods on behalf of another person, the principal, with a third party where the principal and the third party have their places of business in different States. It will therefore be the international character of the sales contract that will supply the international factor necessary for the Convention to apply.

After this brief sketch of the new method of dealing with the problems arising out of the unification of this branch of the law, I should like to conclude this address by expressing the wish that the new text which has emerged from the meetings organised in preparation for this second Conference will attract a large measure of approval from delegations and, once transformed into a Convention, complete, in a manner that is useful, the cycle of instruments on the law of international sale, complementing the uniform rules already adopted on the contract of sale and on the formation of the sales contract.

I should like to close by renewing my thanks to all those who have given such valuable assistance to the work on this subject over a span of almost 45 years, whether in committees of governmental experts or in committees of non-governmental experts, and, in particular, the delegates present here, to whom I extend my best wishes for a successful Conference".

ELECTION OF THE PRESIDENT OF THE CONFERENCE

Mr WIDMER (Switzerland) proposed Mr Grönfors (Sweden) who had successfully held many eminent positions and served on various United Nations bodies.

Mr ROLLAND (Federal Republic of Germany) strongly supported the proposal.

Mr MATTEUCCI (President of UNIDROIT) endorsed the opinion of the previous speaker.

Mr Grönfors was elected President of the Conference by acclamation.

Mr Grönfors took the chair.

The PRESIDENT of the Conference thanked the meeting for its confidence in him.

Item 1 ON THE PROVISIONAL AGENDA: ADOPTION OF THE AGENDA (CONF.6/1)

The provisional agenda was adopted without comment.

Item 2 ON THE AGENDA: ADOPTION OF THE RULES OF PROCEDURE (CONF.6/2 and Add.1)

The PRESIDENT drew attention to document CONF.6/2 and to the amendments proposed by Switzerland in document CONF. 6/2 Add.1.

Mr WIDMER (Switzerland) explained that the purpose of his delegation's amendment was to formalise Mr Bärlocher's position, as Commissary-General.

The PRESIDENT proposed a further amendment to Rule 13 to include a Final Clauses Committee. The words "and the Chairman of the Final Clauses Committee" should be added to the end of the first sentence.

The amendments proposed by Switzerland and by the President were adopted unanimously.

Mr SWART (Netherlands) asked whether the Rules of Procedure should mention the election of a Rapporteur.

The PRESIDENT drew his attention to Rule 50 which did so.

Item 3 ON THE AGENDA: ELECTION OF THE VICE-PRESIDENTS OF THE CONFERENCE (CONF.6/2)

The PRESIDENT suggested that the item should be dealt with

later after consultations had taken place.

It was so agreed.

Item 4 ON THE AGENDA: ELECTION OF THE SECRETARY-GENERAL AND OF THE RAPPORTEUR (CONF.6/2)

The PRESIDENT proposed as Secretary-General Mr Evans who had already given great satisfaction during many years of work for UNIDROIT.

Mr Evans was elected unanimously.

It was decided to postpone the election of the Rapporteur until consultations had taken place.

Item 5 ON THE AGENDA: APPOINTMENT OF THE CREDENTIALS COMMITTEE (CONF.6/2)

The PRESIDENT suggested that the item should be dealt with later after consultations had taken place.

It was so decided.

Item 6 ON THE AGENDA: ORGANISATION OF THE WORK OF THE CONFERENCE, INCLUDING THE ESTABLISHMENT OF COMMITTEES, AS NECESSARY (CONF.6/2)

The PRESIDENT asked the meeting to approve the principle that a Committee of the Whole, dealing with the Convention except for the Final Clauses, a Committee on the Final Clauses and a Drafting Committee would be required, but to leave the details until later.

It was so decided.

Item 7 ON THE AGENDA: ELECTION OF THE CHAIRMEN OF THE COMMITTEE OF THE WHOLE AND OF THE DRAFTING COMMITTEE (CONF.6/2)

Election of the Chairman of the Committee of the Whole

Mr PLANTARD (France) proposed Mr Widmer (Switzerland), who had long experience of legislative techniques and working with UNIDROIT, as Chairman of the Committee of the Whole.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) and Ms RUESTA DE FURTER (Venezuela) supported the proposal.

Mr Widmer was unanimously elected Chairman of the Committee of the Whole.

The PRESIDENT pointed out that the Chairman of the Drafting Committee could be elected only after the composition of that committee had been decided.

It was so agreed.

The meeting rose at 11.15 a.m.

2nd plenary meeting

Wednesday, 2 February 1983 at 3.15 p.m.

President: Mr GRÖNFORS (Sweden)

CONF.6/S.R.2

Item 3 ON THE AGENDA: ELECTION OF THE VICE-PRESIDENTS OF THE CONFERENCE (CONF.6/2)

The PRESIDENT invited nominations for the posts of Vice-Presidents.

Mr MUCHUI (Kenya) proposed Mr Bonell (Italy), Mr Fajardo-Maldonado (Guatemala), Mr Kimbembé (People's Republic of the Congo), Mr Koschevnikov (USSR) and Mr Liu (China).

Mr LOW (Canada) seconded those nominations.

The delegates in question were elected unanimously.

Item 6 ON THE AGENDA: ORGANISATION OF THE WORK OF THE CONFERENCE, INCLUDING THE ESTABLISHMENT OF COMMITTEES, AS NECESSARY (CONF.6/2)

Nomination of the Drafting Committee

The PRESIDENT said that, after consultations, he had been invited to suggest the composition of the Drafting Committee, taking due account of geographic and language areas. He suggested, therefore, that it should be composed of representatives of the following States: Austria, Chile, Congo, Czechoslovakia, France, Ghana, Japan, the Netherlands, Norway, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America.

It was so decided.

Item 7 ON THE AGENDA: ELECTION OF THE CHAIRMEN OF THE COMMITTEE OF THE WHOLE AND OF THE DRAFTING COMMITTEE (CONF.6/2)

Election of the Chairman of the Drafting Committee

The PRESIDENT invited nominations for the post of Chairman of the Drafting Committee.

Mr DUCHEK (Austria) proposed Mr Farnsworth of the United States delegation.

Mr KARSTEN (United Kingdom) seconded the proposal.

Mr Farnsworth was unanimously elected.

The PRESIDENT said that the composition of the Credentials Committee would be decided after consultations with delegations.

The meeting rose at 3.45 p.m.

3rd plenary meeting

Thursday, 3 February 1983 at 3 p.m.

President: Mr GRÖNFORS (Sweden)

CONF.6/S.R.3

Item 5 ON THE AGENDA: APPOINTMENT OF THE CREDENTIALS COMMITTEE (CONF.6/2)

The PRESIDENT announced that, after consultations, representatives of the following States had been proposed to serve on the Credentials Committee: Angola, Bulgaria, Japan, Switzerland and the United States of America. In the absence of objections, he would take it that it was the wish of the Conference to appoint them.

It was so agreed.

The PRESIDENT recalled that according to the Rules of Procedure the Credentials Committee would appoint its own chairman.

The meeting rose at 3.15 p.m.

4th plenary meeting

Tuesday, 8 February 1983 at 9.30 a.m.

President: Mr GRÖNFORS (Sweden)

CONF.6/S.R.4

Item 6 ON THE AGENDA: ORGANISATION OF THE WORK OF THE CONFERENCE, INCLUDING THE ESTABLISHMENT OF COMMITTEES, AS NECESSARY (CONF.6/2)

The PRESIDENT announced that the Secretariat had not prepared a draft preamble because it had wished to have proposals from States. He therefore suggested that the matter should be immediately referred to the Final Clauses Committee so that a draft text could be submitted for discussion in plenary.

It was so decided.

The meeting rose at 9.35 a.m.

5th plenary meeting

Monday, 14 February 1983 at 11.15 a.m.

President: Mr GRÖNFORS (Sweden)

CONF.6/S.R.5

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (CONF. 6/C.1/Doc.1 and CONF.6/C.2/Doc.1)

The PRESIDENT expressed his gratitude to the committees and in particular to their Chairmen for the valuable work done in preparing the documents before the Conference. He explained the

procedure for adoption of the Final Act and emphasized that observers did not have the right to vote.

Preamble

The Preamble was adopted by 31 votes to none with 4 abstentions.

Article 1

The PRESIDENT drew attention to the amendment to paragraph (1) contained in the joint proposal by the delegations of Czechoslovakia, Finland, the Netherlands, Norway, Sweden, Turkey and the United States of America (CONF.6/W.P.2).

Mr SEVON (Finland) pointed out that the words "of goods" had dropped out after the words "a contract of sale" in the penultimate line of the English text. He explained that the purpose of the amendment was to underline the fact that the agent acted on behalf of another person.

Mr BONELLI (Italy) was strongly in favour of the text proposed by the Committee of the Whole. In his view if the joint proposal were adopted it would be difficult to relate paragraph (1) to paragraph (2).

The result of the vote was 19 votes in favour and 10 against with 8 abstentions.

The amendment (CONF.6/W.P.2), having failed to obtain the required two-thirds majority, was not adopted.

Paragraph (1) was adopted without change by 34 votes to 2 with 1 abstention.

Paragraph (2) was adopted by 37 votes to none.

Paragraph (3) was adopted by 38 votes to none.

Paragraph (4) was adopted by 37 votes to none.

Article 1 as a whole was adopted by 38 votes to none.

Article 2

Paragraph (1) was adopted by 37 votes to none.

Paragraph (2) was adopted by 36 votes to 1 with 2 abstentions.

Paragraph (3) was adopted by 38 votes to none.

Article 2 as a whole was adopted by 37 votes to none.

Article 3

Mr KARSTEN (United Kingdom), referring to paragraph (1) (h), said that for the sake of uniformity with the French text the English text should be amended to read "the agency of a person conducting an auction."

The PRESIDENT noted that there was no support for the proposal.

Paragraph (1) was adopted without change by 38 votes to none.

Paragraph (2) was adopted by 37 votes to none with 2 abstentions.

Article 3 as a whole was adopted by 38 votes to none.

Article 4

Mr ARTIGAS (Spain) observed that the French text of Article 4 (b) referred to "bénéficiaire", in the singular, while the English text referred to "beneficiaries", in the plural.

The PRESIDENT said that the wording in both languages had

been modelled on the relevant provision of the Hague Convention on agency.

Mr KARSTEN (United Kingdom) drew attention to the underlining of the words "trustee" and "trust" in the Hague Convention.

Article 4 was adopted by 39 votes to none.

Article 5

Mr PLANTARD (France), referring to the French text of the proposed article, said that it had been agreed in the Committee of the Whole to add "de" and "d'", so that the final part of the sentence should read: "... de déroger à l'une quelconque de ses dispositions ou d'en modifier l'effet". Referring to the Australian proposal for an amended Article 5 (CONF.6/W.P.1), which his delegation supported, the French text should have three commas deleted, the words "décider en accord" replaced by "convenir", and the final words "les effets" by "l'effet", so that the text would read: "Le représenté ou un intermédiaire agissant conformément aux instructions expresses ou implicites du représenté peut convenir avec le tiers d'exclure l'application de la présente Convention ou de déroger à l'une quelconque de ses dispositions ou d'en modifier l'effet."

Mr BENNETT (Australia), presenting his delegation's proposal, said that it had been submitted in the light of the discussion in the Committee of the Whole in the context of Article 15 (7). There could be no doubt as to the importance of Article 5. There would be occasions in practice when businessmen might wish to vary or even exclude the effect of the Convention for the purpose of specific transactions. Experience in his country had shown that the acceptability of the Vienna Convention to businessmen, and consequently to government, was to a large extent dependent on the acceptability of the provision enabling parties to vary or exclude. Since the purpose of the present Convention was to govern agency, more particularly relationships between principals using agents and third parties with whom the agents had dealings, Article 5 must be

drafted in such a way that it provided for variation or derogation agreements at the time of negotiation of business transactions by agents and third parties – the principal was not normally in direct contact with the third party, his personal participation in such an agreement not being required. Where a principal was prepared to appoint a person as agent, he would normally also be prepared to permit the agent to deal with variation or derogation, in accordance with any instructions which the principal might see fit to give.

The original text of Article 5 had introduced the notion that if a variation or derogation agreement was agreed to by only two of the three parties, the remaining party would not be bound by it. This notion would have prevented a third party from being bound by an agreement between the principal and the agent and, to that extent, was unobjectionable. However, it would also have prevented a principal becoming bound to an arrangement between the agent and the third party, a situation which had not been altered by the text as proposed by the Committee of the Whole because of the words “as between themselves”. The Australian proposal was designed to remove that problem and to make Article 5 a provision which would work in practice because it recognised that a third party must always be party to any agreement affecting the relationship between the principal and the third party. At the same time it would allow a principal's rights to be affected either by the principal himself or by his agent acting under his instructions.

Mr CUKER (Czechoslovakia) proposed deleting the words “acting in accordance with the express or implied instructions of the principal” in the Australian proposal.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) said that his delegation could not accept the Australian proposal for Article 5 without any reference to Article 11.

Mr BENNETT (Australia) said that the omission from the written proposal of reference to Article 11 had been inadvertent and that the words “subject to Article 11” should be included in the text of the proposal.

Mr SWART (Netherlands), referring to the oral proposal made by the delegation of Czechoslovakia, said that it went against the text adopted by Committee of the Whole, against the original text and against the proposal made by Australia (CONF.6/W.P.1). It would also entail the necessity of inserting the old paragraph (2). Consequently, he was very much against the oral proposal.

The oral proposal of the delegation of Czechoslovakia was rejected by 21 votes to 8 with 9 abstentions.

Mr BONELL (Italy) would prefer the words "subject to Article 11" to be placed between "or" and "derogate" as they were in the Report of the Committee of the Whole to the Conference (CONF. 6/C.1/Doc.1).

Mr BENNETT (Australia) had no objection to that suggestion.

Mr SWART (Netherlands) pointed out that obviously the inclusion of any such reference to a later article would be dependent on the later article being adopted.

The proposal by the delegation of Australia (CONF.6/W.P.1) for a new Article 5 was adopted as amended by 20 votes to 8 with 12 abstentions.

Article 6

Paragraph (1) was adopted by 38 votes to none with 1 abstention.

Paragraph (2) was adopted by 36 votes to 1 with 2 abstentions.

Article 6 as a whole was adopted by 39 votes to none with 1 abstention.

Article 7

Paragraph (1) was adopted by 35 votes to none with 4 abstentions.

lions.

Paragraph (2) was adopted by 32 votes to none with 7 abstentions.

Article 7 as a whole was adopted by 34 votes to none with 5 abstentions.

Article 8

Article 8 as a whole was adopted by 38 votes to none.

Article 9

The PRESIDENT drew attention to the proposal made by the delegation of Bulgaria to delete the words "or implied" in paragraph (1) (CONF.6/W.P.6).

In reply to a question from the PRESIDENT, Mr GUEORGUIEV (Bulgaria) said that the intention of the proposal was to make the paragraph read "... the principal must be express".

The amendment had the support of a number of delegations.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) concurred with the previous speaker. For reasons already discussed during the Conference, the significance of "implied" was not clear. He supported the proposal.

Mr SWART (Netherlands) said that the Convention would lose most of its value if the word "implied" were deleted in the present paragraph.

The proposal by the delegation of Bulgaria (CONF.6/W.P.6) was rejected by 30 votes to 9.

Paragraph (1) was adopted without change by 28 votes to 7 with 2 abstentions.

Paragraph (2) was adopted by 37 votes to 1 with 1 abstention.

Article 9 as a whole was adopted by 30 votes to 6 with 3 abstentions.

Article 10

Article 10 was adopted by 30 votes to 9.

The meeting rose at 1 p.m.

6th plenary meeting

Monday, 14 February 1983 at 3.30 p.m.

President: Mr GRÖNFORS (Sweden)

CONF.6/S.R.6

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (CONF. 6/C.1/Doc.1)

Title of the Convention and titles of Chapters I-III

The PRESIDENT said that, for technical reasons connected with the reproduction of the final text, the Secretariat of the Conference had requested that the titles should be confirmed before proceeding to consideration of Article 11.

The title of the Convention (CONF.6/C.1/Doc.1, page 2) was adopted by 32 votes to none with 2 abstentions.

Mr KARSTEN (United Kingdom) suggested that, in the English title of Chapter I, the word "sphere" should be changed to "scope".

Mr PLANTARD (France) noted that the French title of the cor-

responding chapter of the Vienna Sales Convention read "Champ d'application . . ." and not "Domaine d'application . . ." as in the text before the Conference.

The PRESIDENT noted that the corresponding English title in that Convention read "Sphere of application . . .". He suggested that the Conference should follow the style of the Vienna Convention in the two languages.

The President's suggestion for the title of Chapter I in the two languages was adopted by 32 votes to none with 6 abstentions.

The title of the Chapter II (CONF.6/C.1/Doc.1, page 4) was adopted by 39 votes to none.

The title of Chapter III (CONF.6/C.1/Doc.1, page 5) was adopted by 38 votes to none.

Mr BONELLI (Italy) suggested that the title of Chapter IV should be adopted after consideration of the articles in that chapter.

It was so agreed.

Article 11

Paragraph (1) was adopted by 33 votes to 2 with 1 abstention.

The PRESIDENT noted that the Romanian delegation had proposed the replacement of paragraph (2) by the text appearing in CONF.6/W.P.8.

Mr SEVON (Finland) was of the opinion that the Romanian proposal really consisted of two proposals – rejection of the text of paragraph (2) presented by the Committee of the Whole and adoption of that presented by the Romanian delegation. He suggested that the voting should take place in that order.

Mr SWART (Netherlands) considered the Romanian proposal a single proposal which, being an amendment, should be voted on first.

Mr ARON (Romania) supported by Mr JOVANOVIĆ (Yugoslavia) agreed with the procedure suggested by the representative of Finland.

The PRESIDENT noted that the Conference would vote first on paragraph (2) as it appeared in CONF.6/C.1/Doc. I.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics), speaking in explanation of vote, said that his delegation would have to vote against the paragraph since it conflicted with certain articles of his country's civil legislation. He appealed for understanding on the part of his colleagues and said that the retention of paragraph (2) in the Convention would render his country's participation problematical.

Paragraph (2) was rejected by 17 votes to 11 with 12 abstentions.

At the invitation of the PRESIDENT, Mr ARON (Romania) introduced the text of paragraph (2) proposed by his delegation and drew attention to the reasons given in its working paper.

Mr SWART (Netherlands) opposed the Romanian proposal. Now that the Conference had voted down the text presented by the Committee of the Whole, it was all the more necessary not to include a reservation clause in respect of Article 9, which was perhaps the key provision of the Convention.

The text proposed for paragraph (2) by Romania was rejected by 21 votes to 12 with 6 abstentions.

The PRESIDENT observed that as Article 11 now consisted of a single paragraph, the paragraph number "(1)" should be deleted.

Article 11, as amended, was adopted by 33 votes to 3 with 3 abstentions.

Article 12

Article 12 was adopted by 39 votes to none with 1 abstention

Article 13

Paragraph (1) was adopted by 39 votes to none with 1 abstention.

Mr PLANTARD (France) suggested that in the French text of paragraph (2) (a) it would be better to use the present tense throughout and to say "parce que le tiers n'exécute pas les siennes". That would be in harmony with the style of the similar clause in paragraph (4).

It was so agreed.

Paragraph (2), as modified in the French text, was adopted by 33 votes to 4 with 2 abstentions.

Paragraph (3) was adopted by 36 votes to none with 3 abstentions.

Paragraph (4) was adopted by 32 votes to 2 with 7 abstentions.

Paragraph (5) was adopted by 37 votes to none with 3 abstentions.

Paragraph (6) was adopted by 36 votes to 3 with 2 abstentions.

Paragraph (7) was adopted by 36 votes to 2 with 1 abstention.

Article 13 as a whole was adopted by 33 votes to 3 with 4 abstentions.

Article 14

Paragraph (1) was adopted by 36 votes to none.

Paragraph (2) was adopted by 37 votes to 1 with 2 abstentions.

Article 14 as a whole was adopted by 36 votes to none with 3 abstentions.

Article 15

Paragraph (1) was adopted by 35 votes to none with 2 abstentions.

Paragraph (2) was adopted by 40 votes to none.

Mr GRETTON (United Kingdom) saw no need for paragraph (3) and proposed its deletion. Where all three parties knew of the lack of authority, no contract existed. The case remained at the stage of negotiation and fell outside the purview of the Convention.

Mr SWART (Netherlands) said that while his delegation held no strong views on the proposal, it preferred retaining the paragraph since it would offer some guidance.

Paragraph (3) was adopted without change by 29 votes to 5 with 6 abstentions.

Paragraph (4) was adopted by 39 votes to 1.

Paragraph (5) was adopted by 40 votes to none.

Paragraph (6) was adopted by 39 votes to 1.

Paragraph (7) was adopted by 40 votes to none.

Paragraph (8) was adopted by 31 votes to 7.

Article 15 as a whole was adopted by 35 votes to none with 5 abstentions.

Article 16

Paragraph (1) was adopted by 37 votes to 3.

Paragraph (2) was adopted by 38 votes to none with 1 abstention.

Article 16 as a whole was adopted by 37 votes to none with 2 abstentions.

The meeting was suspended at 4.50 p.m. and resumed at 5.10 p.m.

Article 17

Mr MOULY (France) proposed that Article 17 be deleted, since it only tended to create uncertainty.

Mr POSWICK (Belgium) said that he supported that proposal.

Mr BONELL (Italy) said that his delegation was in favour of Article 17 as it stood.

Mr JOVANOVIĆ (Yugoslavia) said he could support Article 17 with the exception of sub-paragraph (c), which in his opinion ran against the spirit of the Convention.

Mr SWART (Netherlands) favoured the deletion of sub-paragraph (c), since that provision would create difficulties for countries like his own which recognised an irrevocable power of attorney.

The PRESIDENT suggested that the Conference should first vote on Article 17 as it stood, and afterwards on the possible deletion of sub-paragraph (c).

Article 17 was adopted by 25 votes to 8 with 4 abstentions.

The PRESIDENT invited the Conference to vote on the Netherlands proposal to delete sub-paragraph (c) of Article 17.

The proposal to delete sub-paragraph (c) was rejected by 22 votes to 8 with 6 abstentions.

Article 17, as a whole, was adopted by 29 votes to 3 with 3 abstentions.

Article 18

Article 18 was adopted by 37 votes to none.

Article 19

Mr KARSTEN (United Kingdom) suggested, as a matter of drafting, that Article 19 should open with the phrase "Subject to Article 20, . . ." to draw attention to a limitation on its application.

Mr SWART (Netherlands) said that it was clear from the concluding words of Article 20 that it constituted an exception to Article 19. The United Kingdom suggestion was unnecessary.

Mr KARSTEN (United Kingdom) withdrew his proposal.

Article 19 was adopted by 35 votes to 1 with 2 abstentions.

Article 20

The PRESIDENT invited the Mongolian representative to introduce his amendment to Article 21.

Mr DASHDONDOG (Mongolia) said that the essence of his delegation's proposal (CONF.6/C.1/W.P.40) was to define more clearly the time when the agent was deemed to have received notice of termination of authority. For that purpose, the proposal was that such notice should be given in writing.

Mr SWART (Netherlands) considered the amendment unnecessary. In order to accommodate States which had problems regarding the form of the notice, the Conference had already adopted Article 11.

Mr GRETTON (United Kingdom) said that his delegation would prefer Article 20 to be deleted altogether. It constituted a rather arbitrary exception to Article 19; its application was uncertain and it was likely to be interpreted differently in different courts. If the article stood, he supported the Mongolian amendment to the effect that the agent must produce evidence in writing.

Mr ANTONETTI (France) supported the proposal to delete the article, which was likely to be a source of confusion.

Mr STÖCKER (Federal Republic of Germany) supported the retention of Article 20 as constituting a necessary restriction on Article 19.

The PRESIDENT ruled that the Mongolian amendment should be voted upon first.

The Mongolian amendment (CONF.6/C.1/W.P.40) was rejected by 21 votes to 12 with 6 abstentions.

The PRESIDENT put to the vote Article 20. The result of the vote was as follows:

20 votes in favour and 15 against with 4 abstentions.

Article 20, having failed to obtain the necessary two-thirds majority, was not adopted.

Article 21

Article 21 was adopted by 34 votes to 2 with 2 abstentions.

Title of Chapter IV

The title of Chapter IV (CONF.6/C.1/Doc.1, page 7) was adopted by 39 votes to 1.

Proposed Article 22 bis

Mr CUKER (Czechoslovakia) drew attention to the following mistakes in the joint proposal by his delegation and that of Norway (CONF.6/W.P.7):

The first line should read: "Add a new article 22bis".

The end of the fourth line should read: "provided that the principal and the third party . . ."

The meeting rose at 5.50 p.m.

7th plenary meeting

Monday, 15 February 1983 at 9.30 a.m.

President: Mr GRÖNFORS (Sweden)

CONF.6/S.R.7

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (CONF. 6/C.2/Doc.1)

Chapter V – Final Provisions

The PRESIDENT invited the Conference to consider the final provisions of the Convention (CONF.6/C.2/Doc.1). He reminded delegations that renumbering of articles would be carried out by the Secretariat wherever appropriate. He drew attention to three minor drafting amendments to the French text of the document, as proposed by the French delegation: (i) that "domaine d'appli-

cation" should become "champ d'application" in Article 30, paragraph (1), in conformity with other parts of the text; (ii) that the word "délai" should become "période" in Article 31, paragraph (3), line 4, also in conformity with other parts of the text, and (iii) that the words "par le dépositaire" should be added after the last word of Article 35, paragraph (2). He took it that, in the absence of any objection, those minor amendments were agreeable to the Conference.

It was so agreed.

The PRESIDENT invited the Conference to vote on the title of Chapter V (CONF.6/C.2/Doc.1, page 3).

The title was adopted by 30 votes to none.

Article 22

Article 22 was adopted by 30 votes to none with 1 abstention.

Proposed Article 22 bis

Mr CLER (Czechoslovakia), introducing the joint Czechoslovak/Norwegian proposal to introduce a new Article 22 bis (originally referred to as new Article 25 bis in CONF.6/W.P.7), said that the proposed article was identical with Article 90 of the Vienna Sales Convention, except for changes in accordance with the present wording of Articles 5, 7 and 26 of the Convention before the Conference. The main purpose of the proposal was to allow for regional unification, where that might not be covered by the provision for declarations under Article 26 and to facilitate ratification for some States by making Article 32 more acceptable.

Mr DUCHEK (Austria) said that the proposed article as currently worded might have the unwanted effect of introducing into the Hague Convention on the law applicable to agency an escape clause to the present Convention, and in the present Convention an escape clause to the Hague Convention. He therefore suggested, in order to

accommodate the wish expressed in the proposal not to have an escape clause for conflicts of law but a provision taking into account States which had made agreements among themselves, that the new article might include the word "substantive" in the second line, to read "... which contains substantive provisions...".

Mr CUKER (Czechoslovakia) confirmed that such an amendment to the proposal would be acceptable.

Mr PFUND (United States of America) suggested that "provisions of substantive law" might be clearer than "substantive provisions".

Mr PLANTARD (France) said that the French version of the previous speaker's suggested wording might be "dispositions de droit matériel".

The new Article 22 bis, as amended orally, was adopted by 21 votes to none with 13 abstentions.

Article 23

Mr SWART (Netherlands), supported by Mr POSWICK (Belgium), proposed that the period for signature, established in Article 23 (1), should be extended until 31 December 1984.

Mr BONELL (Italy) suggested that a compromise date might be 30 June 1984. Should, however, that date not be acceptable, he would support the extension until 31 December 1984.

The proposal for extension until 31 December 1984 was adopted by 17 votes to none with 17 abstentions.

Paragraph (1), as amended, was adopted by 34 votes to none with 2 abstentions.

Paragraph (2) was adopted by 36 votes to none with 1 abstention.

Paragraph (3) was adopted by 36 votes to none with 1 abstention.

Paragraph (4) was adopted by 36 votes to none with 1 abstention.

Article 23 as a whole was adopted as amended by 36 votes to none with 1 abstention.

Article 24

Paragraph (1) was adopted by 36 votes to 1.

Paragraph (2) was adopted by 36 votes to none with 1 abstention.

Paragraph (3) was adopted by 37 votes to none with 1 abstention.

Paragraph (4) was adopted by 37 votes to none with 1 abstention.

Article 24 as a whole was adopted by 36 votes to none with 1 abstention.

Article 25

Article 25 was adopted by 36 votes to none with 2 abstentions.

Article 26

Paragraph (1) was adopted by 38 votes to none.

Paragraph (2) was adopted by 37 votes to none with 1 abstention.

Paragraph (3) was adopted by 37 votes to none with 1 abstention.

Article 26 as a whole was adopted by 37 votes to none.

Article 27

Article 27 was adopted by 34 votes to 2 with 2 abstentions.

Article 28

Article 28 was adopted by 34 votes to 2, with 1 abstention.

Article 29

Mr PLANTARD (France), introducing his delegation's proposal (CONF.6/W.P.10), said that it was intended to remove ambiguity in Article 29 but not to make any substantive change. It had become apparent in discussions that the article as it currently stood was being interpreted in two different ways. For his and other delegations, "A Contracting State the foreign trade of which is carried on by specially authorised organisations" referred only to those States where all foreign trade was carried on by specially authorised organisations, mainly the Socialist States, whereas other delegations took the phrase also to include States where for certain branches of the economy — cereals or steel, for example — there was a State monopoly.

Ms MEDINA (Angola) said that the issue raised by the French delegation was not a matter of procedure but a question of substance. The application of Article 29 should extend to both States with a socialist economy and States with a mixed economy. The amendment proposed by the French delegation would entail too great a restriction of the application of Article 29 and she therefore supported the text as it stood.

Mr WIDMER (Switzerland) agreed with the previous speaker that the matter raised was one of substance. Where a reservation such as was provided for in Article 29 applied to States with a centralised economy, it should also apply to States operating a monopoly in only some branches of the economy.

Mr JOVANOVIĆ (Yugoslavia) said that he could not accept the French proposal because he could see no reason for the article to apply only to those States with a complete monopoly in all branches. The text as it stood would facilitate ratification of the Convention by those States whose economic system was currently in a transitional phase.

Mr BONELL (Italy) said that he could not agree entirely with either point of view expressed. The real question was not so much whether the article referred to States where all foreign trade was carried out by specially authorised organisations but that the States concerned were those with one or more specially authorised organisations carrying out branches of foreign trade with an exclusive regime. Where a State, even without organising its entire foreign trade through a monopolistic organisation, had a certain trade monopoly, it should be entitled to avail itself of the reservation. He suggested that wording to the effect that the organisations in question should be operating as monopolies might be added to Article 29.

The proposal made by the delegation of France (CONF.6/W.P.10) was rejected by 18 votes to 6 with 14 abstentions.

Mr BENNETT (Australia) proposed that Article 29 should be amended to read as follows: "A Contracting State, the whole or specific parts of the foreign trade of which are carried on exclusively by specially authorised organisations, may at any time . . .".

Ms MEDINA (Angola) concurred. That wording was consonant with her interpretation of the article.

Mr WIDMER (Switzerland) suggested that the French version should read as follows: "Tout Etat contractant dont le commerce extérieur, dans son ensemble ou dans des domaines particuliers, est effectué exclusivement par des organisations spécialement autorisées peut à tout moment . . .".

It was so agreed.

The amendment was adopted by 31 votes to 5 with 1 abstention.

Article 29 was adopted as amended by 33 votes to 1 with 5 abstentions.

Mr SWART (Netherlands), speaking in explanation of vote, said that he had abstained since the article was superfluous. It was limited to cases where the organisation concerned acted as buyer or seller and could not therefore be regarded as an agent for the purpose of the present Convention.

Article 30

The PRESIDENT drew attention to the proposal by the delegation of the United Kingdom (CONF.6/W.P.9).

Mr KARSTEN (United Kingdom) explained that the proposal was intended to cover cases which, in the United Kingdom, fell within the concept of agency but which were not covered by the text adopted for Article 1 of the Convention. Clearly his country would prefer the Convention to cover all cases of agency, rather than being forced to apply private international law to some cases. Otherwise, it might find difficulty in ratifying the Convention. The proposed wording could be added to Article 30 or, with the addition of the words "A Contracting State may at the time of accession declare that it will apply the provisions of this Convention to . . ." before the text of paragraph (c) in his proposed draft, form a separate article.

The PRESIDENT suggested the addition of the words "signature, ratification, acceptance, approval or" before "accession" in the United Kingdom proposal read out by the member of that delegation and asked him to decide whether he wished to propose it as an addition to Article 30 or as a new article.

Mr KARSTEN (United Kingdom) agreed with the additional wording and said that if his proposal were adopted he would like

a new article to be inserted before Article 30.

Mr PLANTARD (France) questioned the need for a new article on the lines proposed by the United Kingdom. Surely those preoccupations were covered by Article 30 (1).

Mr KARSTEN (United Kingdom) replied that his delegation had made its proposal because it could not support Article 30 as the scope was too wide.

Mr SWART (Netherlands) pointed out that the adoption of the new article proposed would raise difficult problems concerning the relation between Article 29 and Article 30 as it would in effect be an example of the cases contained in Article 30 (1); that paragraph covered the question adequately.

The proposal by the delegation of the United Kingdom (CONF. 6/W.P.9) as amended was rejected by 21 votes to 1 with 16 abstentions.

Paragraph (1) was adopted by 26 votes to 6 with 4 abstentions.

Paragraph (2) was adopted by 25 votes to 6 with 7 abstentions.

Article 30 as a whole was adopted by 26 votes to 7 with 5 abstentions.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics), in explanation of vote, said that he had voted against the article because it was very unclear and its scope was too wide. In addition, paragraph (1) stated that the provisions and not the Convention as a whole would be applied.

Article 31

Paragraph (1) was adopted by 35 votes to none.

Paragraph (2) was adopted by 36 votes to none.

Paragraph (3) was adopted by 34 votes to none.

Paragraph (4) was adopted by 35 votes to none with 1 abstention.

Paragraph (5) was adopted by 35 votes to none with 1 abstention.

Article 31 as a whole was adopted by 36 votes to none.

Article 32

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) said that since a number of delegations wished to enter reservations concerning Article 30, the provisions of Article 32 could not be applied so that the article should be deleted.

Mr WIDMER (Switzerland) did not think that the concern expressed by the USSR delegation was justified because even if Article 30 had not been adopted Contracting States would have been free to apply the Convention in other spheres. In his view, Article 32 was only intended to exclude reservations to the substantive articles, essentially the first four chapters.

Mr JOVANOVIĆ (Yugoslavia) intended to vote against Article 32 which was too restrictive. Although he hoped that States would not make excessive use of reservations, in order to allow them time to adapt they should be able to enter reservations on specific articles.

Ms MEDINA (Angola) said that since the Convention provided that States could derogate from certain articles, they should have the possibility to enter reservations.

Article 32 was adopted by 25 votes to 8 with 6 abstentions.

Article 33

Mr DUCHEK (Austria) introduced the amendment to this arti-

cle proposed by the delegations of Austria, Czechoslovakia, Finland, Switzerland and the United States of America and contained in CONF.6/W.P.5. If it were necessary to await the tenth instrument of ratification the Convention might never enter into force. However, if it entered into force after the fifth instrument of ratification had been deposited, other States would be encouraged to implement ratification. While it was true that the Vienna Convention stipulated ten instruments of ratification, it should not constitute a binding precedent and the fact that it had replaced two other conventions perhaps justified the higher number of ratifications required.

Mr SWART (Netherlands) proposed that the requisite number of instruments be reduced to three. Since many States were reluctant to ratify a Convention that had not yet entered into force he was in favour of the earliest possible entry into force.

Mr JOVANOVIĆ (Yugoslavia) emphasized that it was the content that encouraged States to ratify a Convention. If only three instruments were required the Convention would resemble a bilateral rather than an international agreement.

The PRESIDENT proposed that a vote should be taken on the oral proposal made by the delegation of the Netherlands.

The oral proposal made by the delegation of the Netherlands was rejected by 26 votes to 4 with 7 abstentions.

The PRESIDENT asked the Conference to vote on the amendment proposed by Austria, Czechoslovakia, Finland, Switzerland and the United States of America.

The result of the vote was 21 votes in favour and 13 against with 5 abstentions.

The amendment contained in CONF.6/W.P.5 having failed to obtain the required two-thirds majority, it was not adopted.

Paragraph (1) was adopted without change by 32 votes to 3 with 3 abstentions.

Paragraph (2) was adopted by 36 votes to 1 with 2 abstentions.

Article 33 as a whole was adopted by 35 votes to 1 with 2 abstentions.

Mr BONELL (Italy) explained that he had voted against the text proposed by the Final Clauses Committee because, as the delegate of Yugoslavia had rightly pointed out, the content was important and it was precisely for that reason that he wished to see the Convention enter into force as soon as possible.

Article 34

Article 34 as a whole was adopted by 38 votes to none with 1 abstention.

Article 35

Paragraph (1) was adopted by 39 votes to none.

Paragraph (2) was adopted by 39 votes to none.

Article 35 as a whole was adopted by 39 votes to none.

Concluding paragraphs

The concluding paragraphs were adopted by 39 votes to none.

The meeting rose at 12.05 p.m.

8th plenary meeting

Thursday, 15 February 1983 at 3 p.m.

President: Mr GRÖNFORS (Sweden)

CONF.6/S.R.8

Item 5 ON THE AGENDA: APPOINTMENT OF THE CREDENTIALS COMMITTEE

Report of the Credentials Committee (CONF.6/5)

The PRESIDENT drew attention to the report of the Credentials Committee (CONF.6/5) which stated that the Committee had found the credentials of the delegations listed therein to be in due and proper form, in accordance with Rule 3 of the Rules of Procedure. The Committee had proposed that the Conference take note of its report.

Mr JOVANOVIĆ (Yugoslavia) supported the observations of the Angolan representative recorded in the report.

Mr MUCHIUI (Kenya) said he had difficulty with the Committee's proposal that the Conference should take note of its report. According to Rule 5 of the Rules of Procedure, representatives participated only provisionally, pending a decision of the Conference on their credentials. He inquired whether the Conference should not be called upon to take such a decision in respect of the objection raised by the Angolan representative, supported by the Bulgarian representative, to the credentials of one delegation.

Mr McCARTHY (Ghana) said his delegation wished to associate itself with the views expressed by the representative of Angola at the meeting of the Credentials Committee. He *disagreed* with the Chairman and the majority of the members of the Credentials Committee in their view that the subject-matter of the Conference was purely legal and as such politics should not be introduced into it.

His delegation's view was that politics and law were closely related to the extent that political activity in most countries derived its legitimacy from the supreme law of the country, the Constitution. The mandate of nearly all delegations to the Conference was political and the views of delegations could not help taking a political colouration. Nearly all delegations to the Conference represented States which were members of the United Nations General Assembly which suspended South Africa's membership of that Assembly because of South Africa's apartheid policy which the UN had condemned as a crime against mankind. Member states of the UN, to avoid being accused of inconsistency and hypocrisy, must expel South Africa from all international Conferences in which they participate and to which South Africa sends delegations. The Credentials Committee erred in inviting the Conference simply to take note of its recommendations. In view of the lack of unanimity within the Committee, the proper recommendation should have been an invitation to the Conference to take a decision on South Africa's participation by vote. His delegation would support such a recommendation.

The PRESIDENT said that the Conference had before it the proposal of the Credentials Committee. It was open to all delegations to make such statements as they wished, which would be fully reflected in the report.

Mr MUCHUI (Kenya) regretted that the Conference had received the Committee's report at such a late stage in the proceedings. Rule 3 of the Rules of Procedure stated that credentials should be transmitted to the Secretary-General of the Conference within 24 hours of its opening and Rule 4 stated that the Credentials Committee, appointed at the beginning of the Conference, should report to it without delay. In any case, however, the Committee had no authority in respect of any formal objections raised during its deliberations. It was the responsibility of the Conference to decide such issues by voting.

The PRESIDENT said that the delay, although regrettable, was by no means unusual, since in practice the 24 hour rule for the

transmission of credentials could rarely be observed. He pointed out that he had as yet made no ruling, but the first step must be for the Conference to consider the proposal of the Credentials Committee.

Ms MEDINA (Angola) said it was regrettable that the Conference had not been in a position to consider the report of the Credentials Committee before it got down to discussing the draft Convention. The Rules of Procedure did not clearly define the competence of the Credentials Committee, but it was for the Conference to take the decision on substantive issues. The problem was not a new one and she hoped that all delegations would follow the lead given by the United Nations and by Conferences such as the Vienna Law Conferences.

Mr HALFAOUI (Morocco) stated that his delegation would like to associate itself with the observations expressed by the delegations that had spoken before.

His delegation believed that the participation of South Africa at this Conference was not acceptable as it was a country that had always scorned the international community by persisting in its policy of apartheid, repression and flagrant violations of human rights.

The racist policies of South Africa had, he continued, to incite the Conference to adopt a position analogous to that of the United Nations and other international Organisations, namely to refuse to allow South Africa to participate in the work of the Conference.

Mr HAFEZ (Egypt) supported the Angolan representative. The matter should be put to the vote.

Mr RABEARIVelo (Observer for Madagascar), associating himself with previous speakers, said that his country would always share the views of the African countries on that painful subject.

Mr ALBAKREY (Iraq) fully endorsed the observations of the Kenyan representative. The fact that the work of the Conference was legal and technical in nature did not mean that the issue raised by the Angolan representative was irrelevant to it. The Credentials

Committee had been appointed to examine credentials and make recommendations to the Conference, not for information only, but to enable it to take a decision — which it should now proceed to do. The South African regime was abhorrent by its nature, its conduct and its lack of validity to represent its people.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) supported the Angolan representative's proposal. The fact that his delegation shared the views of previous speakers was reflected in the report of the Credentials Committee in the statement by the Bulgarian representative on behalf of the Socialist countries attending the Conference.

Mr POPOV (Bulgaria), speaking as a member of the Credentials Committee, supported the Angolan representative. The Conference must vote on the issue. His stand did not reflect any personal animosity against the South African representatives.

The PRESIDENT invited the Conference to decide whether or not it wished to adopt the proposal of the Credentials Committee to take note of its report (CONF.6/5).

The Conference adopted the Credentials Committee's proposal by 20 votes to 16 with one abstention.

The meeting was suspended at 3.40 p.m. and resumed at 4.10 p.m.

Mr MUCHUI (Kenya) fully associated his delegation with the statement of the representative of Angola concerning the South African regime. Kenya's position should not, however, be regarded as directed against the people of South Africa or against Mr Van Rensburg, whose technical expertise had made a valuable contribution to the work of the Conference. That, however, did not in any way alter the position of Kenya with regard to the regime he and his colleagues represented.

Item 9 ON THE AGENDA: ADOPTION OF THE FINAL ACT OF THE CONFERENCE AND ANY INSTRUMENTS, RECOMMENDATIONS AND RESOLUTIONS RESULTING FROM ITS WORK (CONF.6/C.1/Doc.1 and CONF.6/C.2/Doc.1)

The PRESIDENT put to the vote the Convention as a whole, as amended at the previous meeting of the Conference.

The Convention as a whole was adopted unanimously by 40 votes in favour, none against and no abstentions.

Final resolution (CONF.6/W.P.3)

The PRESIDENT drew attention to the text of the resolution proposed in CONF.6/W.P.3. He thought that it would be fitting for the Conference to request UNIDROIT to see whether it could continue its work of some twenty years and develop rules governing the internal relations between principal and agent at international level. It would be an arduous task but such rules might prove useful either on a global or a regional level.

The proposed resolution was adopted by 40 votes to none.

Explanatory Report

Mr SWART (Netherlands) said that his and other delegations considered that it would be desirable to have an Explanatory Report on the provisions of the Convention. He asked whether the Conference could not agree to request UNIDROIT, and in particular Mr Evans, the Secretary-General of the Conference, to prepare such an Explanatory Report which, while not an official commentary, would be very useful for the States participating in the Conference in explaining the background of the Convention's provisions.

It was so agreed.

Mr MONACO (Secretary-General of UNIDROIT) noted that the idea of such an Explanatory Report had been mentioned at the beginning of the Conference. He considered it a good one and said that UNIDROIT would willingly accept the task.

Draft Final Act of the Conference (CONF.6/6)

The PRESIDENT said that the draft Final Act was prepared on the basis of the Final Act of the Vienna Conference. It would be referred to the Drafting Committee, which would make whatever drafting changes it deemed necessary.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) wished to commend those who had prepared the draft on their good work. At the same time, he did not think it right, in the title, and elsewhere in the draft, to speak of the "UNIDROIT" Diplomatic Conference. A number of countries, including his own, were not members of UNIDROIT. Although his delegation was grateful to UNIDROIT for all the work done in preparation of the Convention, it was participating in the Conference at the invitation of the Swiss Government.

He also suggested that paragraphs 3 and 4 should give the full official names of the participating States.

Mr WIDMER (Switzerland) observed that his Government was hosting the Conference for UNIDROIT, which did not itself have the facilities for holding such a conference. Switzerland had no hesitations with regard to the mention of UNIDROIT in the Final Act.

Mr SEVON (Finland) pointed out that while UNIDROIT could be mentioned in the Final Act, the Conference had already adopted the title of the Convention, which could not be altered.

The PRESIDENT agreed. He suggested that it should be left to the Drafting Committee to bring the Final Act as closely as possible into line with that relating to the Vienna Sales Convention.

The SECRETARY-GENERAL of the Conference, after indicating the procedure for signature that could be followed at the last meeting of the Conference on Thursday, 17 February, said that, in view of the fact that representatives had not had sufficient time to study the summary records, the time limit for the submission of corrections for all summary records would be extended to 15 April 1983. Corrections should be addressed to UNIDROIT, Rome.

Mr MONACO (Secretary-General of UNIDROIT) considered it his duty to pay a tribute to the Commissary-General of the Conference for the enormous amount of work he had done in the organisation of the Conference.

Mr BÄRLOCHER (Commissary-General of the Conference) said that he wished to transmit those thanks to Mr and Mrs Leising, in charge of Conference Services, and their staff of interpreters, précis-writers, translators and other conference personnel, who had so efficiently supported him in the fulfilment of his responsibilities.

The meeting rose at 4.45 p.m.

9th plenary meeting

Thursday 17 February 1983 at 10.10 a.m.

President: Mr GRÖNFORS (Sweden)

CONF.6/S.R.9

Item 9 ON THE AGENDA: ADOPTION OF THE FINAL ACT OF THE CONFERENCE AND ANY INSTRUMENTS, RECOMMENDATIONS AND RESOLUTIONS RESULTING FROM ITS WORK (Final Act of the Conference)

Adoption of the Final Act

The Conference adopted the Final Act of the Conference by acclamation.

Item 10 ON THE AGENDA: SIGNATURE OF THE FINAL ACT AND OF ANY INSTRUMENTS ADOPTED BY THE CONFERENCE (Final Act of the Conference)

The SECRETARY-GENERAL of the Conference called on the representatives in succession to sign the Final Act and on those representatives who had the necessary full powers to sign the Convention also.

The representatives of the Democratic Republic of Afghanistan; the Republic of South Africa; Germany, Federal Republic of; the Commonwealth of Australia; the Republic of Austria; the Kingdom of Belgium; the People's Republic of Bulgaria; Canada; the Republic of Chile; the People's Republic of China; the Republic of the Ivory Coast; the Arab Republic of Egypt; United Arab Emirates; the Spanish State; United States of America; the Republic of Finland; the French Republic; the Republic of Ghana; the Republic of Guatemala; the Hungarian People's Republic; the Republic of India; the Republic of Iraq; the Italian Republic; Japan; the Republic of Kenya; the Kingdom of Morocco; the United Mexican States; the Mongolian People's Republic; the Republic of Nicaragua; the Kingdom of the Netherlands; the Republic of the Philippines; the Portuguese Republic; Republic of Korea; the Socialist Republic of Romania; United Kingdom of Great Britain and Northern Ireland; Holy See; the Kingdom of Sweden; the Swiss Confederation; the Czechoslovak Socialist Republic; the Republic of Turkey; Union of Soviet Socialist Republics and the Socialist Federal Republic of Yugoslavia signed the Final Act.

The President and the Secretary-General of the Conference also signed the Final Act.

The representatives of the Republic of Chile, the Kingdom of Morocco, the Holy See and the Swiss Confederation signed the Convention.

*The meeting was suspended at 10.50 a.m.
and resumed at 11.20 a.m.*

CLOSURE OF THE CONFERENCE

The PRESIDENT called on Mr Evans, Secretary-General of the Conference, representing UNIDROIT.

The SECRETARY-GENERAL of the Conference made the following speech:

"M. le Directeur, Mr President,

Ladies and Gentlemen,

Although this Diplomatic Conference has not quite yet reached its conclusion, might I beg your indulgence to address the Conference, not in my function as its Secretary-General, an office I have been greatly honoured to hold, but in my capacity as a representative of the UNIDROIT Secretariat.

Unfortunately, it was not possible for either our President, Mr Mario Matteucci, or our Secretary-General, Mr Riccardo Monaco, to be present here today and it is therefore on their behalf as well as on that of my colleagues from UNIDROIT, who have given such valiant service during the Conference, that I have the pleasure to say a few words.

In the first place, may I through you Mr President, convey to the Director of the Federal Office of Justice, Mr Voyame, who has so kindly agreed to be present here with us today, the appreciation of the Institute to all the Swiss authorities, federal, cantonal and municipal, who both at the administrative and at the social level have done so much to bring this Conference to a successful conclusion. A particular debt of gratitude is also owed to the Federal Department of Foreign Affairs for lending us for an appreciable length of time the services of our Commissary-General, Mr Bärlocher, without whose invaluable assistance our work would not have been possible; in addition may I at the same time express my gratitude to the interpreters, précis writers, translators, secretaries, hostesses and the other personnel, each of whom played such an important part in enabling us to complete our task without

having to use the extra day which was at our disposal.

This is I think a remarkable achievement for an international Conference, but if this has been achieved, it is also thanks to the members of all the delegations who have attended this Conference and have contributed to the finalisation of the text of the Convention. Reference has been made on more than one occasion to the three wise men who met in Rome in 1981, but here we have had the benefit of the counsels of some one hundred and thirty wise delegates and our thanks go out to them all. Also we, in UNIDROIT, would wish to stress our appreciation to the members of the Steering Committee and of the Drafting Committee; the former kept an overall view of the work of the Conference and the latter attended to the details, so enabling everyone to see the wood and the trees at the same time.

Lastly, I would especially like to thank those whose activity went well beyond the bounds of duty and I refer of course to the Chairman of the Conference, Professor Kurt Grönfors, the Chairman of the Committee of the Whole, Mr Pierre Widmer, the Chairman of the Final Clauses Committee, Mr Leif Sevón and to Professor Allan Farnsworth and to Mr Alfred Duchek, who in succession chaired the meetings of the Drafting Committee.

Now, to quote one of the distinguished delegates here today, we, in UNIDROIT, have lived with the draft Agency Convention for rather a long time. Now we look forward for many years to living with a real Convention and, in this connection, Sir, may I once again recall how much the Convention and this Conference owe to the work carried out in 1979, when a First Conference met in Bucharest to examine this subject at the invitation of the Government of Romania.

Apart, of course, from the obvious satisfaction of seeing this agency Convention finally adopted, the Secretariat of the Institute must express its gratification at the number of States and international Organisations which attended the Conference; forty nine States as full members of the Conference, nine observer States and seven intergovernmental Organisations. Of the States represented, no fewer than sixteen of those entitled to sign the Final Act and seven observer States are not at present members of UNIDROIT. Their presence here in Geneva will therefore be a source of great

encouragement to us for the future and we hope that we shall have the honour and the pleasure of seeing them at further UNIDROIT meetings in Rome, and perhaps in the not too distant future, as members of our Institute.

In conclusion, Mr President, I note that in accordance with Article 17 (b) of our Convention, UNIDROIT's authority in the matter of the external aspects of agency relationships has, with the adoption of this Convention, been terminated. However, with the Resolution adopted by the Conference two days ago, we have an express, and what is a more a written, authorisation to look into the internal relations of principal and agent at an appropriate time. This is a clear confirmation of the fact that UNIDROIT has neither ceased to exist, nor lost its capacity to act, and before resuming for a short period my customary hat as Secretary-General of this Conference, may I once again on behalf of UNIDROIT extend our warmest thanks to you all and say how much my colleagues and I myself look forward to seeing you again soon."

The PRESIDENT expressed his gratitude to all those who had participated in the Conference. UNIDROIT had studied agency in the international sale of goods for some time and had taken the unique step of calling on three "wise men" to define the problems and propose solutions. As a small organisation it had shown qualities that were often lacking in larger international organisations.

The Swiss Government had generously provided the necessary infrastructure to ensure the success of the Conference and Mr Bärlocher and his staff had given strong support.

If he had sometimes shown himself to be a strict President, it had been in the interests of the Conference and he had at all times enjoyed the invaluable assistance of the Chairmen of the committees.

Mr SWART (Netherlands) congratulated the President on having conducted the proceedings with efficiency and speed. All those who had helped in organising the Conference deserved gratitude, in particular Mr Bärlocher.

He also wished to stress the contribution made by Mr Evans, who had done so much work on the Convention, and Mr Widmer,

Chairman of the Committee of the Whole, who had shown such wide knowledge of the subject matter.

Mr VOYAME, Director of the Federal Office of Justice of Switzerland made the following address:

"Mr President,

Your Excellencies,

Ladies and Gentlemen,

We have arrived, after three weeks of work, at the last meeting of the Geneva Diplomatic Conference and the last intervention that you will hear in this hall.

You may be proud of yourselves. The system of inter-governmental instruments has been enriched, thanks to you, by an important Convention with which the unification of commercial law has taken a big step forward. You have thus contributed to the security of law at the international level, to the development of exchanges and, through this, to the progress of well-being. You have certainly met obstacles on your way. There was for example, the thorny problem of internal relationships between the agent and the principal. Or the divergencies on written form. It has required a lot of imagination to find adequate solutions to these problems. You have all given evidence of this creative approach. It was also necessary for these solutions to be accepted by everyone. This spirit of conciliation, of international cooperation has also been shown here. The Swiss authorities are very happy that work characterised by such a mental approach and which has brought us to a result of such quality, has been carried out on the soil of their country.

I am profoundly grateful to you.

My gratitude is extended in particular to the Romanian authorities, the organisers of the Bucharest Conference which gave your work the necessary decisive impulse.

It is also addressed to the scientific craftsmen of the new instrument, the President of UNIDROIT, Mr Matteucci, its Secretary-General, Mr Monaco, its Deputy Secretary-General, Mr Evans, its research officers, Mr Stanford and Mr Mengin. It is they, with the assistance of the governmental experts who prepared the drafts, who guided your work to a successful conclusion.

I should also like to express my gratitude to the protagonists of the Geneva Conference, especially Professor Grönfors, its President, and all the office staff, to Mr Sevón, Chairman of Committee II, to Mr Farnsworth and Mr Duchek, Chairman and Vice-Chairman of the Drafting Committee. And, although they are my compatriots, I believe you would not want me to forget Mr Widmer, Chairman of Committee I and Mr Bärlocher, Commissary-General of the Conference. All have made a decisive contribution to the success of the Geneva Conference by their knowledge, their diligence, their charm.

The Convention on Agency in the International Sale of Goods is now a fact. It has already achieved a fine success because the Final Act was signed by forty-two States and the Convention itself by four States. Let us hope that after such a good start it will continue to attract still more success and in particular many ratifications. In this respect, let me make a special appeal that your Governments give this matter their due attention.

The job is not entirely finished. In the Resolution that you have voted, you have asked UNIDROIT to see whether it might be possible to draw up an instrument — a Convention, a code of conduct or a model law — to cover internal agency relations. You will thus have an opportunity to complete your work.

And the diligence of UNIDROIT does not stop there of course. Other draft Conventions are on the drawing board. There will be other Conferences which will enable us to pursue international legal cooperation and also to build on the ties of friendship which are created in these meetings.

Mr President, Your Excellencies, Ladies and Gentlemen, I want to thank you for coming to Switzerland to perform such a useful task. I wish you a happy return to your own countries and I declare the Geneva Diplomatic Conference closed."

SUMMARY RECORDS OF THE COMMITTEE OF THE WHOLE (COMMITTEE I)

1st meeting

Tuesday, 1 February 1983, at 12.00 p.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.1

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (Study XIX — Doc. 63, CONF.6/3 Add. 1 and Add.2, CONF.6/4)

The CHAIRMAN expressed the hope that the Conference would endorse the proposal made by the restricted group of experts to delete Chapter III of the 1972 draft, leaving it for possible incorporation in a future international Convention.

It was so decided.

CHAPTER I — SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1

The SECRETARY-GENERAL of the Conference briefly introduced the provisions of Article 1.

Paragraph (1)

Mr CUKER (Czechoslovakia) referred to his delegation's proposal in CONF.6/C.1/W.P.1 and said that in order to make the draft Convention more comprehensive its scope should be widened to

cover cases where the agent only negotiated a contract.

The CHAIRMAN pointed out that both the restricted group of experts and the Committee of Governmental Experts had expressed the view that an agent who only negotiated a contract could not be included since relations between the principal and agent were not governed by the draft Convention.

Mr HAFEZ (Egypt) thought that the Convention applied whether or not the contract was concluded.

Mr SWART (Netherlands) did not think that negotiation of a contract should be included at the present stage.

Referring to the word "international" in Article 1 (1), he proposed that it should either be deleted or that an explanation of its meaning should be given so as to avoid confusion. In the Vienna Sales Convention the word only appeared in the title.

Mr GUEORGUIEV (Bulgaria) said that the word "*prétend*" in the French text of Article 1 (1) had several meanings and required clarification.

Mr BONELL (Italy), referring to the proposal by the Czechoslovak delegation, said that a distinction should be made between the agent whose activity was from the beginning restricted purely to negotiation and the agent whose activity was for some reason or other terminated at the negotiation stage. In the context of Article 1 (2), the courts of his country would apply the Convention in the second case, although not in the first.

Extending the scope of application as proposed would imply the inclusion of commercial agency, on which different principles had been adopted by different national legislations, and would create enormous difficulties. His delegation was therefore not able to support that proposal.

Concerning the Netherlands proposal, a certain inconsistency did indeed exist between draft Article 1 (1) and draft Article 2 (1). Although his delegation could support the draft as it was, it could equally support the Netherlands proposal in the interest of greater clarity.

Mr KARSTEN (United Kingdom), referring to the Netherlands proposal, said that his delegation could support the draft either as it stood or with the amendment proposed by the Netherlands delegation.

Referring to the Czechoslovak proposal, since the draft Convention had come to be concerned only with external relationships and not the internal relationship between principal and agent, it would be difficult in practical terms to justify excluding the role of the negotiating agent. An example in that sense might be a typical case where an agent made representations concerning the quality of goods for sale to a third party who would rely on them in deciding whether to proceed with the contract or not. The third party might not know at that stage whether the contract would be concluded by the agent or by the principal.

Mr SEVON (Finland), referring to the Czechoslovak proposal, said that the effect of extending the scope in the sense proposed might well lead to considerable difficulties. The example given by the United Kingdom representative in support of the proposal was not entirely convincing since it seemed to deal not so much with agency as with intent and the effect of statements in connection with a contract of sale. His delegation could not support the proposal.

Mr MAGNUSSON (Sweden), referring to the Czechoslovak proposal, said that since the draft Convention intended to exclude the internal relationship between principal and agent, extending the scope as proposed might well tend to lead to general problems throughout consideration of the draft Convention. He supported keeping Article 1 as it stood.

Referring to the Netherlands proposal, his delegation could support the text as drafted or accept the proposed amendment.

Mr ROLLAND (Federal Republic of Germany) said that his delegation shared the views expressed by the Italian and Finnish delegations on the Czechoslovak proposal. It was to be feared that the proposal on Article 1 might lead to a change rather than an extension of the scope of application, particularly in regard to Chapters III and IV.

Concerning the Netherlands proposal, while his delegation had never considered the use of "international" as in any way implying a precise definition, it could support the proposed amendment, although it would prefer the text to remain as it stood.

Mr LOW (Canada), referring to the Czechoslovak proposal, said that the proposed extension of the scope did not give his delegation cause for concern since from the practical point of view it was not a case which arose frequently in its experience. A possible surprise element in relation to the agent's powers on the part of the third party — the concern raised by the United Kingdom delegation — seemed likely to arise in only a very limited number of cases and would be covered to a great extent by Article 1 (1) and (2). In the interest of avoiding potential, somewhat academic difficulties and delaying the work of the Conference, he supported draft Article 1 as it stood.

The CHAIRMAN agreed that it would be difficult in the context of the current draft Convention to ensure that all possible elements of surprise on the part of the third party were eliminated. He asked the United Kingdom delegation whether, in the light of the opinions expressed by previous speakers, it wished to reaffirm its doubts about the draft article as it stood.

Mr KARSTEN (United Kingdom) said that his delegation continued to be of the opinion that, since the draft Convention dealt with the question of authority as affecting third party and principal, it would surely be difficult to ignore the question of whether an agent had authority to make promises or to exclude the possible consequences of statements made by commercial agents. It did not, however, wish to insist that those matters should be included if there was no support for them.

Mr CUKER (Czechoslovakia) said that, since there had been no support for it, his delegation withdrew its proposal.

The meeting rose at 1.10 p.m.

2nd meeting

Tuesday, 1 February 1983, at 3.00 p.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.2

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (Study XIX — Doc. 63, CONF.6/3 Add.1 and Add.2, CONF.6/4)

Article 1 (continued)

Paragraph (1) (continued)

At the request of the CHAIRMAN, Mr SWART (Netherlands) explained that the word "international" in Article 1 (1) might be construed as a further restriction, in addition to the limitation indicated in Article 2. The word "international" should therefore be omitted from Article 1.

The CHAIRMAN took it that the word "international" would, however, be retained in the title to show the connection with the Vienna Sales Convention.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) said that he was not at all convinced that the omission of "international" was desirable.

Mr KIMBEMBE (Congo) was of the same opinion. There would be a patent contradiction between the presence of "international" in the title and its absence from Article 1. If it was felt that its presence in Article 1 might cause confusion, perhaps something should be added to define it.

Mr BENNETT (Australia) said that his delegation had reservations about omitting "international" from Article 1. There might

be some doubts as to whether the Convention related to the international sale of goods or to international agents. In his view, the Convention was concerned with furthering international trade. It did seem that there was a case for defining what was meant by international trade.

Mr PELICHET (Hague Conference on Private International Law) said that it must be made clear whether the Convention was dealing with international agency or the international sale of goods. It might well happen that an "internal" sales contract would be concluded by an agent whose place of business was in a different State from that of the third party: would the relations between the third party and the agent be governed by the Convention in such a case?

Mr DUCHEK (Austria) considered that the approach had been that it was an international sale only where the parties were in different States; an international sale of goods was a sale concluded under the conditions of Article 2. If it was intended to refer to something else, that something would have to be defined. Such a course would however mean that the Convention was going in a different direction from what was intended by the entire draft.

The CHAIRMAN confirmed, as a member of the UNIDROIT Committee of Governmental Experts, that the intention had been to supplement the Vienna Convention and that the phrase "international sale of goods" was defined by Article 2 (1). If it were desired to adopt a different approach, that must be decided now and he was sure that it would open a wide debate.

Mr BONELL (Italy) said that the Committee must be careful about the implications of the one or the other approach. As he understood it, Article 1 related simply to the scope *ratione materiae* of the Convention. If that was so, he himself would prefer the omission of the word "international" from Article 1 (1), since the sphere of application was defined in Article 2. Perhaps a new formulation of Article 1 (1) would solve the difficulty.

Mr ROGNLIEN (Norway) felt that both the *ratione materiae*

and the sphere of application should be as close as possible to the Vienna Sales Convention. One solution might be to add something like "as defined in Article 2" at the end of Article 1 (1).

The SECRETARY-GENERAL of the Conference, after reviewing the history of the provision under discussion, said that it was very clear that it was the intention to follow the Vienna Convention as far as possible but that the inclusion of the word "international" in Article 1 (1) had no technical legal significance.

Mr SWART (Netherlands) pointed out that the word did not appear in the corresponding article of the Vienna Convention, and its omission would therefore not have the consequences feared by some speakers.

Mr PLANTARD (France) said that he agreed entirely with the representative of the Netherlands. Everything was defined in Article 2. The word "international" in Article 1 added nothing and opened the door to trouble. For example, international trade was not defined in the same way by the law of different States. Since the Secretary-General of the Conference had said that the inclusion of "international" had no substantive connotation, it could be omitted.

Ms COLLACO (Portugal) agreed that "international" was not needed. Its inclusion would widen the scope of the Convention.

Mr KIMBEMBE (Congo) and Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) said that they could accept the solution suggested by the representative of Norway, namely the addition of the words "as defined in Article 2".

Mr PLANTARD (France) pointed out that Article 2 defined the relations of the agent but not the nature of an international sale.

Mr ROGNLIEN (Norway) agreed. A wording different from what he had suggested would be needed to link Articles 1 (1) and 2 (1).

Mr SWART (Netherlands) said that there was no need for a link and tentatively suggested the words "in international relationships as defined in Article 2".

Mr BONELL (Italy) thought that as the sphere of application was defined in Article 2 and there was no formal link with other Conventions, one solution might be to revert with respect to Article 1 (1) to the wording of the corresponding provision drafted by the Bucharest Conference (Study XIX — Doc. 63, Appendix 1).

After a brief procedural discussion, Mr SEVON (Finland) suggested that like-minded delegations should consult one another with a view to arriving at an agreed text for submission to the Committee. To decide on ideas, without examining the form of words in which they were expressed, would unnecessarily consume the time of the Committee.

The CHAIRMAN suggested that interested delegations consult during the scheduled recess of the present meeting.

It was so agreed.

The CHAIRMAN said there seemed to be a tacit consensus that the word "international" could be safely deleted.

Mr BONELL (Italy) said that his proposal was actually an alternative to the Norwegian one. He would prefer to delete "international", but if others wanted a more explicit reference, he would prefer no reference at all to Article 2 (1), but rather the wording of the Bucharest draft.

Mr SWART (Netherlands) pointed out that there was a certain discrepancy between the English words "has authority or purports to have authority" and the French expression "*a le pouvoir d'agir ou prétend agir*".

Mr LIU (China) proposed that the Preamble to the Vienna Convention be adopted in the present Convention, with the amend-

ment that the term "contracts" in the third paragraph be changed to "the agency system". Concerning Article 1 (1), he proposed that the word "purports" be replaced by the word "proves".

Paragraphs (2) and (3)

The CHAIRMAN said that the Chinese proposals dovetailed with other comments and would be taken into account by the Drafting Committee. Concerning paragraph (2), he noted that the observation of Costa Rica had questioned whether a reference to performance of the contract was really necessary. There would be comments on that point by Norway in connection with Article 8, but at present there appeared to be no objections to paragraph (2). With regard to paragraph (3), he invited the comments of the observer from the Hague Conference.

Mr PELICHET (Hague Conference on Private International Law) said that his Organisation was not satisfied with the drafting of that provision which gave rise to confusion as the Convention was precisely not intended to govern relations between the principal and the third party, which derived from the contract of sale concluded by the agent. He proposed that it be amended along the following lines: "It is concerned only with relations between the agent and the third party on the one hand and, as regards the relations between the principal and the third party, only with the effects of the acts of the agent in actual or purported exercise of his authority on the other".

Mr SWART (Netherlands) said that Mr Pelichet was right in theory, but he found his proposed amendment unduly long. He himself could accept paragraph (3) as it stood.

Mr MAGNUSSON (Sweden) agreed that Mr Pelichet's proposed amendment was rather heavy; he would prefer a shorter text.

The CHAIRMAN said that any misconception that paragraph (3) applied to a sales contract as such would soon be dispelled by the subsequent articles.

Mr ROLLAND (Federal Republic of Germany) said there was no doubt that paragraph (3) must be interpreted restrictively, but he also agreed that Mr Pelichet's text was too heavy. He would prefer to leave the paragraph as it was.

Mr FARNSWORTH (United States of America) said that much of Mr Pelichet's difficulty seemed to originate in paragraph (2). He suggested that that difficulty might be removed by replacing the word "governs" in that paragraph by the word "applies".

The CHAIRMAN said that that suggestion would be referred to the Drafting Committee.

Mr BONELL (Italy) said he understood and sympathised with Mr Pelichet's point of view, but he also appreciated the need not to overload the text. He was satisfied with the present wording and if any change were to be made in it, he would prefer to delete paragraph (3) altogether.

The CHAIRMAN noted that most delegations seemed to agree with Mr Pelichet in theory but not in practice. He asked if any delegation wished to second Mr Pelichet's proposal.

There being no delegation prepared to second the proposal, paragraph (3) was approved as it stood.

The meeting was suspended at 5.15 p.m. and resumed at 5.30 p.m.

Paragraph (4)

The CHAIRMAN said that in the absence of objections, he would take it that at the first reading, the text of Article 1 (4) could stand.

It was so agreed

Paragraph (1) (continued)

The CHAIRMAN asked the Committee to revert to Article 1 (1)

and to consider whether the proposal made by the Netherlands delegation (CONF.6/3 Add.2, page 1) to delete the word "international" was generally acceptable.

Mr GONDRA (Spain) supported the suggestion of the Italian representative that, in order to meet the difficulty raised by the observer from the Hague Conference, there should be a return to the text adopted at the Bucharest Conference, supplemented by the text of the 1972 draft. He therefore suggested that the opening phrase of paragraph (1) should read: "This Convention governs agency relationships of an international character arising where one person, the agent . . . to conclude a contract with a third party." Reference to the international sale of goods would be deleted as would Article 1 (3). The deletion of the latter was desirable owing to the difficulty of separating the external and internal relationship of the principal and the agent. The reference to international sale was implicit in Article 2. However, he did not wish to put forward his suggested amendment as a formal proposal.

Mr BENNETT (Australia) said that the discussion had convinced him that the omission of the word "international" from paragraph (1) would do no harm. Nevertheless, the paragraph was too absolute without qualification. He would like to see a link between it and Article 2. He did not greatly care for the solution of adding at the beginning of Article 1 (1), the phrase "subject to Article 2". He therefore suggested that the matter be referred to the Drafting Committee.

Mr ALBAKREY (Iraq) said he could only offer preliminary observations, as he had just received the documentation. He approved the proposed text of paragraphs (2) and (4) of Article 1. He also favoured the retention of the word "international" in paragraph (1), although the phrase "international sale of goods" might be replaced by "sale of goods of an international character".

Mr VAN RENSBURG (South Africa) was not in favour of accepting either the Spanish or the Australian suggestions for paragraph (1). An adequate definition of the term "international" was already

contained in Article 2 (1). Further definition might suggest, incorrectly, that the draft Convention had to conform entirely with the Vienna Sales Convention. The suggestion of adding "subject to Article 2" was a typically English device — the draft Convention should be interpreted as a whole. He endorsed the proposal merely to delete the word "international" from Article 1 (1).

Mr MUCHUI (Kenya) endorsed the Australian suggestion that the Drafting Committee might be asked to provide a suitable link between that paragraph and Article 2.

Mr McCARTHY (Ghana) opposed the suggested Spanish amendment. He felt, however, that the retention or omission from Article 1 (1) of the word "international" was of minor importance and he was prepared to accept the majority view on the question.

Mr ROGNLIEN (Norway) said he would not press his suggestion as a formal proposal. He considered the suggestion of linking Article 1 (1) with Article 2 to be a substantive change, whereas the question of reverting to the Bucharest text might well be referred to the Drafting Committee.

The CHAIRMAN put to the vote a number of alternative suggestions for amending Article 1 (1), with the following results:

Those in favour of removing the word "international" as a qualifier of "sale of goods." : 19

Those in favour of adding a link between Article 1 (1) and Article 2: 5

Those in favour of adopting as an opening phrase the words: "This Convention governs agency relationships of an international character arising . . .": 9

Those against that proposal: 10

The meeting rose at 6.25 p.m.

3rd meeting

Wednesday, 2 February 1983, at 9.30 a.m.

Chairman: Mr WIDMER (Switzerland)

CONF. 6/C.1/S.R.3

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (Study XIX - Doc. 63, CONF.6/3 Add. 1 and Add. 2, CONF.6/4)

Article 2

The SECRETARY-GENERAL of the Conference introduced the provisions of Article 2, emphasizing the special role played by the agent who was the only person necessarily to be known by both the principal and the third party.

Paragraph (1) (a)

Mr ROGNLIEN (Norway) considered that the provisions of Article 2 should as far as possible be similar to those of the Vienna Sales Convention. He would prefer the deletion of paragraph (1) (a) which only served to restrict the draft Convention's possible scope. He also wished to see a reference to the parties' knowledge of the international character of the dealings.

Mr KUCERA (Czechoslovakia) referred to the amendments proposed by his delegation (CONF.6/C.1/W.P.2) which were along the lines of Article 3 (1) of the Bucharest Conference text. Furthermore, in his view the draft Convention should contain a provision similar to Article 95 of the Vienna Sales Convention.

Mr SWART (Netherlands) did not wish to return to the Bucharest Conference text. He drew attention to his delegation's proposal to replace the words "applies where" in paragraph (1) by the words "does not apply unless" (CONF.6/3 Add.2, page 1).

Mr SEVON (Finland) pointed out that the Bucharest Conference text had been intended to govern both internal and external relations and he was satisfied with the present text.

In addition, it was important not to place too much emphasis on parallelism between the present text and the Vienna Convention. He could not support the first proposals made by Czechoslovakia and he considered that the proposal made by the Netherlands was a matter for the Drafting Committee.

Mr ROLLAND (Federal Republic of Germany) endorsed the views expressed by the previous speaker.

Mr MAGNUSSON (Sweden) expressed satisfaction with the present text.

Mr DUCHEK (Austria) considered that the amendment proposed by Czechoslovakia went against the philosophy of the draft Convention before the Committee.

Mr ROGNLIEN (Norway) said that although he had sympathy with the broader scope of the Bucharest Conference text he could accept the present text as a compromise.

It was sometimes difficult for a party to know whether or not the agent was in a Contracting State.

Mr PELICHET (Hague Conference on Private International Law) emphasized that while the proposed provision in Article 2 (1) (a) could at the very most be justified when the draft Convention also dealt with the internal relations between the principal and the agent, it could be exorbitant in a Convention limited to relations between the third party and the agent. Indeed, to apply the Convention as the law of the habitual residence of the agent in cases where the latter had negotiated the sales contract in the country of the third party was not in accord with the spirit of the most recent codifications (especially the Vienna Convention of 1980) which recognise that it is preferable to retain connecting factors for an international Convention which take account of the situation of *all* the parties.

Moreover, Article 2 (1) (a) of the draft under discussion was in conflict with the *Hague Convention on the law applicable to agency*, Article 11, paragraph (b) of which provides that it is the internal law of the State in which the agent has acted which shall apply if the third party has his business establishment or, if he has none, his habitual residence in that State.

It was for this reason that the Permanent Bureau had proposed amending Article 2 (1) (a) so as to provide that the Convention would apply when *the agent and the third party have their places of business in Contracting States*.

Mr PLANTARD (France) stressed the need to keep in mind the special nature of uniform law. It was an advantage for an agent to carry out his business in a country that had adopted the uniform law for otherwise he might find that all his contracts were subject to different laws. The problem of potential conflict with the Hague Convention was theoretical since the latter contained provisions specifically intended to avoid any such conflicts.

Experience had shown that in cases of potential conflict between uniform law and national law, the former should prevail.

He concluded by expressing support for the present text.

Mr SWART (Netherlands) could accept the text proposed by the Hague Conference. The Netherlands proposal was intended as a kind of compromise. It would only add a limitation in certain cases in which an agent acted in a place different from that of his place of business. Foreseeability must also be taken into account since the place of business of the agent was not always foreseeable.

With regard to the conflict between uniform law and national law, it was a long-standing problem that could not be resolved.

Mr GONDRA (Spain) was in favour of giving the Convention a wider field of application. The present text of paragraph (1) (a) introduced a restrictive factor which was that the agent was in a Contracting State. He therefore supported the proposal made by Norway.

Mr BONELLI (Italy) said that the problem had two aspects: firstly, the underlying philosophy and secondly the specific con-

nection between the draft Convention and existing instruments. The solution adopted in the Vienna Convention did not constitute the only possibility and in an agency relationship the agent was obviously the crucial factor. He would prefer to see the text remain unchanged.

Mr HAUSHEER (Switzerland) said that he agreed entirely with the delegates of France and Italy. In any case, partners to a contract should seek information about each other. He could accept the wording of Article 2 as it stood but felt that paragraph (2) should be redrafted for greater clarity.

Mr SEVON (Finland) said that he could not agree with the delegate from Spain since his suggestion would tend to narrow the scope of the Convention, which should be as broad as possible.

With regard to the example given by the observer from the Hague Conference in the written observations of his Organisation, it was most unlikely that the Nigerian company would be unaware of the agent's country of business establishment. He was therefore unconvinced by the reasoning behind the observer's comments. Secondly, any conflict of conventions was only a future possibility and was precisely the reason for the inclusion of Article 22 in the Hague Convention.

Furthermore, if the UNIDROIT Convention were too restrictive, it would be of no practical use. He strongly supported the text as it stood but if a majority were in favour of reducing the scope, he could support the deletion of paragraph (1) (a) altogether.

Mr STÖCKER (Federal Republic of Germany) stated that in the interests of having the Convention ratified by as many States as possible, he favoured a wide scope. Therefore Article 2 should avoid reference to where the parties had their places of business and he advocated the deletion of paragraph (1) (a). Paragraph (1) (b) would then be superfluous and could also be deleted. If that view was not supported by the majority, he suggested the addition of a paragraph (4) to Article 2 allowing Contracting States to extend the scope of the Convention by means of a unilateral declaration.

There was no need for concern about conflict with the Hague Convention since, if the two Conventions covered the same ground,

clearly States would choose to ratify the better one.

Mr ROGNLIEN (Norway) agreed with the previous speaker that paragraph (1) (a) and even paragraph (1) (b) could be deleted, but not that provision for an extension by unilateral declaration was necessary as the possibility of such a national extension would, in any event, result from practice. The question of foreseeability could be solved by adopting a provision similar to that in Article 1 (2) of the Vienna Convention in which places of business were disregarded.

Mr DUCHEK (Austria) supported the approach in the existing text. Any broadening of the scope, although good in theory, might mean in practice that States would hesitate to ratify the Convention. Deletion of paragraph (1) (a) would make the scope of the Convention very narrow and would lead to great difficulties in implementation, with the possibility of a strong element of surprise for all concerned.

Any possible conflict between conventions should be avoided but Article 22 of the Hague Convention covered such eventualities by providing an escape clause.

He had an open mind as yet on the addition of "and has acted in a Contracting State" in paragraph (1) (a) proposed by the delegate from the Netherlands: the notion of "acting" might lead to ambiguity but the amendment did introduce a subjective element and would make it difficult for the principal to see whether the contract would be covered by the Convention. It might, however, be the least bad of the compromises suggested.

Mr KARSTEN (United Kingdom) explained the rationale behind the amendment proposed by his delegation in CONF.6/C.1/W.P.20 which would meet a number of the criticisms of the existing text. It might seem radical in a Convention on agency to delete any reference to the agent when determining the sphere of application, but the amendment had the advantage of simplicity and might well increase the chances of acceptance by States. After all, the main aim was to produce a workable and successful Convention.

In reply to a query from the CHAIRMAN he explained that paragraph (1) (b) would remain as an alternative.

The CHAIRMAN invited further comments on the proposal made by the delegate from the Federal Republic of Germany that paragraph (1) (a) and (b) be deleted.

Mr GONDRA (Spain) said that his proposal to delete paragraph (1) (a) implied the deletion also of paragraph (1) (b) or, if it was decided to give the Convention an even wider scope of application, it was possible to retain paragraph 1 (b) as an alternative to the first sentence of paragraph (1) instead of being cumulative as it was in the present text.

Mr BONELLI (Italy) said that the present text was a reasonable compromise. If, however, it did not receive majority support his delegation would rather prefer to support the proposal of the Federal Republic of Germany than to accept a solution according to which the sphere of application would be more restricted.

Mr HAFEZ (Egypt) supported the proposal of the Federal Republic of Germany.

The CHAIRMAN suggested that a vote should be taken on the proposal by the delegate of the Federal Republic of Germany.

It was so decided.

The proposal was defeated by 18 votes to 7.

Mr MAGNUSSON (Sweden) said that he could support the proposal made by the delegate from Norway to delete paragraph (1) (a) completely.

Mr LOW (Canada) pointed out that there was a basic policy choice of whether the Convention should have a very extended scope of application or contain connecting factors. Clearly, the latter would make it easier for the parties to foresee possible events. He had a slight preference for some restriction and could support the United Kingdom approach.

Mr BENNETT (Australia) pointed out that paragraph (1) (b) lacked any clear objective connecting factor and was therefore very wide. He thought that a clear connection should be provided in paragraph (1) (a). He supported the United Kingdom proposal.

Mr ALBAKREY (Iraq) advocated the deletion of paragraph (1) (a) and the retention of paragraph (1) (b) as cumulative to paragraph (1).

Mr GONDRA (Spain) disagreed. Paragraph (1) (b) should be retained, but as an alternative.

The meeting rose at 1.05 p.m.

4th meeting

Wednesday, 2 February 1983, at 3.45 p.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.4

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (Study XIX - Doc. 63, CONF.6/3 Add. 1 and Add. 2, CONF.6/4)

Article 2 (continued)

Paragraph (1) (a) (continued)

The CHAIRMAN hoped that, after the consultations, some delegations had withdrawn their proposals.

Mr PELICHET (Hague Conference on Private International Law) said that since his own proposal had not attracted sufficient support, he was prepared to support the United Kingdom proposal, which gave due allowance to the Hague Convention.

Mr SWART (Netherlands) said that his delegation would support the United Kingdom proposal.

Mr SEVON (Finland) pointed out that an observer was not entitled to make a proposal. He wished to know if the Czechoslovak proposal had been withdrawn.

Mr CUKER (Czechoslovakia) said that his delegation had withdrawn its proposal.

Mr MUCHUI (Kenya) said that his delegation felt that the ideal situation would be midway between the scope of application of the Convention and the practical possibility of its application. It therefore supported the United Kingdom proposal.

Mr BONELL (Italy) said it was necessary to distinguish between the situation of the so-called disclosed agent and that of the undisclosed or commission agent. In the case of the latter, he feared that under the United Kingdom proposal it would not be possible to know which law would apply.

Mr KARSTEN (United Kingdom) agreed that there was no satisfactory solution to that problem either in the United Kingdom proposal or in the present text.

Mr ROGNLIEN (Norway) said that his delegation could vote for the United Kingdom proposal, but pointed out that in that case something should be included in paragraph (2) to cover the case of the commission agent and any other unforeseen factor of an international character.

The CHAIRMAN suggested that the adoption of the United Kingdom text would imply a favourable vote on sub-paragraph (b). It might be unfortunate to separate those two sub-paragraphs.

Mr PLANTARD (France) said that in the Convention system the agent would be known from the start and the buyer would know what law would govern the contract. The original text, in his opin-

ion, was preferable and he would vote for it.

The CHAIRMAN said that he agreed with that view.

Mr DUCHEK (Austria) said he shared the views of the Italian and French delegates and would not vote for the United Kingdom proposal.

Mr KARSTEN (United Kingdom) said he felt that the third party ought to know which law applied. It had been suggested that the agent would not know by what law he was governed but, as the draft now stood, the Convention would not apply if an action against him were not brought in a Contracting State. His delegation was more concerned with the ability of the principal and the third party to foresee the jurisdiction.

Mr ROGNLIEN (Norway) thought that both the United Kingdom proposal and the present draft presented the same difficulties with regard to the situation of a commission agent. In his opinion the scope of application of the Convention should depend on the place of business of the commission agent.

The CHAIRMAN put the United Kingdom proposal concerning Article 2 (1) (a) to the vote.

The United Kingdom proposal (CONF.6/C.1/W.P.20) was rejected by 18 votes to 14.

The CHAIRMAN noted that paragraph (1) (a) thus remained unchanged.

Paragraph (1) (b)

In reply to a question by Mr FARNSWORTH (United States of America) the CHAIRMAN said that the Czechoslovak delegation intended to propose an article for insertion in the Final Provisions enabling a State to reserve its position on the application of paragraph (1) (b).

Although discussion of the proposal could be postponed until the Conference reached the Final Provisions, he thought it might be better to deal with it at the present juncture.

Mr KUCERA (Czechoslovakia) said that the article in question would be similar in wording to Article 95 of the Vienna Sales Convention. It would enable any State to declare that it would not be bound by Article 2 (1) (b) of the Convention.

Mr FARNSWORTH (United States of America) indicated that if the United States ratified the Vienna Convention, it intended to take advantage of Article 95.

Mr SWART (Netherlands) observed that reservations tended to weaken international agreements. Articles concerning reservations should not be included if only a few States desired them. He was surprised that those who favoured an article on possible reservations to the provision under discussion had not first proposed its deletion. Perhaps they might have mustered a majority.

Mr SEVON (Finland) said that while his country did not contemplate entering a reservation to paragraph (1) (b), it understood why some other countries might think it necessary to do so. His delegation appreciated the fact that Czechoslovakia was not asking for deletion. It obviously wished to allow those States which favoured paragraph (1) (b) to benefit from it.

Mr PLANTARD (France) recalled that at the Vienna Conference his delegation had objected to the inclusion of Article 95. Without opposing the Czechoslovak proposal, he would welcome some explanation of why it was considered necessary in the present case.

Mr KUCERA (Czechoslovakia) explained that his delegation's motives were the same as in the case of the Vienna Convention. His country had special legislation concerning international relations. This legislation applied where, according to the rules of conflict, Czechoslovak law applies. The Czechoslovak proposal was designed to make possible the application of this legislation when

the concrete case was not linked so closely with a Contracting State as provided in Article 2 (1) (a).

Mr FARNSWORTH (United States of America) explained that a group of United States experts had examined the corresponding provision of the Vienna Convention and had concluded that the United States would be at a disadvantage if it did not invoke it vis-à-vis others who had not ratified the Convention. The point at issue was not whether the reservation article was good or bad. It was a fact that it had been included in the Vienna Convention and some States would make use of it.

Mr LIU (China) said that he supported the Czechoslovak proposal for the sake of consistency with the Vienna Convention.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) said that, having heard the Czechoslovak representative's explanation, his delegation thought that it would be wise to follow the course he proposed.

Mr SWART (Netherlands) remarked that the United States representative had touched on the best argument against a reservation clause. If one State were allowed to enter a reservation, the principle of balance would require other States to do likewise. If most States felt that they needed such a clause, well and good, but he did not think the Convention should be weakened for just a few States.

Mr ROGNLIEN (Norway) agreed. He failed to see the relevance of the argument of reciprocity between States. In view of the nature of the proposed Convention, he was surprised to hear the United States representative demand reciprocity between States while disregarding reciprocity between private parties.

Mr BONEILL (Italy), after reviewing the arguments that had been advanced, said that his delegation agreed with the representative of Finland that the Czechoslovak proposal should be adopted for the

sake of those who felt that they needed it.

Mr ROGNLIEN (Norway) requested that the Czechoslovak proposal be made available in writing.

The meeting was suspended at 4.45 p.m. and resumed at 5.20 p.m.

The CHAIRMAN observed that the Czechoslovak proposal was now available as a document. He put it to the vote.

The Czechoslovak proposal (CONF.6/C.1/W.P.8) was approved by 14 votes to 10 with 8 abstentions.

Paragraph (2)

The CHAIRMAN recalled that the purpose of the paragraph had been explained by the Secretary-General at the previous meeting of the Committee. Amendments had been proposed by the Norwegian delegation (CONF.6/3, pages 8-9) and by the Turkish delegation (CONF.6/C.1/W.P.10) while there was also a drafting proposal by the French delegation (CONF. 6/C.1/W.P.21).

Mr TERADA (Japan) said that he understood the intention of the paragraph, but he was doubtful how the phrase "those provisions of the Convention governing the case" was to be interpreted. If, for example, a principal made a claim against a third party on the grounds of Article 13, the third party, wishing to avoid a contractual obligation, would insist that he neither knew nor ought to have known that the agent was acting as an agent. In that situation, the phrase "those provisions of the Convention governing the case" would include Article 13. However, if the third party wished to bring a claim under Article 13 against the principal, he could disregard the element of surprise and, in that situation, the phrase would not include Article 13. The interpretation would depend on which party was making a claim or presenting a defence. He thought that a simpler formulation, as suggested by France, would be preferable.

Mr PLANTARD (France) said that if the principle underlying Article 2 (2) was maintained, his proposal (CONF.6/C.1/W.P.21) would merely be a matter of drafting which did not require discussion.

Mr ROGNLIEN (Norway), introducing his proposed amendment (CONF.6/3, pages 8-9), said that the present text of Article 2 (2) protected the third party against one surprise situation, but not against the situation in which although the third party knew there was a principal, the latter's identity and place of business had not been disclosed. That case would be covered by the addition of the words "regardless of the principal's place of business". The criterion should be the location of the agent's place of business and not that of the undisclosed principal. A further safeguard for the third party would be provided by a new paragraph (3) on the lines of Article 7 (2) of the Vienna Sales Convention.

Mr ÜNAL (Turkey) recalled that his amendment was to delete the second part of Article 2 (2), starting with the words "unless the agent". The first part of the paragraph made an exception to the sphere of application of the Convention, as defined in Article 2 (1). The second part, however, contained an exception to the exception which was prejudicial to the interests of the third party.

Mr BENNETT (Australia) supported the French proposal. He noted that it reverted to the text of the corresponding article (Article 3 (2)), in the Bucharest draft in that it referred to the Convention, rather than to "those provisions of the Convention governing the case" — a phrase which had provoked some opposition. However, he thought that the French proposal was a substantive change, and not merely a matter of drafting.

Mr PLANTARD (France) said that the practical effect would be the same in either case.

Mr GONDRA (Spain) asked whether the words "at the time of contracting" had been inadvertently omitted from the French draft.

Mr PLANTARD (France) stated that this was the case.

Mr SWART (Netherlands) supported the French proposal. It should be sent to the Drafting Committee. The English text might be simplified to read "The Convention shall not apply unless . . ." He felt that the Turkish amendment was based on a misunderstanding. It should be reconsidered in the light of the French proposal. He could accept the new paragraph in the Norwegian amendment taken from the Vienna Convention, but the reformulation of the present paragraph (2) was too complicated as it stood.

Mr SEVON (Finland) said he would favour a combination of the French and Norwegian proposals. It was difficult to attach importance to the principal's place of business in cases where his very existence had not been disclosed.

Mr DURAND (Benin) proposed, as a matter of drafting, that paragraph (2) should be split into two paragraphs, the first of which should end with the words "shall not apply". The second paragraph should begin "However, by way of exception to the preceding paragraph, those provisions shall apply when the agent and the third party. . .".

The meeting rose at 6.10 p.m.

5th meeting

Thursday, 3 February 1983 at 9.50 a.m.

Chairman: Mr WIDMER (Switzerland)

CONF. 6/C.1/S.R.5

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (Study XIX — Doc. 63, CONF.6/3 Add.1 and Add.2, CONF.6/4)

Article 2 (continued)

Paragraph (2) (continued)

Mr MAGNUSSON (Sweden), referring to the Norwegian proposal (CONF.6/C.1/W.P.25), and in particular to include "regardless of the principal's place of business" in Article 2 (2), said that the meaning was sufficiently clear as the draft stood.

Mr BONELL (Italy) said that he was in favour of including an amendment as proposed by the Norwegian delegation and supported by that of Finland.

Mr KARSTEN (United Kingdom) said that, while at first sight the Norwegian proposal seemed an attractive one, it would in fact be difficult wholly to avoid the third party's being taken by surprise in the event of there being an undisclosed principal. Article 2 (1) already alerted a third party to the possibility of there being an element of surprise. He preferred to see the draft text maintained as it stood.

Mr SEVON (Finland) said that, while appreciating the point of view of the United Kingdom delegation, a type of situation could be envisaged where it might be difficult to know which rule of law should apply. For example, a Swedish third party negotiating with a German agent might discover only after the contract had been

concluded that the principal also had his place of business in Sweden, in which case the principal and third party would not have their places of business in different States. He agreed, however, that it would be difficult in paragraph (2) to cover all possible situations.

Mr DUCHEK (Austria) said that, taking into consideration the fact that the issue raised by the previous speaker was in essence whether national or international law should apply where the agent but not the principal had his place of business in a different State, it was important that the rule of law to be applied should be one with which the parties concerned were familiar. He preferred to have the draft text remain as it stood.

Mr ROGNLIEN (Norway) said that where a contract was concluded by an agent in his own name having his place of business in a different State to that of the third party, there would indeed be an international sale as provided for under the Vienna Sales Convention. The element of surprise would arise where the Convention was found not to be applicable to what a third party had believed to be an international contract of sale. The proposal he was making concerned a matter of substance and was therefore different to the proposal by the French delegation (CONF.6/C.1/W.P.21), which was a drafting amendment. He would not insist on the inclusion of "and the requirements under litra (a) or (b) of paragraph (1) are fulfilled", as included in square brackets in CONF.6/C.1/W.P.25.

The CHAIRMAN invited the Committee to vote on the inclusion of "regardless of the principal's place of business" in Article 2 (2).

The Norwegian amendment was rejected by 18 votes to 4 with 9 abstentions.

The CHAIRMAN invited the Committee to consider the Norwegian proposal (CONF.6/3, page 8) to include a reference to commission agents in Article 2 (2).

Mr VAN RENSBURG (South Africa) said that the wording of Article 2 should naturally follow the same lines as that of Article 15. Article 2 (2) should have two sub-paragraphs, the second of which should contain a reference to a contract of commission, in the same way as did Article 15 (1) (a) and (b).

Mr MAGNUSSON (Sweden) said that he could not support the Norwegian proposal.

Mr ROGNLIEN (Norway) said that the proposal had been two-fold: to ensure on the one hand that, where the commission agent had his place of business in a different State to that of the third party, even though that of the principal might be in the same as the latter, the Convention should apply, and on the other hand that, where the commission agent had his place of business in the same State as that of the third party, even though that of the principal was in a different State, the Convention should not apply. However, since the Committee had not wished to adopt the first part of the Norwegian proposal on paragraph (2), it might be preferable for it to consider the proposed addition of a new paragraph (3) — which, if approved, would to some extent cover the issue about which he was concerned — rather than considering further the Norwegian proposals on paragraph (2).

Mr VAN RENSBURG (South Africa) said that since Mr Rognlien had withdrawn his proposal to amend paragraph (2), he would not insist on supporting it.

The CHAIRMAN invited the Committee to consider the French proposal (CONF.6/C.1/W.P.21) to make a drafting amendment in order to simplify the wording of Article 2 (2). In reply to a request for clarification by Mr SEVON (Finland), he confirmed that the proposed amendment included the words "at the time of contracting".

The CHAIRMAN took it that, if there was no objection, the proposed amendment was approved.

It was so agreed.

Mr ÜNAL (Turkey) said that the purpose of his delegation's proposal (CONF.6/C.1/W.P.10) on Article 2 (2) had been to avoid possible ambiguity. However, as there had been no support for the proposal, he withdrew it.

Mr SWART (Netherlands) said that remaining suggestions for further simplification of paragraph (2) would no doubt be reflected in the text to be produced by the Drafting Committee.

*Article 2, additional paragraph proposed by the delegation of
Norway (paragraph (2 bis) or (3))*

Mr ROGNLIEN (Norway) said that the aim of proposing a new paragraph (CONF.6/3, page 9), to be inserted following present paragraph (2) and before present paragraph (3), was to protect the third party from surprise where the principal's place of business had not been disclosed at the time of negotiation of a contract. In certain cases, the result of such a provision would have the negative effect that the Convention would not apply, since the international element would be disregarded if only discovered subsequent to the conclusion of the contract. Such a provision was particularly important in relation to the principal's place of business, although there were also cases where it was of some consequence to mention the agent's place of business.

Mr SWART (Netherlands) said that he supported the Norwegian proposal.

Mr KARSTEN (United Kingdom) said that the reference to the place of business of the principal or agent in the proposed additional paragraph seemed to be inconsistent with the decision taken by the Committee in relation to paragraph (2) of the same article. If the proposed additional paragraph were to be approved, then logically it should follow that in each case where there was an undisclosed principal, his place of business should be similarly disregarded. He was therefore against the proposal.

Mr BONELLI (Italy) said that he agreed with the previous speak-

er that it would be preferable not to make reference to the principal's place of business, since it would mean that in the case of an undisclosed principal, the Convention would not apply. He could not support the proposal.

Mr ROGNLIEN (Norway) said that his amendment was substantive and therefore inevitably contrary to the present text. The proposal to adopt a provision similar to Article 1 (2) of the Vienna Sales Convention was aimed at preventing the third party from being subjected to unexpected application of the UNIDROIT Convention.

Mr PLANTARD (France) said that the parallel with the Vienna Convention was clear but that the UNIDROIT Convention had to cover a more complicated situation involving three parties and he therefore counselled caution. The Norwegian proposal would achieve its aim of ensuring that the Convention did not apply when it was discovered only afterwards that the agent and the third party had their places of business in different States.

He believed that it was better if in such inevitable cases international law, such as the UNIDROIT Convention which would be widely known in the commercial world, were to apply rather than national law which would not necessarily be known.

Therefore, he could not support the Norwegian amendment.

The CHAIRMAN said that it was his understanding that the proposed amendment was designed to avoid application of the Convention in cases where it had not been clear from the beginning that the contract was an international one.

Mr SEVON (Finland) thought that the present amendment was different in scope to the one already rejected for Article 2 (2) as it covered all cases of undisclosed principals.

He could support the amendment.

Mr MUCHUI (Kenya) stated that he found it difficult to reconcile the proposed amendment with the text already approved for Article 2 (2). If the amendment for a new paragraph were accepted,

sensation.

Mr HAFEZ (Egypt) proposed a change in the wording of sub-paragraph (e) to bring the English and the French texts into line. In the English text, the word "quasi-judicial" should be amended to read "administrative".

The matter was referred to the Drafting Committee.

The SECRETARY-GENERAL of UNIDROIT drew attention to the Explanatory Report on sub-paragraph (c) and advocated that the sub-paragraph be redrafted to cover a more general field as it did not at present cover all cases of non-consensual representation.

Ms COLLACO (Portugal) said she would prefer to retain the present text.

Mr SWART (Netherlands) agreed that although it was perhaps not strictly necessary to mention each agency specifically, it made the text clearer.

However, if the Common Law countries preferred a more general text he had no objection.

Mr KARSTEN (United Kingdom) said that a more general text would not be sufficiently clear. Therefore, although the present text raised problems for Common law countries, he preferred to keep it.

Mr VAZE (India) emphasized that personal law in India had many facets due to the multiplicity of religions, so sub-paragraph (c) would not be relevant in his country.

Article 3, sub-paragraphs (c), (d) and (e) were approved as they stood.

*Article 3, additional paragraph (2) proposed by the delegation
of Norway*

Mr ROGNLIEN (Norway), introducing his delegation's amendment to Article 3 (CONF.6/3, page 9) expressed concern that the draft Convention did not take into account potential conflict with national consumer protection laws and gave an example of such a possible conflict.

Mr MAGNUSSON (Sweden) said that as far as Sweden was concerned at present there could be no conflict between the Convention and laws to protect the consumer, but the situation might change and he therefore supported Norway's amendment.

Mr SWART (Netherlands) also supported the amendment.

Mr PLANTARD (France) thought that the amendment was outside the scope of application of the Convention and would give rise to confusion between sales law and agency law.

Mr DUCHEK (Austria) expressed support for the amendment. In view of its consumer protection legislation, such a provision was necessary in Austria.

Ms COLLACO (Portugal) said that if Norway's amendment were adopted it would be necessary to define what provisions of the national law had to be taken into account.

Mr BONELL (Italy) emphasized that the 1964 Uniform Law on International Sale had adopted a different approach to that of the Vienna Sales Convention. In his view it was preferable to take Article 16 of the Hague Convention as a precedent rather than the Vienna Convention. Norway's amendment, which he supported, had a broad formulation and was consistent with current developments in international private law. He was strongly opposed to any reference to the national law of the buyer.

Mr FARNSWORTH (United States of America) was in favour of

the amendment, although he had some doubts concerning its impact on case-law in Common Law countries.

Mr HAFEZ (Egypt) did not consider that the draft Convention contained any provisions detrimental to consumers' interests.

Mr ALBAKREY (Iraq) said that in view of the importance given to the interests of consumers in his country he was in favour of the amendment. He suggested that it could be contained in a separate article terminating with the words "in relation with the agency's activity".

Mr BRODIE (United Kingdom) endorsed the amendment since many countries had consumer legislation containing mandatory rules. However, he proposed that the word "mandatory" should be inserted before the word "provision".

Mr VAN RENSBURG (South Africa) considered that the words "derogates from" should be used rather than the word "affects".

Mr ROLLAND (Federal Republic of Germany) did not see the need for the amendment because in his view there was no conflict between the draft Convention and national law. Nevertheless, since many delegations considered it necessary he would not oppose its adoption.

The CHAIRMAN asked whether the Committee wished in principle to approve the amendment proposed by Norway, leaving its final wording and place in the text to be decided by the Drafting Committee.

The amendment was approved in principle by 18 votes to 1 with 15 abstentions.

The meeting rose at 1.05 p.m.

6th meeting

Thursday, 3 February 1983, at 3.15 p.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.6

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (Study XIX — Doc.63, CONF.6/3 Add.1 and Add.2, CONF.6/4)

Article 3 (continued)

Proposed new paragraph (2) (continued)

The CHAIRMAN recalled that the Norwegian amendment to Article 3 had been accepted in principle, subject to the question of making the term "national law" more specific and to the addition of the word "mandatory" before the word "provision".

Mr SWART (Netherlands) said there was no need to be specific with regard to national law, but he was in favour of adding the word "mandatory".

Ms BURRE-HÄGGLUND (Finland) agreed that precision as to national law would be undesirable as it might have the effect of restricting national requirements on consumer protection for foreigners temporarily in the country.

Mr ROGNLIEN (Norway) said that the national law should be that of the court seized of the case. Another solution would be to follow the example of the Vienna Sales Convention and to exclude consumer sales altogether. He opposed the addition of the word "mandatory".

Mr BONEILL (Italy) said he would prefer the original Norwegian formulation: the exclusion of consumer sales would raise the problem of finding a definition for consumer transactions.

Mr KARSTEN (United Kingdom) agreed that the Committee should not attempt to define the connecting factor to specify the appropriate national law. The formulation might perhaps be rounded out to read: "Nothing in the Convention affects any provision applicable under private international law".

Mr FARNSWORTH (United States of America) suggested the formulation "Nothing in the Convention derogates from any otherwise applicable provision of national law".

Ms COLLACO (Portugal), Mr SWART (Netherlands) and Mr VAZE (India) supported the United States formulation.

Mr KARSTEN (United Kingdom) withdrew his proposal in favour of the United States formulation.

Mr STÖCKER (Federal Republic of Germany) suggested that the word "national" should be deleted in view of the fact that the European Economic Community was contemplating a convention introducing consumer protection provisions of an international character.

Mr FARNSWORTH (United States of America) proposed the words "any otherwise applicable rule of law for the protection of consumers".

Mr SWART (Netherlands) preferred the retention of the phrase "national law" which was used elsewhere in the Convention. In any case, an international treaty, when accepted by a State, became part of its national law.

The CHAIRMAN put to the vote the second United States formulation which omitted the word "national".

The formulation was accepted by 19 votes to 3 with 10 abstentions.

Mr VAN RENSBURG (South Africa) said that in his country a considerable number of consumer protection measures were em-

bodied in non-mandatory enactments. He would therefore oppose the addition of the word "mandatory" before "provision".

The CHAIRMAN put to the vote the proposal to add the word "mandatory".

The proposal was rejected by 20 votes to 3 with 11 abstentions.

The CHAIRMAN announced that the first reading of Article 3 had been completed.

Article 4

The SECRETARY-GENERAL of the Conference, introducing Article 4, said that the text was the draft adopted by the Bucharest Conference. Like Article 3 (d) and (e), it was taken from the Hague Convention on the law applicable to agency.

The CHAIRMAN said that if he heard no objection, he would take it that the Committee wished to approve Article 4 (a) at first reading.

It was so agreed.

Mr GRETTON (United Kingdom), introducing the proposal to add a new paragraph after paragraph (a) (CONF.6/C.1/W.P.24), explained that it provided for a case similar to those covered in Article 3 (d) and (e). Under English law, a manager or receiver could be appointed by creditors before a company went into liquidation or lost the capacity to act.

Mr FARNSWORTH (United States of America) wondered whether it would not be possible to broaden the final phrase of (a) instead of inserting an additional paragraph. It was the term "conferred by law" which was thought to be too narrow.

Mr BONELL (Italy) was reluctant for the Committee to become

involved in too much detail: other special cases might be brought up. There was general agreement as to the intention to exclude certain types of case. An Italian court would certainly exclude the case covered by the United Kingdom proposal under Article 4 (a).

Mr KARSTEN (United Kingdom) said that there were possible differences between what might be ruled by an Italian court and an English court. However, he pointed out that there was an intermediate stage when creditors might appoint their own agent, similar to the situation where "receivers" were appointed by the court. There might also be what in English law was called a "debenture agreement". A special provision would be needed to meet the point of the Italian representative.

Mr HAUSHEER (Switzerland) thought that the United Kingdom judges would probably be prepared to read the Convention in a broader sense in order to meet the point of the United Kingdom representative.

Mr DUCHEK (Austria) felt that these problems would better be left to the Drafting Committee.

Mr VAN RENSBURG (South Africa) said that his delegation opposed the United Kingdom proposal.

Mr FARNSWORTH (United States of America) said that it might be possible to include a reference to an agreement with creditors.

Mr KARSTEN (United Kingdom) said he would willingly co-operate with the Drafting Committee for that purpose.

Mr MUCHUI (Kenya) said he had some doubts about the United Kingdom proposal, but could appreciate its rather narrow connection with British company law.

Mr BONELL (Italy) said that Italian judges confronted with the United Kingdom proposal would find themselves in great difficulties.

Mr KARSTEN (United Kingdom) said he would not insist on a separate paragraph if the Committee would agree to a redrafting along the lines proposed by the United States. He proposed, therefore, that it should be submitted to the Drafting Committee.

The CHAIRMAN put the United Kingdom proposal to the vote.

The proposal was rejected by 14 votes to 13 with 10 abstentions.

Mr FARNSWORTH (United States of America) asked whether it was always within the discretion of the Drafting Committee to receive drafting proposals, or whether it was necessary to refer them to the Committee.

Mr ROGNLIEN (Norway) said he was not sure that all delegations had voted against the United Kingdom suggestion of having its proposal referred to the Drafting Committee.

The CHAIRMAN invited the United Kingdom delegate to explain the possible repercussions of his second proposal.

Mr KARSTEN (United Kingdom) said he feared that in that respect there was an unbridgeable difference between the Common law and the Civil law systems. In his system it was necessary to exclude cases where directors and partners acted in that capacity.

Mr BONELL (Italy) said he was in agreement with the United Kingdom proposal.

Mr ROGNLIEN (Norway) had some doubts about the Common law use of the expression "or *under*" the constituent documents" used by the United Kingdom delegate. It was necessary to make a clear distinction between the functions of an officer conferred "by" the constituent documents and the functions of an officer particularly appointed to act as an agent. After all, the Board of Directors could always appoint an agent in the person of one of its

own officers or employees. Such agency should be inside the Convention, even in cases where the constituent documents expressly permitted such appointments.

Mr SWART (Netherlands) agreed that the clause in question might give rise to confusion, but nevertheless he thought that the present text should be left as it stood.

Mr VAN RENSBURG (South Africa) said that he shared the views of the representatives of Norway and the Netherlands.

Mr SWART (Netherlands) thought it would be better to leave the article as it stood.

The CHAIRMAN put the United Kingdom proposal to the vote.

The United Kingdom proposal was rejected by 27 votes to 8 with 4 abstentions.

Article 4, as a whole, was approved.

The meeting was suspended at 4.55 p.m. and resumed at 5.15. p.m.

Article 5

The SECRETARY-GENERAL of the Conference briefly introduced the provisions of this article.

Paragraph (1)

Mr ROGNLIEN (Norway) introduced the text, contained in CONF.6/3, page 9), which his delegation proposed for Article 5. Paragraph (1), as it now stood, spoke of "the parties". Presumably, there were three. However, they were not equal, for there was a link between the principal and his agent. Consequently, it should be made clear that Article 5 referred to the two sides to the contract of sale.

The CHAIRMAN observed that the delegations of the Netherlands, the USSR and the Congo had indicated support for the Norwegian proposal.

Mr McCARTHY (Ghana) pointed out that the meaning of the word "parties" in paragraph (1) differed from that in paragraph (2). Paragraph (1) did not deal with a tripartite relationship. There could be only two parties: the third party on the one hand and the agent or principal on the other. In paragraph (2) however, there were three parties at first, but after the contract of sale was concluded, once again only two parties. The difference in meaning of the word "parties" should be specified in each of the two paragraphs. On paragraph (1), he supported the Norwegian proposal.

Mr ILOKI (Congo) welcomed the remarks of the two previous speakers. Paragraph (1) could only be referring to two parties.

Mr TERADA (Japan) supported the Norwegian proposal.

Mr ÜNAL (Turkey) pointed out that the meaning of the word "parties" was discussed in paragraphs 43 and 44 of the Explanatory Report on the draft Convention, in connection with its use in Article 7. He considered the Norwegian proposal clearer than the formula suggested in paragraph 44 of the Explanatory Report.

Mr ANTONETTI (France) said that he supported the Norwegian proposal because it more clearly described the situation, although he wondered about the implications of the phrase "in their mutual relations".

Mr VAN RENSBURG (South Africa) considered the retention of that phrase important. Any instruction by a principal to his agent that one or more of the provisions of the Convention should not apply could be regarded as a kind of separate agreement. He had no difficulty with the original text but if it was to be replaced by the Norwegian proposal, the phrase in question should be retained.

Mr ILOKI (Congo) asked whether Article 5 referred to exclusion or derogation only before the contract of sale or also thereafter.

Mr ROGNLIEN (Norway) said there was no limitation in time. The two sides could agree on exclusion or derogation at any time, also after the contract was concluded and indeed even after the judgment of a court.

Mr ALBAKREY (Iraq) proposed as a solution the retention of the existing text of paragraph (1) and the addition of the Norwegian proposal.

Mr ROGNLIEN (Norway) was not sure that such a solution conformed to what he had had in mind.

The CHAIRMAN suggested that the Drafting Committee could be asked to consider the possibility proposed by the representative of Iraq. On that basis he put the Norwegian proposal to the vote.

The Norwegian proposal (CONF.6/3, page 9) was approved by 29 votes to none with 6 abstentions.

Paragraph (2)

In reply to a question by the CHAIRMAN, Mr ROGNLIEN (Norway) explained that the note in CONF.6/3 concerning paragraph (2) did not necessarily call for the omission of that paragraph. In view of the text just adopted, paragraph (2) could be safely omitted, but if anyone, including the Drafting Committee, wished to propose a more precise wording for the paragraph, he had no objection.

Mr ÜNAL (Turkey) said that after the adoption of the Norwegian proposal, there was no longer any problem concerning the different use of the word "parties", and paragraph (2) could be kept as it stood.

Mr ILOKI (Congo) said he had difficulty understanding para-

graph (2). If, say, the agent and the third party agreed to derogation from certain provisions of the Convention, could the principal then insist on rights accorded under those provisions? If so, such a situation would not be normal, at least for a Civil law country.

Mr SWART (Netherlands) said that although paragraph (2) was now implicit in the Norwegian text just adopted, he considered it better to be explicit. He therefore favoured keeping paragraph (2) but without the word "However".

Mr McCARTHY (Ghana) said he failed to see how there could be three parties to an agreed legal contract. Paragraph (2) required amendment and he was prepared to propose one.

Mr VAN RENSBURG (South Africa) suggested that replacement of the words "agreed upon" by the words "assented to" would show that paragraph (2) did not refer to the sales agreement or contract. However, in order to avoid all possible misunderstanding, he favoured omission of paragraph (2).

The CHAIRMAN noted that several delegations had proposed omitting paragraph (2). He put the question to the vote.

The proposal to omit Article 5 (2) was approved by 22 votes to 10 with 7 abstentions.

The meeting rose at 6.10 p.m.

7th meeting

Friday, 4 February 1983 at 9.30 a.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.7

ELECTION OF VICE-CHAIRMEN OF THE COMMITTEE OF THE WHOLE
AND OF THE RAPPORTEUR (CONF. 6/2)

Mr LOW (Canada) suggested that there should be two Vice-Chairmen of the Committee of the Whole and proposed Mr Cuker (Czechoslovakia) and Mr Hafez (Egypt).

Mr Cuker and Mr Hafez were elected first and second Vice-Chairmen respectively.

Mr LOW (Canada) suggested that the Rules of Procedure should be modified and that Mr Evans should be asked to fulfil the functions of Rapporteur.

It was so decided.

The CHAIRMAN said that the Rules of Procedure could be amended accordingly later.

Mr SWART (Netherlands) asked what was the exact function of the Rapporteur. Would he prepare an explanatory memorandum on the Convention after its adoption?

The CHAIRMAN referred him to Rule 50 of the Rules of Procedure which laid down the functions of the Rapporteur.

The SECRETARY-GENERAL of the Conference added that, should the Conference request it, an explanatory memorandum would certainly be prepared, either by the Rapporteur or by UNIDROIT itself. There was a precedent for such action.

Mr ROGNLIEN (Norway) asked if there would be a report by the Committee of the Whole to the Conference.

The CHAIRMAN replied that it would be his task to do that.

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Article 6

The SECRETARY-GENERAL of the Conference briefly introduced the provisions of Article 6.

Paragraph (1)

Article 6 (1) was approved as it stood.

Mr BONELLI (Italy) pointed out that Article 6 (2) used the word "governs" which he found infinitely preferable to the word "applies" used in Article 1. He requested that "governs" be used as often as appropriate in the Convention.

The CHAIRMAN said that the matter would be referred to the Drafting Committee.

Paragraph (2)

Mr SEVON (Finland), referring to the proposed amendment by the observer from the Hague Conference on Private International Law, drew attention to the fact that Article 7 (2) of the Vienna Sales Convention had already been accepted by a Diplomatic Conference. Article 6 of the UNIDROIT draft Convention reproduced that text and he strongly supported the text as it stood.

Mr DUCHEK (Austria), explaining that the observer from the Hague Conference was unable to be present and had asked him to express his point of view, said that the limited scope of the present

Convention meant that certain important *lacunae* inevitably existed — the proposal in CONF.6/C.I/W.P.28 attempted to make provision for one such gap, where the law of the forum might lead to the application of even a fourth country's law in the absence of specific indications in the UNIDROIT Convention. Mr Pelichet also considered it unfortunate that a lawsuit might be decided by a combination of the rules of the Convention and of a country where the agent did not have his place of business and therefore he had proposed that the law of the agent's place of business should always apply.

Mr Duchek considered that the question of gaps in the Convention was a very serious one and that Mr Pelichet's proposal had the advantage of ensuring that the same law would be applied for the principal, the agent and the third party. Such uniformity was desirable but he doubted whether the Conference would wish to go into the details of private international law.

He supported the proposal tentatively but would be strongly against deletion of the text within square brackets.

The CHAIRMAN doubted the extent to which adoption of the proposal would lead to uniformity since a judge would be strongly influenced by the law of his own country while trying to apply that of another. Deletion of the text within square brackets would lead to the application of national law and therefore remove any influence exerted by the Convention.

Mr SEVON (Finland) said that he would be completely against the proposal if the text in brackets were deleted. Furthermore, he failed to see how the proposal would ensure that the law of the agent's country would apply as that would not necessarily always be the case under Article 6 (2).

Mr TERADA (Japan) and Mr BONELL (Italy) stated their opposition to the proposal.

Mr ROGNLIEN (Norway) opposed the proposal. Clearly, the law of the place of business of the agent was frequently a very important factor in private international law and, in any event, it

would often be invoked automatically on the basis of the private international law of the forum: in other cases, however, it was unreasonable, and there was the added disadvantage that a court would be obliged to apply a law which was unfamiliar to it.

Moreover, there would be difficulty in drawing a clear line between the gaps within the Convention dealt with in Article 6 (2) and what was not governed by the Convention, so it was not advisable to have provisions other than those in Article 2 (1) (b) for such cases.

Finally, for Article 6 (2), the Conference should not formulate any rule other than that laid down in the Vienna Convention.

Mr SWART (Netherlands) failed to understand the import of the Hague Conference's proposal since Article 2 (1) of the UNIDROIT Convention did not make it clear which law was to apply. If the law of the agent's country were meant, then that should be explicit in the wording of the proposal.

He found it very difficult to accept any text other than that in the Vienna Convention and so was against the proposal.

In the light of the foregoing discussion, Mr DUCHEK (Austria) felt that the proposal did not reflect what the observer from the Hague Conference wished to stress. He therefore withdrew his support from the proposal.

In reply to a question from the CHAIRMAN, Mr ROGNLIEN (Norway) confirmed that his delegation's proposal to transfer Article 6 to the end of Chapter 1 (see CONF.6/3, page 9) could be referred to the Drafting Committee.

Article 6 as a whole was approved as it stood, subject to drafting changes.

Article 7

The SECRETARY-GENERAL of the Conference briefly introduced the provisions of Article 7.

Mr STÖCKER (Federal Republic of Germany) considered that

Article 7 was not within the scope of the draft Convention and he therefore proposed that it be deleted, in accordance with the view expressed by Professor Müller-Freienfels, a member of the restricted group of experts.

Mr SWART (Netherlands) also supported deletion of the article since it might give rise to problems of priority between the Convention and usage.

Mr BONELLI (Italy) said that in Italy usage played an important role and he was strongly in favour of retaining the article with certain drafting amendments. A reference to usage could provide a means of filling certain gaps in the draft Convention.

Mr CUKER (Czechoslovakia) supported deletion of the article because usage could be dealt with under Article 5.

Mr ROGNLIEN (Norway) said that usage was important since it could influence not only the conclusion and interpretation of a contract but in general the effect of acts undertaken by the agent for the purpose of concluding the contract or in relation to its performance, viz. Article 1 (2). Article 4 (a) of the Vienna Convention expressly provided that it was not concerned with "the validity of the contract or of any of its provisions or of any usage", validity being a matter for a court to decide. Article 7 likewise depended on whether the usage was deemed valid or not.

Mr VAZE (India) had difficulty reconciling the words "usage" and "widely known". If a person were paid a substantial sum for facilitating the conclusion of an arms contract, even though the practice was against the law, did that constitute a widely known usage?

The CHAIRMAN replied that in such cases a court would have to decide whether or not such a usage was valid.

Mr MUCHUI (Kenya) supported the retention of Article 7. In his view there was little danger of condoning illegal usages since

courts were empowered to decide upon the validity of usages.

Mr BENNETT (Australia) was in favour of retaining the article. He did not think that the need to interpret usages would arise as frequently in connection with the draft Convention as it did with the Vienna Convention. In any case in his country courts would have regard to usages whether or not Article 7 was adopted.

Mr ANTONETTI (France) joined previous speakers in supporting the retention of Article 7.

Mr ÖZSUNAY (Turkey) was in favour of deleting the article.

By 27 votes to 8 with 4 abstentions it was decided to retain Article 7.

Paragraph (1)

Mr ROGNLIEN (Norway) introduced his delegation's amendment to paragraph 1 (CONF.6/3, page 10) emphasizing that it was essential to define what was meant by "parties."

Mr ÖZSUNAY (Turkey) endorsed the view expressed by the delegate of Norway.

Mr ANTONETTI (France) shared the view expressed by the Norwegian representative, but wondered what would be the situation if the third party also had an agent. He therefore proposed that the text should be amended to read "the principal, the third party and their respective agents".

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) supported Norway's amendment.

Mr GRETTON (United Kingdom) pointed out that according to Article 14 (2), the principal was bound even if he tried to end the agent's authority and he wondered whether the same distinction between the parties was implied.

Mr BONELL (Italy) said that Article 14 (2) dealt with apparent authority.

The CHAIRMAN was of the opinion that the form of authority had little influence in Article 7.

Article 7 (1), as amended by the delegation of Norway, was approved.

Paragraph (2)

Mr ÖZSUNAY (Turkey) introduced the amendment to paragraph (2) proposed by his delegation (CONF.6/C.1/W.P.11).

Mr BONELL (Italy) considered that the present text was satisfactory. The reference to international organisations contained in Turkey's amendment was vague and he wondered what international organisations would be involved. By entrusting one organisation with the question of acknowledgement of usage, there was a danger that the organisation might not always be up to date on the subject.

Mr ÖZSUNAY (Turkey) pointed out that recognition of usages by an international organisation would be more objective than the present text.

The amendment to Article 7 (2) submitted by the delegation of Turkey was rejected by 18 votes to 1 with 18 abstentions.

Mr POPOV (Bulgaria) proposed that in the French text the words "*elles avaient ou auraient dû avoir connaissance*" be replaced by the words "*avaient connaissance ou auraient été en mesure de connaître*", as used elsewhere in the text.

Mr SWART (Netherlands) observed that in the English text the same formula was employed and it was only in the French text that there was a difference.

The SECRETARY-GENERAL of the Conference said that in previous discussions on the text, in which the related wording in Article 16 (2) had also been taken into account, French-speaking delegations had believed it preferable to use a positive formula. There had been no intention of implying a change in substance; the question was one of drafting.

Mr ANTONETTI (France) suggested that the Drafting Committee should be requested to consider the wording in French, bringing the English and French texts into line.

In reply to Mr BONELLI (Italy) and Mr ROGNLIEN (Norway) respectively, the CHAIRMAN confirmed that the Drafting Committee would bear in mind the desirability of ensuring as far as possible uniformity of language in Article 7 (1) and Article 5 specifically, and throughout the draft Convention in general.

Article 8

The SECRETARY-GENERAL of the Conference briefly introduced the provisions of Article 8, drawing particular attention to the omission of the words "or its performance" — contained in the Vienna Convention — which had not been considered appropriate in the case of the present Convention which dealt essentially with relations arising out of agency.

Mr ROGNLIEN (Norway) said that he was not convinced by the argument for such an omission and drew attention to his delegation's proposal to add the words "including its performance" (CONF.6/3, page 10).

His interpretation of the article was that aspects other than simply that of the place of conclusion of the contract should be taken into consideration; they should include, for example, the place where the contract was negotiated and the place where the goods contracted for were to be delivered. It might also strike the reader of the present Convention as being rather strange if it should depart in that article from the text of the Vienna Convention.

Mr FARNSWORTH (United States of America) said that, while he indeed understood Article 8 in the sense that performance would be included in the aspects to be taken into consideration, he could foresee difficulties in finding an explicit means of expression to which the rather awkward phrasing which the Norwegian delegation had been forced to adopt in its proposal bore witness. Therefore, while he supported the Norwegian understanding on interpretation, he was doubtful as to the need for explicit inclusion or the ease with which a suitable expression might be added.

Mr BONELL (Italy) said that he shared the views of the previous speaker. Whereas the Vienna Convention referred to the "contract" and was concerned with the conclusion and performance of sale contracts, the present Convention was also concerned with the agency relationship, so that in the interests of clarity it had been considered necessary in the present article to specify "contract of sale", which in itself was an indication that different aspects, including performance, were to be included.

Mr SWART (Netherlands) said that the situation was the same in the present Convention as in the Vienna Convention and it was therefore difficult to justify a change in wording. It might, of course, be possible to include a relevant note on the article in the Explanatory Report, which should, of course, include an explanation of the departure from the Vienna Convention and why it was considered necessary.

Mr ROGNLIEN (Norway) said that he was satisfied from the discussion that there was general agreement on interpretation. On that understanding, should the Drafting Committee not be able to improve on the existing drafting, he could agree to the text remaining as it stood. Norway, when incorporating the Vienna Convention into its national legislation, would adopt the solution of referring to the "sale", rather than the "contract", the former being understood to include performance as well as the contract of sale.

Mr ÖSZUNAY (Turkey), referring to Article 8 (a), said that there seemed to be some ambiguity in the two parts of the sub.

paragraph: the first part established an objective criterion — that the place of business was that which had the “closest relationship to the contract of sale which the agent has concluded”, whereas the second part — “or purported to conclude, having regard...” was more subjective. He proposed that the second part should be deleted.

Mr ANTONETTI (France) requested clarification of the word “purported” in the English text and suggested that the Drafting Committee should give consideration to the wording of the drafting, bearing in mind both the English and the French texts.

Mr SWART (Netherlands), referring to the Turkish proposal, said that in practice it was quite probable that what was contemplated by the parties would in fact be taken into consideration when concluding a contract. Moreover, the article was in line with the Vienna Convention in that respect. He was therefore in favour of the text remaining as it was.

The CHAIRMAN invited the Committee to vote on the deletion proposed by the Turkish delegation.

The amendment was rejected by 23 votes to 1 with 10 abstentions.

The CHAIRMAN said that he would take it that, on first reading, the text of Article 8 could stand.

It was so agreed.

CHAPTER II — ESTABLISHMENT AND SCOPE OF THE AUTHORITY OF THE AGENT

Article 9

The SECRETARY-GENERAL of the Conference briefly introduced the provisions of Article 9.

Paragraph (9)

Mr ILOKI (Congo) referred to the proposal by his delegation contained in CONF.6/3, page 9, relating to Article 9 (1), and suggested that reference should be made to "authority" rather than "authorisation". He expressed concern that the present wording would have implications in regard to capacity and in that respect referred to Article 3 (d). An amendment in the sense he suggested would facilitate a future harmonisation of his, and perhaps other, national legislations with the Convention.

The CHAIRMAN said that in his view the article should not be interpreted as raising the question of capacity but as attempting to distinguish between the act of authorisation and the resulting authority.

The meeting rose at 1.00 p.m.

8th meeting

Friday, 4 February 1983, at 3.00 p.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.8

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (Study XIX - Doc. 63, CONF.6/3 Add. 1 and Add.2, CONF.6/4)

*Article 9 (continued)**Paragraph (1) (continued)*

The CHAIRMAN noted that the Bulgarian proposal (CONF.6/C.1/W.P.31) was similar in intent to the Czechoslovak proposal. He asked whether the objective of the Czechoslovak proposal (CONF.6/C.1/W.P.3) could not be met by the Norwegian proposal (CONF.6/3, page 10) to establish a new Article 9bis referring to the appa-

rent authority dealt with in Article 14.

Mr CUKER (Czechoslovakia) said that his delegation agreed to the Norwegian proposal but, if it became a separate article, that would not solve his delegation's difficulty with the word "implied" in Article 9 (1). Perhaps it would be possible to combine the Norwegian proposal with the text of Article 9 (1).

Mr ROGNLIEN (Norway) felt that such combination would be dangerous. "Implied authorisation" and "apparent authorisation" were two separate concepts. Whether authorisation was express or implied, it represented the will of the principal and constituted genuine authorisation. "Apparent authorisation" was an entirely different matter and should be consigned to a separate article, which would say that the authority of the agent could also arise from the conduct of the principal and the circumstances of their situation as perceived in good faith by the third party. His proposal was based on that of Professor Gower, one of the three members of the restricted group of experts.

He had no difficulty with the word "implied" and Article 9 (1) should be left as it stood.

Mr BONELL (Italy) considered it the task of the Committee to seek consensus. As he undertood the Czechoslovak proposal, it was simply designed to clarify the concept of "implied authorisation". Consequently, there was no link to the apparent authorisation dealt with in Article 14 (2), and discussion should be confined to Article 9 (1).

As to the Czechoslovak proposal, he feared that, in trying to define "implied" in terms similar to those used in Article 14 (2), it might cause confusion with the different concept presented in that provision.

On the other hand, the Norwegian proposal for an immediately following separate article, with its cross-reference to another article, was also confusing, and it was unnecessary since its presence would make no real difference in substance.

Mr HAKANSSON (Sweden) considered the analysis of the representative of Italy very clear and he endorsed it.

Mr STAUDER (Switzerland) said his delegation would be content to deal with the question of apparent authorisation entirely in Article 14 (2). However, by way of a compromise of the opposing views, he was prepared to suggest that a separate Article 9bis might state that an apparent authorisation to act as defined in Article 14 (2) was assimilated to authorisation to act.

Mr KARSTEN (United Kingdom) did not think it advisable to discuss two questions very different in kind at one and the same time. All the Czechoslovak delegation seemed to want was a more precise formulation of the word "implied". In his view, however, it would be undesirable to be more precise in a Convention of the kind under discussion, for that would require the greatest care in drafting.

The Czechoslovak proposal was similar to Article 5 of the Hague Convention on agency, an article dealing with the choice of the internal law governing the relationship of the agent and the principal. However, he noted that instead of the words "must be inferred with reasonable certainty from the terms of the agreement between the parties" in the Hague Convention, the Czechoslovak proposal said "must be such that it may be inferred with reasonable certainty from the acting of the parties".

On balance he felt that it would be better not to go into such refinements and to leave the text as it stood.

Mr VAN RENSBURG (South Africa) suggested that discussion of the Norwegian proposal should be postponed until the Committee took up Article 14 (2), since Norway had also proposed certain amendments to that provision.

With regard to the Czechoslovak proposal, he would observe that implied authorisation was authorisation that existed in fact. In other words, it was the intention of the principal that the agent should act on his behalf, even though not declared expressly. Perhaps a better word would be "tacit", but "implied" had become the accepted term in that regard.

He appreciated that the Czechoslovak proposal sought to define "implied" but what happened in attempting to express the idea in more detail was that rules of adjective or procedural law were put

into a text which should be confined to substantive law. For example, the requirement in the proposal that there must be "reasonable certainty" that there was authorisation amounted to telling a court of law how much evidence was necessary for it to come to a conclusion. However, it was a general rule that in private law matters questions of fact were decided on a preponderance of probability. The proposal would thus amount to interference in the amount of evidence that would be needed in a court.

For those reasons, his delegation would prefer the formulation in Article 9 (1) as it stood.

Mr SWART (Netherlands) said that to his mind the "implied" authorisation of Article 9 (1) meant that the agent had been led to believe that he had authorisation, whereas in Article 14 (2) it was the third party that had been led to believe that the agent had authorisation. If it was necessary to define the word "implied" in Article 9 (1), that might be done by using the formula in Article 14 (2) substituting "agent" for "third party".

Mr GONDRA (Spain) said he appreciated the intention of the Czechoslovak proposal (CONF.6/C.1/W.P.3) to clarify the term "implied authority", but the complicated formulation would create more problems than it solved. Neither Civil nor Common law jurists had difficulty with the substance — implied authority was an authority flowing from *facta concludentia*. To mark the difference between such authority and apparent authority, it might be useful to substitute "tacit" for "implied", — certainly in French. He would prefer to retain the present text with that change. No attempt should be made to deal with apparent authority in the article.

Mr DUCHEK (Austria) endorsed the comments of the Spanish representative. It was impossible to define "implied authority" and the judgment must ultimately rest with the courts on the basis of case-law. The real problem was the dividing line between apparent and implied authority which was drawn differently in different national legislations. In that connection, it would be worth discussing the Swiss proposal which sought to achieve the same result in

all legislations. "Implied authority" was a common expression, used in other international conventions. Nothing would be gained by substituting "tacit", particularly in respect of a translation into German. He could, however, accept the change, if a majority of the Committee so desired, but it would, in his view, limit the scope of the paragraph.

Mr MUCHUI (Kenya) agreed with the views expressed by the South African representative. He could not support the Czechoslovak proposal – the definition of implicit authority must be left to the courts. He favoured the retention of the word "implied" which was currently used in such a context in other legal texts.

Mr CUKER (Czechoslovakia) said he could accept the word "tacit" by way of compromise, preferably with the addition, in brackets, of the phrase "*per facta concludentia*".

Mr MACAPAGAL (Philippines) endorsed the comments of the Italian representative. "Implied authority" was a well known legal term and the text should be retained as it stood.

Mr ROGNLIEN (Norway) observed that the basic criterion was the will of the principal and the way in which that will was expressed. Any attempt to describe apparent authority should be placed in a separate paragraph or article.

Mr BENNETT (Australia) preferred the present text of the paragraph. An important concept was involved which would affect subsequent articles. Implied authority was indeed authority, flowing from certain established facts. On the other hand, use of the word "tacit" in the context would merely emphasize that the authority was not express.

Mr MOULY (France) supported the present text, which moved in accordance with cartesian principles from the simple to the more difficult, from the will of the principal in Chapter II to the effects of the acts of the agent in Chapter III. He could, however, accept the substitution of "tacit" for "implied".

Mr VAZE (India) said that Articles 9 and 14 were interconnected and it was difficult to discuss one of them in isolation from the other. He suggested the term "ostensible authority", rather than "tacit authority", to indicate some overt act by the principal which led the third party to conclude reasonably that the agent did have authority. Although the matter must ultimately depend on the judgment of the courts, it was proper for substantive law to give some indication of the degree of proof required.

Ms COLLACO (Portugal) preferred the retention of the present text with the substitution of the word "tacit" for "implied". The point to be borne in mind was the difference of approach between implied and apparent authority: implied authority was concerned with the relationship between the principal and the agent, whereas apparent authority regarded the matter from the standpoint of the third party. The Czechoslovak proposal was on the borderline between the two, but the protection of the third party was dealt with in Article 14 (2).

Mr ALBAKREY (Iraq) suggested that the two paragraphs of Article 9 might be merged along the following lines:— "The authorisation of the agent by the principal may be express or may arise from the conduct of the principal and the circumstances of their mutual relationship that restricts the agent to performing all acts necessary to achieve the purposes for which the authorisation was given." Such a formulation would make it unnecessary to refer to either implied or tacit authority and would confine the agent within certain bounds.

The CHAIRMAN put to the vote the issue of maintaining the present text of Article 9 (1) or replacing "implied" by some other word or explanatory phrase.

The existing text of Article 9 (1) was approved by 25 votes to 5 with 3 abstentions.

The meeting was suspended at 4.55 p.m. and resumed at 5.20 p.m.

Mr HANZAL (Council for Mutual Economic Assistance) said that his Organisation considered that its contacts with UNIDROIT were useful and hoped that it could co-operate with UNIDROIT in the implementation of the articles adopted at the Conference.

Mr GUEORGUIEV (Bulgaria) said he thought it necessary to make a clear separation between paragraphs (1) and (2). Paragraph (2) dealt with problems of the scope of the agent's authority and in some countries there were questions of purely legislative technique which had to be considered.

Mr ROGNLIEN (Norway) said that the question of splitting up paragraphs (1) and (2) into separate articles was a problem for the Drafting Committee.

Mr GUEORGUIEV (Bulgaria) agreed that a question of principle was involved which might perhaps be solved by the Drafting Committee.

The CHAIRMAN said that that point could be taken up later. He now asked whether or not there should be some reference in Chapter II to the existence of apparent authority.

Mr ROGNLIEN (Norway) said there was a link between Article 9 and Article 14 because they both described ways by which the principal could be bound to the third party by the acts of the agent. It should be made clear that Article 9 (1) dealt only with actual authorisations. The draft was based on a distinction between "authorisation" and "authority". In this terminology "authorisation" meant the way by which the principal conferred power on the agent; "authority" meant the power of the agent to bind the principal towards the third party, a power that could arise either by actual authorisation (Article 9 (1)) or by "apparent" authorisation (Article 14 (2)). He considered the Swiss proposal acceptable, but he would prefer to say instead of "apparent authority" that "apparent authorisation" as specified in Article 14 (2) should be assimilated to authorisation by virtue of Article 9 (1).

Mr STAUDER (Switzerland) said his delegation would prefer to deal with the problem of apparent authorisation in Article 14, but had submitted its own oral proposal as a compromise.

Mr BENNETT (Australia) said that his delegation would oppose the Norwegian and Swiss proposals.

The CHAIRMAN said that the idea behind the Swiss proposal was that apparent authority was not authority at all.

Mr KARSTEN (United Kingdom) said he could endorse the views of the Italian delegation. The problem, of course, reflected a difference between the Common law and the Civil law countries which should be resolved by appropriate drafting. He hoped that the Swiss representative would submit his proposal in writing. He did not think that any decision should be taken at the present stage of the debate.

Mr VAN RENSBURG (South Africa) said that most delegations wanted to distinguish between "authority" and "apparent authority". He could not agree to the Norwegian and Swiss proposals.

The CHAIRMAN pointed out that the Swiss proposal had attempted to reconcile two different tendencies.

Ms COLLACO (Portugal) said she preferred the Swiss proposal.

Mr SWART (Netherlands) said they should leave the text as it stood. The problem was only theoretical and could be explained in the commentary.

The CHAIRMAN put to the vote the proposal to add a reference to "apparent authority" in the heading of Chapter II.

The proposal was defeated by 23 votes to 4 with 10 abstentions.

Paragraph (2)

The CHAIRMAN asked the Mexican representative if he still

wished to put forward his proposal (CONF.6/C.1/W.P.34).

Mr CRUZ GONZALEZ (Mexico) said that he did.

Mr KARSTEN (United Kingdom) suggested that paragraph (2) be deleted altogether, as it added nothing to paragraph (1) and might cause difficulties when interpreting the Convention.

Mr ROGNLIEN (Norway) suggested that the whole of Article 9 might be deleted, as the content of it was already included in all national laws.

Mr SWART (Netherlands) said he agreed with the United Kingdom representative that paragraph 2 did not say very much and would be of little help in practice.

He had grave difficulties with the Mexican proposal and, if forced to choose, would prefer to delete paragraph (2).

Mr CRUZ GONZALEZ (Mexico) said that even in the case that Article 9 (2) was deleted, his delegation would insist on its proposal, because Article 9 (1) implied an authorisation to the agent, thus risking his exercising acts concerned with the bringing of proceedings before a judicial or quasi-judicial authority without an express authorisation.

Mr BONELL (Italy) said he could not agree to the deletion of paragraph (2). The rule of construction in that paragraph would be of considerable use in practice to businessmen.

The CHAIRMAN put the proposal to delete paragraph (2) to the vote.

The proposal was rejected by 27 votes to 7 with 1 abstention.

The CHAIRMAN put the Mexican proposal (CONF.6/C.1/W.P.34) to the vote.

The Mexican proposal was rejected by 22 votes to 3 with 13 abstentions.

The CHAIRMAN put to the vote the suggestion that the Committee should, in its deliberations, proceed directly to Article 13 and not to Articles 10, 11, and 12.

The proposal was rejected by 13 votes to 10.

The meeting rose at 6.15 p.m.

9th meeting

Saturday, 5 February 1983 at 9.30 a.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.9

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (Study XIX - Doc. 63, CONF.6/3 Add. 1 and Add. 2, CONF.6/4)

Article 10

The SECRETARY-GENERAL of the Conference briefly introduced the provisions of Article 10.

Article 10 was approved without amendment.

Article 11

Paragraph (1)

The SECRETARY-GENERAL of the Conference briefly introduced the provisions of Article 11 (1).

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) emphasized that the provisions contained in paragraph (1) were par-

ticularly important for the USSR where authorisation in writing was essential. The text was a *sine qua non* for eventual ratification of the Convention by the USSR.

Mr SWART (Netherlands) pointed out that if paragraph (1) were adopted in order to solve the problems faced by certain States it might create even greater problems for other States. The text was inconsistent with the objectives of the Convention and he proposed the deletion of Article 10.

Mr BONELL (Italy) said that although he was satisfied with Article 10 alone, he realised the importance of Article 11 for many States and he was prepared to accept it in principle. The point raised in the Netherlands amendment (CONF.6/3 Add.2, page 2) concerning the imbalance created by Article 11 must be taken into account and he thought it could be overcome by adding the words "and that the agent or principal had his place of business in a Contracting State which had made a declaration under Article X of this Convention" at the end of Article 11 (3).

Mr SEVON (Finland) considered that it would be regrettable if certain States were precluded from ratifying the Convention because of Article 10. The views expressed by the Netherlands delegation were also relevant and he thought that the concern of both parties could be met by amending Article X to read "A Contracting State whose legislation requires authorisations, ratifications and terminations of authority to be made . . .". By adopting Article 10 and the Italian amendment to Article 11 (3), the problem would be solved.

Mr SANDVIK (Norway) would have preferred the deletion of Article 10, but was prepared to accept for Article 11 a text similar to that used in the Vienna Sales Convention.

Mr HAFEZ (Egypt) said that although Egyptian law provided for authorisation to be given in different forms he had no objection to approving Article 11 so as to enable as many States as possible to ratify the Convention.

Mr ÜNAL (Turkey) was in favour of the text because his country's legislation provided that contracts between the principal and the agent must be in writing.

Mr SWART (Netherlands) doubted whether the amendment proposed by Finland would make the concept any clearer. The more general the rule, the greater the effect of the reservation.

Mr JOVANOVIĆ (Yugoslavia) said that the question of form, to which Article 10 related, while an important one, should not be over emphasized. From the point of view of Yugoslavian legislation, and probably of the legislation of many other countries, no major problem arose in respect to sales contracts. He suggested that Article 11 (1) might be drafted in a positive way, rather than a negative one as at present. Mention of specific form, other than written form, should be avoided and the drafting kept as broad as possible.

The CHAIRMAN, in reply to a question by Mr TERADA (Japan), said that he understood that the conclusion of Article 11 (1) did not presuppose the exclusion of the application of Article 14 (2).

Mr MOULY (France) said that a fundamental difficulty in relation to Article 11 was that both to include and to exclude a reservation such as that envisaged in paragraph (1) would tend to weaken the effect of the Convention: inclusion of the reservation would tend to lead to two separate regimes, whereas certain States feared that too great a freedom in regard to form might have an adverse effect given their specific legal systems. A compromise might be possible by requiring authorisation to be in writing and by maintaining greater liberty for ratification or termination, which could also be inferred from conduct — albeit without including the concept of apparent authority — as envisaged in Article 16. In such a case, it would be sufficient for those countries which could not accept greater freedom of form to refrain from adopting criteria such as conduct as a basis for the effects of agency.

Mr KARSTEN (United Kingdom) said that the relationship of

the present paragraph with Article 14 (2) should be borne in mind when reaching a decision on the former.

Mr VAN RENSBURG (South Africa) said that written authority might not necessarily always exclude apparent authority, in the sense that written authority could be subsequently withdrawn without the third party having knowledge of withdrawal. He supported the Netherlands position.

The CHAIRMAN invited the Committee to vote on a reservation in the sense of Article 11 (1), on the understanding that, if appropriate, an amendment to Article 11 as proposed by the Italian delegation and an amendment to Article X as proposed by the Finnish delegation and himself might be discussed subsequently.

The inclusion of an article providing for a reservation, such as the one envisaged in Article 11 (1), was approved by 23 votes to 9 with 5 abstentions.

Paragraph (2)

The SECRETARY-GENERAL of the Conference briefly introduced the provisions of this paragraph.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) said that it had emerged from the discussions that there was no common understanding of the meaning to be attached to "implied", as contained in Article 9, even though the proposal to delete the word had not been approved. Whereas written authority made a situation very clear where there were specific legal provisions on the matter, implied authority was less clear and less frequent but in the interests of clarity should perhaps not be expressly excluded from the Convention. Nevertheless, for those countries which might have doubts on the point, there should be an opportunity to make a reservation. The Convention would not be unduly weakened by such a provision.

Ms COLLACO (Portugal) said that the effect of accepting a

reservation in the sense of paragraph (2) would be very broad, so much so that paragraph (2) could hardly be considered as merely making possible a reservation in the usual sense of the term. For that reason she could not support inclusion of the paragraph.

Mr SWART (Netherlands) said that although it was rather difficult to discuss such a reservation without more specific indication of the type of cases in which it might be required, he doubted that it was really necessary since in effect there could never be any obligation on the part of a third party to have dealings with an agent who did not have authorisation in the form which the third party demanded.

Mr MUCHUI (Kenya) said that while bearing in mind the need to make it possible for the greatest number of States to become parties to the Convention, care should be taken to avoid having attempts to achieve uniformity in one article nullified by the provisions of another article. After the discussion on implied authority in relation to Article 9, it would be most unfortunate if what had been achieved there should be nullified by allowing the possibility for any Contracting State to make a declaration under Article Y. He could therefore not accept paragraph (2) as it stood. Should such a paragraph be necessary, he would prefer that the opportunity to make a reservation should be limited to those States whose legislation included a mandatory requirement for express authorisation. Alternatively, rather than having paragraph (2) included as it stood, he would prefer to have Article 9 and Article 16 (7) deleted in the interests of consistency.

Mr JOVANOVIĆ (Yugoslavia) said that he supported the Chairman's point of view in relation to Article 9. It would be very difficult to find out what reservations had been made and he was therefore against restricting the Convention in such a manner.

Mr DUCHEK (Austria) said that he had voted for the adoption of Article 11 (1) because of the precedent established by the Vienna Sales Convention but he felt that the reservations in Article 11 (2) would weaken the Convention too much. They should be lim-

ited to absolutely necessary cases, as otherwise an element of uncertainty would enter into international trade as business circles would not always be aware which States had made reservations.

Consequently, he favoured deletion of Article 11 (2).

Mr BONELL (Italy) was also strongly opposed to Article 11 (2). The concern of those who supported it would be covered by the rule in Article 6 (1) stating that regard was to be had to the need to promote uniformity in the Convention's application as well as to ensure the observance of good faith in international trade. Application of the same concept of good faith would solve the problem and make it unnecessary for reservations to be expressed.

Mr GUEORGUIEV (Bulgaria) stressed that the problem was a difficult one and that the purpose of the Convention was to reach a compromise between different systems of law, producing a text acceptable to as many countries as possible so that the opportunity to make reservations should be retained for those countries which required explicit declarations.

The CHAIRMAN suggested that a vote should be taken on whether, if Article 11 (2) were retained, it should be restricted to States which required express declarations.

Mr DUCHEK (Austria), supported by Mr ROGNLIEN (Norway), objected. A decision should first be taken on the inclusion of the principle and a vote should therefore be taken on whether the paragraph was accepted.

It was so agreed.

Article 11 (2) was rejected by 21 votes to 11 with 4 abstentions.

Paragraph (3)

The CHAIRMAN pointed out that Article 11 (3) would be re-numbered 11 (2).

The SECRETARY-GENERAL of the Conference briefly introduced the provisions of Article 11 (3).

Mr BONELL (Italy) repeated his proposed addition which read "and that the agent or the principal had his place of business in a Contracting State which had made a declaration under Article X of this Convention". The words were to be added to the existing text.

Mr JOVANOVIĆ (Yugoslavia) proposed that since Article 11 (3) was closely linked with Article 15, consideration of the former should be postponed until Article 15 was discussed.

The CHAIRMAN stressed that if the principle embodied in Article 11 (3) were not accepted, there was a risk that the Convention would be stillborn, and he proposed therefore that discussion of Article 11 (3) should continue.

The Yugoslav proposal was not approved.

In reply to a question by Mr DUCHEK (Austria), Mr BONELL (Italy) explained that once it was known that the agent had his place of business in a Contracting State which had made a declaration, it would be known that a declaration had been made.

Mr MUCHUI (Kenya) said that he understood Article 11 (3) as attempting to protect the third party and to reduce the possible surprise element. The proposal made by the Italian representative was helpful as it would reduce the possibility of surprise even further and perhaps allay to a certain extent the fears of those delegations which had accepted Article 11 (1) with reluctance.

Therefore he fully supported the amendment.

The SECRETARY-GENERAL of the Conference stated that there was no difficulty inherent in the proposal from the point of view of logic — it would restrict the application of Article 11 (1).

Mr KARSTEN (United Kingdom) expressed his uncertainty as

to the need for such a paragraph. His country was very attached to the idea of the undisclosed principal and after listening to the introduction to the paragraph given by the Secretary-General of the Conference he was unconvinced that any solution was required for such cases. After all, once the principal had been disclosed, the third party could ascertain that a reservation had been made. Perhaps the Convention was trying to be over-protective to the third party.

Mr BONELL (Italy) pointed out that at that stage it was too late for the third party to take any effective action. He must know beforehand that the principal had such a defence.

Mr RUGNLIEN (Norway) said that the purpose of Article 11 was to allow a declaration to be made for cases where the principal or the agent had his place of business in a declaring State. Paragraph (1) had originally envisaged only the principal. The agent had been added later as some States felt it necessary, which seemed questionable. The article was complicated by paragraph (3), which within the present structure made an exception to the relevance under paragraphs (1) and (2) of the *principal's* place of business. The additional exception now proposed by the representative of Italy should, however, be addressed to both alternatives relevant under paragraph (1) and refer also to the case where the *agent* had his place of business in a Contracting State which had made a reservation.

The CHAIRMAN pointed out that the previous speaker's comment would only apply if the Italian proposal were adopted.

Mr SEVON (Finland) said that he assumed that those speakers who had supported the Italian proposal were also in favour of accepting Article 11 (3).

Article 11 (3) was approved by 19 votes to 10 with 10 abstentions.

The Italian proposal was approved by 21 votes to 2 with 13

abstentions.

Article 11 as a whole was approved as amended and with appropriate renumbering.

The meeting rose at 12.10 p.m.

10th meeting

Monday, 7 February 1983 at 9.50 a.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.10

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (Study XIX — Doc. 63, CONF.6/3 Add. 1 and Add. 2, CONF.6/4)

Article 12

Mr ROGNLIEN (Norway), supported by Mr FARNSWORTH (United States of America), proposed that the article should be referred to the Drafting Committee.

It was so decided.

CHAPTER III — LEGAL EFFECTS OF ACTS CARRIED OUT BY THE AGENT

Article 13

The SECRETARY-GENERAL of the Conference introduced Article 13.

The CHAIRMAN drew attention in respect of Article 13 to the

comments of the Congolese representative (CONF.6/3, page 3). He himself thought that the Congo representative was under the misapprehension that the acts of the agent bound the principal without the third party being informed. The Japanese delegation had suggested that Articles 13 and 15 be merged, which would help to solve the problem of the onus of proof.

Mr JOVANOVIC (Yugoslavia) proposed the deletion of a reference to the third party.

Mr DATCU (Romania) could not agree to the proposal by the Congo; the draft should be kept as it stood.

Mr GONDRA (Spain) proposed that the words "at the time of contracting" should be inserted after the words "and the third party knew or ought to have known".

The CHAIRMAN wondered whether that addition was really necessary.

Mr TERADA (Japan) said he supported the Spanish proposal.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) said he could support the Congolese proposal if it was intended to provide greater clarity in the relations between the parties. He could also support the Spanish proposal.

The CHAIRMAN said that the possible introduction of the time element could be left to the Drafting Committee. The Yugoslav representative had suggested the deletion of a reference to the third party, but a majority would seem to be in favour of retaining it.

Mr ROGNLIEN (Norway) said that he had some doubts about the Spanish proposal. The Drafting Committee should give careful consideration to the terminology, but he preferred the text as it stood.

The CHAIRMAN said that he shared that view.

Mr SEVON (Finland) said he could not agree with the Norwegian representative. He supported the Spanish proposal.

Mr FARNSWORTH (United States of America) said it might be helpful if all references to "the time of contracting" were dealt with at the same time.

Mr GONDRA (Spain) suggested that the matter could best be left to the Drafting Committee, after the draft had been considered as a whole.

The CHAIRMAN agreed with that suggestion.

Mr VAN RENSBURG (South Africa) said he was opposed to any reference to the "time of contracting", since such a reference would be much too restrictive.

Mr BONELLI (Italy) said that (1) the wording of Article 13 should be in line with Article 15, as there was an obvious correspondence between the two; (2) Article 8 should not be worded in the same way; (3) he could not, in the light of the right of recourse provided for in Article 15 (2), agree with the view of the South African representative.

Mr PLANTARD (France) said there was no need to have the same rules for Articles 13 and 15, as the situation in the two articles were quite different. It would be dangerous, in his opinion, to include any specification as to the time of contracting in Article 13, since an agent might often, in practical cases, make an offer which would hold good for only a certain period.

The CHAIRMAN said he was not sure that the question of the duration of the offer was involved in Article 13.

Mr BENNETT (Australia) favoured the existing text without the additional words proposed by the representative of Spain. So far there had been no mention of "contract" in the draft Convention. Article 13 began with the words "When an agent acts . . .".

In other words, the article referred to any time in the dealings between the agent and the third party up to the conclusion of the contract, and that was as it should be.

He was conscious of the need for consistency with Article 15 but that question could be considered when Article 15 was discussed.

Mr SWART (Netherlands) favoured insertion of the words "before or at the time of contracting" in Articles 13, 14 and 15.

Mr ROGNLIEN (Norway) agreed that knowledge acquired after conclusion of the contract should be irrelevant. The text as it stood clearly did not relate to that period. As to the period prior to the conclusion of the contract, there might be special circumstances where the knowledge was acquired after the agent acted but before the conclusion of the contract. In general, however, if there was uncertainty about what should be the rule in every circumstance, it would be better not to be precise. Even the words "time of contracting" had a wider meaning than "time of conclusion of the contract" and they would have to be defined.

The CHAIRMAN said that, as he interpreted the intent of Article 13, if before or at the conclusion of the contract the third party knew or ought to have known that the agent was acting as an agent, the principal and third party would be bound in respect of what preceded and what followed the conclusion of the contract. But all that need not be specified. It was implicit in Article 1 (2).

Mr ALBAKREY (Iraq) thought that Article 13 should not be limited to the time of conclusion of the contract. He preferred the text as it stood.

Mr BONELL (Italy) disagreed. The time in question was not different from that in Article 15 (1) (a) and there should be concordance between the two articles. He could accept the Netherlands wording, which did differ in substance from the Spanish proposal.

Mr FARNSWORTH (United States of America) agreed with the

Norwegian representative that it was dangerous to be too precise. Under Article 1 (2), the Convention was to apply not only to the conclusion of the contract but also to any act undertaken by the agent for the purpose of concluding it or in relation to its performance.

He agreed that there should be consistency with Article 15, but it was that article which should be aligned with Article 13, not *vice-versa*.

Mr VAZE (India) observed that importing the words "at the time of contracting" from Article 15 could be detrimental to the third party. The agent might perform a variety of acts in connection with a contract, some of which might be outside his authority. If the part that was within his authority could be separated from the rest, that part would bind the principal. If it could not, the principal would not be bound at all. The article should therefore not be pinned down to the time of contracting.

Mr SEVON (Finland) said that after listening to the discussion he now felt that he had to support the position of the representative of Norway that it would not be wise to introduce the phrase proposed by the representative of Spain.

The SECRETARY-GENERAL of the Conference said that Article 13 dealt with one case only — that of disclosed agency where there is no contract of commission. Article 15, on the other hand, was, in his view, intended to deal *inter alia* with what happened when a third party discovered after the conclusion of a contract that there was an undisclosed principal. Unfortunately, Article 15 as drafted did not bring that out too clearly. Perhaps it would be better, before deciding to change Article 13, to wait and see how Article 15 could be redrafted. Then, if necessary, the Committee could come back to Article 13.

The CHAIRMAN noted that there was no support for the idea of omitting from Article 13 a reference to the binding of the third party, as proposed by the representative of the Congo, who unfortunately could not attend the meeting.

Mr JOVANOVIĆ (Yugoslavia) withdrew his proposal.

The CHAIRMAN put to the vote the proposal for introducing the phrase "at the time of contracting" or a variant thereof.

The proposal was rejected by 23 votes to 11 with 2 abstentions.

Article 13 was approved unchanged, subject to reconsideration after discussion of Article 15.

Mr ROGNLIEN (Norway) wanted it noted that the use of the past tense in Article 13 meant that knowledge acquired by the third party after the conclusion of the contract was irrelevant.

The meeting was suspended at 11.10 a.m. and resumed at 11.40 a.m.

Article 14

The SECRETARY-GENERAL of the Conference, after briefly introducing Article 14, asked for the Committee's guidance on the scope of Article 14, whether it was related to Article 13 only or to Article 15 also.

The CHAIRMAN noted that there was a Turkish proposal (CONF.6/C.1/W.P.14), to reverse the order of Articles 14 and 15 on the ground that Article 15 was related to Article 13, whereas Article 16 was related to Article 14. The reply to the Secretary-General's question could affect that proposal.

Paragraph (1)

Mr KUCERA (Czechoslovakia) pointed out that there was a proposal by his delegation (CONF.6/C.1/W.P.4) to add the words "unless the principal ratifies this act by the agent" at the end of paragraph (1). If that was regarded as merely a matter of drafting, it could be referred to the Drafting Committee.

The CHAIRMAN observed that that proposal was linked also to Article 16. It too would be affected by a change in the sequence of the articles.

Mr FARNSWORTH (United States of America) was not sure that it was merely a drafting point, for it would affect the wording of Article 16.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) considered the Czechoslovak proposal reasonable and wished to support it.

Mr MARELLE (Holy See), referring to the Congo's observations concerning Article 13 (CONF.6/3, page 4), which applied equally to Article 14 (1), thought that they might be due to a discrepancy between the English and French texts. The latter did not include the words "to each other". It was a matter that might be looked at by the Drafting Committee.

The CHAIRMAN agreed but observed that the Congolese proposals went beyond drafting. They would delete almost the whole of Article 15, for example.

Mr SWART (Netherlands) said with reference to the Secretary-General's question that he did not see the practical importance of going into the matter.

Mr ROGNLIEN (Norway) agreed. If one were in doubt whether Article 14 related to the case of an undisclosed agency or a commission agent, he would find the answer in Article 15.

The SECRETARY-GENERAL of the Conference asked about the case of a disclosed agency where the agent was given authority but exceeded his authority. Under Article 15 (1), there would be no right of direct action, just as in the case of Article 14 (1). Thus, the solution would be the same, but more or less indirectly. He would have wished to have a clarification, at least for the purposes of the Explanatory Report.

Mr VAN RENSBURG (South Africa) said that in the case of a disclosed agent acting outside the scope of the authority in his own name, thus binding himself, the principal obviously would not be able to act against the third party under the terms of Article 15. But under Article 16 (7), which is a general rule, ratification by the principal would enable him to intervene. That, in his view, would be the answer in the unusual case cited by the Secretary-General.

Article 14 (1) was approved.

Paragraph (2)

The CHAIRMAN recalled that two amendments had been submitted, by the Norwegian and USSR delegations respectively (CONF.6/3, pages 11-12 and CONF.6/3 Add. 1, page 1).

The SECRETARY-GENERAL of the Conference, introducing the draft text of Article 14 (2), referred to the Explanatory Report, paragraphs 66 and 67. As now drafted, the text applied the Common law notion of estoppel. It offered the third party the choice of being bound or not being bound, whereas the principal had no such choice, although the possibility of ratification under Article 16 was not excluded. The paragraph was concerned with cases of disclosed agency as described in Article 13. It could also have some application in cases where a commission agent exceeded his authority.

Mr ROGNLIEN (Norway), introducing his amendment (CONF. 6/3, pages 11-12), observed that the effects of estoppel were disputable, even in Common law countries and, in the text under discussion, they were very uncertain. It appeared however that the principal was estopped with regard to lack of authorisation of the agent, whereas the third party had a choice. There should be parity of rights between the two parties. He therefore proposed a return to the corresponding text, Article 26 (2), of the Bucharest draft, although the concluding phrase might read "... to the extent provided in Article 13."

Mr SWART (Netherlands) said it was a very common situation that one party only had a choice. In the present instance, the principal had brought it upon himself by his conduct. He therefore preferred the current text, as being more honest and as being in line with the notion of estoppel.

Mr VAN RENSBURG (South Africa) also preferred the current text. To consider whether it was unfair to the principal, it was better to take a specific case than to argue in the abstract. If a principal in Zimbabwe duly authorised an agent in the Federal Republic of Germany to purchase machinery for him, he might thereby establish relations with three manufacturing companies in that country. He might subsequently revoke the agent's authority by registered letter, but fail to inform the three companies of his action. In that case, according to the Norwegian amendment, both the principal and the third party would be bound, whatever their wishes, unless they exchanged a reciprocal release. Under the current text, both parties were protected: the principal could always ratify and the third party could always give notice of refusal to accept ratification. If, relying on the apparent authority of the agent, the third party delivered goods which never reached the principal, he would have the support of the paragraph in suing the latter. South Africa was a Civil law country but it had accepted the notion of estoppel as being fair and logical.

Mr ROGNLIEN (Norway) felt that the South African representative had not chosen a good example. If both parties agreed not to be bound, that would settle the matter. It was also true that ratification would often provide a solution, but better provision should be made for cases where there was no ratification. It was not a minor point: if, when there was a clash of interests over a contract, the choice of the third party was not time-bound, he would be able to play the market.

Mr MAGNUSSON (Sweden) endorsed the Norwegian view that both parties should be bound in accordance with the principle enunciated in Article 13. He could accept the Bucharest text, but he would prefer language which linked Articles 13 and 14 more

closely together.

Mr DASHDONDOG (Mongolia) proposed the deletion of the paragraph on the ground that there were no practical criteria on which to judge the principal's conduct. But that was the factor on which hinged the decision as to whether the third party was behaving reasonably in accepting the agent's authority and its scope. Furthermore, as appeared from Article 2 (2) and Article 15 (4), the identity of the principal was generally unknown.

Mr DUCHEK (Austria) emphasized that the current text and the Norwegian amendment would have the same effects in most cases. The point could not be discussed in isolation from ratification, which might be implied. Typical ratification was an action by the principal against the third party who would then have no choice, only an escape clause under Article 16 (2). Subject to that observation, he was satisfied with the present text.

Mr BENNETT (Australia) agreed with the previous speaker. The Norwegian amendment brought no substantive change. The two essential elements in the situation were lack of authority on the part of the agent and misleading conduct on the part of the principal. The question of the third party's conduct did not arise. It would require considerable redrafting of the Norwegian amendment to bind the third party as well. The existing text should be retained.

Mr McCARTHY (Ghana) endorsed the comments of the Australian representative. The difference between the two texts was a matter of drafting, the present text being couched in negative terms whereas the Norwegian amendment was couched in positive terms. In general, he favoured a positive form, but in the present case, he preferred the current text.

Mr SEVON (Finland) supported the Norwegian amendment, since the existing text would allow the third party to speculate on the market. However, he agreed with previous speakers that the differences between the texts had been exaggerated.

The meeting rose at 1.05 p.m.

11th meeting

Monday, 7 February 1983 at 3.00 p.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.11

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (Study XIX — Doc. 63, CONF.6/3 Add. 1 and Add. 2, CONF.6/4)

Article 14 (continued)

Paragraph (2) (continued)

The CHAIRMAN invited the Committee to vote on the Norwegian proposal on paragraph (2).

The amendment was rejected by 21 votes to 7 with 3 abstentions.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) referred to the proposal of his delegation (CONF.6/3 Add.1, page 1) to make a reference to Article 11, in view of the requirement of written form under Soviet legislation.

The CHAIRMAN said that, as it was common knowledge in international trade that the legal system of Socialist countries required written form, and in view of the references in the draft article to "reasonably" and "good faith", the notion of apparent authority could hardly be acceptable in cases involving those systems, so that reference to Article 11 was unnecessary.

Mr BONELL (Italy) said that he shared the view of the Chairman and could not support the USSR proposal.

Mr TERADA (Japan) said that he shared the view of the two previous speakers. The question raised by the USSR would seem to hinge on the question of good faith and therefore the text as it stood would be sufficient.

Mr STAUDER (Switzerland) said that whilst he appreciated the concern of the Soviet Union, he agreed with the previous speakers. Where there was good faith, the provision could not be interpreted without the parties bearing in mind the situation of those Contracting States having made a declaration under Article X.

The CHAIRMAN said that it should be borne in mind that the general understanding of the interpretation of the paragraph would be contained in the Explanatory Report on the Convention.

Mr SWART (Netherlands) said that he shared the view that reference to Article 11 would be superfluous and it might even tend to give rise to misunderstanding and erroneous interpretation. He supported leaving the text as it was.

Mr GUEORGUIEV (Bulgaria) said that the proposal of the USSR was not contrary to the requirement of good faith within the context of legislation in Socialist countries.

The amendment was rejected by 24 votes to 7 with 6 abstentions.

Mr SESSER (Mongolia) said that in view of the lack of support for his delegation's proposal for the deletion of Article 14 (2), he would withdraw the proposal.

The CHAIRMAN said that he would take it that, on first reading, the text of Article 14 could stand.

It was so agreed.

Article 15

The SECRETARY-GENERAL of the Conference briefly introdu.

ced the provisions of this article.

The CHAIRMAN said that, in the absence of any support for the Congolese proposal to delete Article 15 (1) (a) and (b) and paragraphs (4), (5), (6) and (7) (CONF.6/3, page 5), he assumed that the Committee did not wish to give further consideration to the proposal.

It was so agreed.

Paragraph (1)

The CHAIRMAN said that, in the absence of any objection, he took it that the proposals by the Norwegian delegation (CONF. 6/3, page 12) and the Turkish delegation (CONF.6/C.1/W.P.16) should be taken into consideration by the Drafting Committee.

It was so agreed.

The CHAIRMAN invited the Committee to give consideration to the question of deleting, from paragraph (1) (a), the words "at the time of contracting", to which reference had been made in connection with Article 13.

Mr FARNSWORTH (United States of America) supported by Mr BONELL (Italy) suggested the deletion of the words in the interest of consistency between Articles 13 and 15.

Mr SWART (Netherlands) was in favour of retaining the words. If, however, it was decided that the words should be deleted, then the wording should be consistent throughout, also in Articles 2, 8 and 11.

Mr MUCHUI (Kenya) said that the drafting of both Articles 13 and 15 showed that the drafters had a time element in mind, given that they used the words "knew" and "ought to have known" rather than "knows" and "ought to know". For that reason his delegation had not been convinced that the time element should not

be expressly included in Article 13 and would have preferred to retain the words in Article 15 (1) (a). However, in view of the decision taken on Article 13, it would prefer Article 15 (1) (a) to be made consistent with the wording in that earlier article.

Mr DUCHEK (Austria) said that he was in favour of deleting the words, given the decision taken in regard to Article 13 and in the interest of consistency, since the underlying conditions were the same for both articles. If, however, it was believed that the time factor was not self-evident, further consideration should be given to the drafting, possibly to a still more precise wording, such as "before or at the time of contracting", and, should it be decided to make a drafting amendment, the interests of consistency should be respected not only in relation to Article 13 but also to Articles 2 (2) and 11 (2).

Mr SEVON (Finland) said that to retain the reference to time in Article 15 (1) (a) without there being a similar reference in Article 13 would be confusing and might have implications in relation to the interpretation of those articles. He could not support the arguments on the question put forward by the South African delegation at the previous meeting and supported deletion of the words in Article 15 (1) (a).

Mr ROGNLIEN (Norway) said that although it might be possible to delete the reference to time in paragraph (1) (a), it would be more difficult to do so in Article 15 (6) or in Article 2 (2).

The CHAIRMAN suggested that the Committee should vote on the proposal for deletion affecting Article 15 (1) (a) and that, in the light of that decision and the decision already taken on Article 13, the Drafting Committee should examine similar references – bearing in mind the desire expressed for consistency – and report to the Committee.

It was so decided.

The amendment was approved by 18 votes to 11 with 7 abstentions.

Paragraph (2) (a)

The CHAIRMAN suggested that the first of the points — system of notices — raised by the United Kingdom (CONF.6/C.1/W.P. 35 and Addendum) should be considered together with the Netherlands proposal (CONF.6/3 Add.2, page 3) and the Australian proposal (CONF.6/C.1/W.P.37).

It was so decided.

Mr KARSTEN (United Kingdom) introduced his delegation's proposal concerning the system of notices (CONF.6/C.1/W.P.35), referring at the same time to the second point — presented in the same document — on commission agents in order to bring attention to the interrelationship between the two points and to set the proposal in the appropriate context. The system of notices as proposed by his delegation would provide a simple solution to the problem in general, whilst a text along the lines of the subsequent paragraphs of Article 15 as presently drafted would be more suitable for cases of commission agency and those falling within the terms of paragraph (1) (b). Whilst appreciating that the drafting of Article 15 had been done in a spirit of compromise in order to admit something of the Common law doctrine of undisclosed principal and at the same time introduce something of the doctrine of right of intervention on the part of the principal in relation to commission agency, he was not convinced that such a measure was wholly necessary, since existing rules seemed to operate satisfactorily and were well accepted. Moreover, Article 15 (7) would seem to be contrary to direct intervention in cases of commission agency.

The CHAIRMAN, speaking in his capacity as a member of the Swiss delegation, said that any proposal in relation to direct intervention in cases involving undisclosed principals in return for recognition of the existing situation in respect of commission agency would be unacceptable.

Mr BONELL (Italy) said that the argument that the system of notices as originally proposed might create unnecessary litigation

could only be convincing in the case of an instrument intended to apply at national level. Such was not the case of the draft Convention, which formed the basis of an international instrument. The drafting of Article 15 was the result of many years of work on the part of legal experts, including Common law experts. The United Kingdom proposal, instead of improving a compromise solution, would merely serve to codify existing divisions between the Common law and Civil law systems. The proposal would not so much serve to simplify the system of notices as on the one hand to codify the doctrine of undisclosed principal and on the other to safeguard the concept of commission agency at international level. He could not, therefore, support the United Kingdom proposal.

Mr SWART (Netherlands) said that he was of a similar opinion to the previous speaker. The two points raised by the United Kingdom were not interdependent and should be discussed separately. Concerning direct intervention, the draft as it stood represented a compromise which made such action possible only in limited and exceptional circumstances. The conditions which had to exist for direct intervention, as expressed in the paragraph as it stood, were that the agent had not fulfilled or was not in a position to fulfil his obligations to the principal. However, the first of these was implied in the second and therefore, in his view, superfluous. While the Australian proposal (CONF.6/C.1/W.P.37) in that connection had the disadvantage of being rather long in its original form, he could agree to have the words "is not in a position to fulfil . . ." replaced by "fails to fulfil . . .", which would be in line with the proposal and would be very short. Any proposal to exclude application to commission agency would be unacceptable.

Mr BENNETT (Australia) said that his proposal sought to alter the text as little as possible, although he had the same difficulties as those of the United Kingdom delegate regarding the subject. There was little point in providing for recognition of the undisclosed principal unless the principal had a clear right to take action if the third party defaulted. He had grave reservations as to whether a court in his country would take the view that the agent had defaulted when in fact the fault lay with the third party, so his

amendment provided for the principal to take action against the third party.

His text had been drafted for completeness, but he could, if desired, shorten the first part to "... where the third party fails to fulfil his obligations under the contract to the agent, ..."

The CHAIRMAN suggested that a decision should be taken on the principle of whether conditions should be included or not.

Mr MAGNUSSON (Sweden) supported the views of Mr Bonell and Mr Swart. There should be some conditions in Article 15, otherwise the spirit of compromise between the various legal systems was lost. The Chairman's suggestion was a good one.

Mr JOVANOVIC (Yugoslavia) said that the notion of failure to perform was dependent on a point of view, say of the third party: if the latter could take direct action whenever he considered there was a failure to fulfil the contract, the consequences, particularly for the developing countries, would be very serious and therefore some more objective criterion was needed. Otherwise, the case could arise where the agent was eliminated altogether, leaving a firm in a developing country without the specialised knowledge it needed to defend itself.

The CHAIRMAN asked the Committee to decide on the principle of the inclusion of conditions.

By 26 votes to 2 with 9 abstentions it was decided that conditions should be included.

Mr SWART (Netherlands) said that the Australian proposal was acceptable to him, though he would prefer the wording he had suggested: "... fails to fulfil ..." instead of "... has not fulfilled ...".

Mr BONELL (Italy) could also accept the Australian proposal.

The CHAIRMAN, in reply to a request for clarification from Mr VAN RENSBURG (South Africa), said that the text under discus-

sion was that contained in CONF.6/C.1/W.P.37.

Mr JOVANOVIĆ (Yugoslavia) reiterated his view that the provision left too much room for subjective decisions. Some words should be added to ensure that the third party was allowed to justify his failure.

Mr BONELLI (Italy) pointed out that since the Australian text was intended to follow the words "... subject to all the defences which the third party may set up ...", the fears of the delegate of Yugoslavia were already met as the third party had the right to defend himself.

Mr MOULY (France) felt that the original text was clear and that the Australian amendment would introduce unnecessary complications. Furthermore, the proposal merely repeated provisions which existed in the draft Convention and further discussion on the proposal was superfluous.

Mr BENNETT (Australia) replied that the text of the draft Convention concerned default of the agent toward the principal. As he understood it, the agent's only obligation was to give to the principal what had already been given to him (the agent) by the third party. The draft would therefore not enable direct action to be taken where the third party defaulted, hence the Australian proposal to cover that eventuality. There was no question of mere duplication.

Mr SWART (Netherlands) said that his understanding of the draft covered the eventuality of the agent's being unable or unwilling to fulfil his obligations. The Australian proposal covered some cases but there still remained others; for example if the agent was insolvent the third party might not wish to pay him as the money would not be forwarded to the principal. For that reason, he preferred the words "or is not in a position to fulfil. ..." to be retained in the Australian proposal. He supported that proposal, with the amendment he had suggested to it earlier.

Mr KARSTEN (United Kingdom) said that the Australian representative's explanations had convinced him of the value of the Australian proposal which he could support.

Mr JOVANOVIC (Yugoslavia) reiterated his belief that the Australian proposal as it stood was not sufficient. Perhaps it could be improved by altering "... or ..." to "... and ..." in the first line to make the two conditions cumulative.

Mr FARNSWORTH (United States of America) was in favour of the Australian proposal as amended by the Netherlands.

The CHAIRMAN asked the Committee to vote on the principle of amending the text along the lines proposed by Australia.

By 20 votes to 10 with 8 abstentions it was decided to amend the text along the lines proposed by Australia.

The meeting was suspended at 5.35 p.m. and resumed at 6.05 p.m.

Mr VAN RENSBURG (South Africa) said that he did not think it should be incumbent on the principal to prove that the third party was not in a position to fulfil his obligations. If a case of supervening impossibility arose making it impossible for the third party to perform, then in any case the obligation would be extinguished. Therefore the first part of the Australian proposal should read: "... where the third party fails to fulfil his obligations ...". In any event, if the agent failed to perform the contract owing to the third party's failure to perform, that situation would fall under the first part of the amendment and the principal would be in a position to sue.

The second part should refer to the position where the agent was unable to fulfil his obligations, and the wording should be in the future tense: "... or the agent will not be in a position to fulfil ..." as that would cover the case where the agent was, say, insolvent and, even if the third party performed, the principal would not obtain performance from the agent.

In reply to a query from the CHAIRMAN, Mr JOVANOVIĆ (Yugoslavia) confirmed that he wished to amend "... or ..." to read "... and ..." in both parts of the Australian proposal.

Mr SWART (Netherlands) stressed his opinion that the two situations of being unable and of being unwilling should be alternative, not cumulative.

The CHAIRMAN suggested that a vote be taken on the proposal by Yugoslavia.

It was so decided.

By 11 votes to 7 with 12 abstentions the proposal to replace "or" by "and" was rejected.

Mr JOVANOVIĆ (Yugoslavia) said that he still felt that the conditions should be cumulative.

The CHAIRMAN asked the Committee to express its preference for the wording of CONF.6/C.1/W.P.37 as it stood, or for that wording with the deletion of "... or is not in a position to fulfil ...".

Mr BENNETT (Australia) stated that he favoured the amendment to his proposal suggested by the Netherlands and supported by the United States of America.

By 17 votes to 3 with 11 abstentions the Committee expressed its preference for the deletion of "... or is not in a position to fulfil ...".

After a discussion on the relative merits of "failed to fulfil", "fails to fulfil", "does not fulfil" and "has not fulfilled" in which Mr SWART (Netherlands), Mr MOULY (France), Mr DUCHEK (Austria), Mr SEVON (Finland) and Mr VAN RENSBURG (South Africa) participated, Mr KARSTEN (United Kingdom) suggested that a decision should be taken as to the substance and that the Drafting

Committee be asked to decide on the exact wording.

Mr SWART (Netherlands) proposed that the words "has not fulfilled" be amended to read "does not fulfil".

By 14 votes to 10 with 12 abstentions the Netherlands proposal was approved.

Mr KARSTEN (United Kingdom) proposed that a vote should be taken on whether to replace the words "does not fulfil" by the words "fails to fulfil".

Mr VAN RENSBURG (South Africa) said that he would also prefer the words "fails to fulfil".

Mr MUCHUI (Kenya), supported by Mr STÖCKER (Federal Republic of Germany) and Mr SEVON (Finland) seconded the United Kingdom proposal to hold a vote.

Mr BONELL (Italy) stressed the importance of the question.

The CHAIRMAN asked whether the Committee preferred the words "fails to fulfil" rather than "does not fulfil", pointing out that it would not change the French text.

By 14 votes to 6 with 14 abstentions the Committee amended the text to read "fails to fulfil".

The CHAIRMAN turned to the last two lines of the Australian amendment, drawing attention to the Yugoslav proposal to replace " . . . or is not in a position . . ." by " . . . and is not in a position . . .".

Mr VAN RENSBURG (South Africa) did not think it was necessary to use the word "and", and he proposed that the penultimate line of the Australian amendment should read " . . . or the agent will not be in a . . .".

Mr SWART (Netherlands) did not agree that the future tense should be used, as the agent's situation might change.

By 24 votes to 4 with 7 abstentions the South African proposal to delete "for any other reason fails to fulfil or" in the penultimate line of the Australian amendment was rejected.

Mr MOULY (France) proposed that the third party and the agent should be mentioned together by amending the second sentence of Article 15 (2) (a) to read "where either the third party or the agent . . .".

Mr SWART (Netherlands) considered that it was a substantive question that would involve deleting the words "fails to fulfil" which had already been accepted.

The CHAIRMAN asked whether the Committee wished to approve the following text for Article 15 (2) (a), subject to eventual drafting amendments: "the principal may exercise the rights acquired on his behalf by the agent against the third party, subject to all the defences which the third party may set up against the agent, where the third party fails to fulfil his obligations under the contract to the agent, or the agent for any other reason fails to fulfil or is not in a position to fulfil his obligations to the principal".

The text read out by the Chairman was approved.

Paragraph (2) (b)

Mr SWART (Netherlands) pointed out that for the sake of uniformity the words "has not fulfilled" should be replaced by the words "fails to fulfil". In his delegation's view the present text was acceptable.

Mr KARSTEN (United Kingdom) said that when there was direct recourse by the third party against the principal in the case of commission agency, the need to prevent the principal raising defences against the agent was less important and he therefore

withdrew his delegation's proposal (CONF.6/C.1/W.P.35).

Mr TERADA (Japan) wondered what defence could be raised by the principal. He could not maintain against the third party that he should pay the principal but only that he should pay the agent.

The CHAIRMAN replied that where there was a possibility of direct action, the principal could also ask for payment to be direct, for example, by calling upon the third party to fulfil his obligations through direct action, so that if the third party were the buyer he would pay the principal directly.

Mr TERADA (Japan) said that according to the text the principal could set up the defences of the agent against the third party so that the principal could require the third party to pay him directly.

Mr VAN RENSBURG (South Africa) thought that the concern expressed by the Japanese delegation was taken care of in the second part of Article 15 (3).

Mr GONDRA (Spain) considered that the text of sub-paragraph (b) should be more closely aligned on that of sub-paragraph (a).

Mr BENNETT (Australia) emphasized that the original text of sub-paragraph (a) was only operative where there was a default in obligations between the agent and the principal, which were internal relations, whereas the default which caused concern to his delegation was the external default involving the third party. Since sub-paragraph (b) dealt with the primary transaction it did not give rise to the same concern.

Mr MUCHUI (Kenya) said that, according to sub-paragraph (a), when the third party had failed to fulfil his obligations the principal had a direct right of action against him, so that, to maintain equity when the agent failed to fulfil his obligations, the third party should have a direct right of action against the principal. He there-

fore proposed that the words "or is not in a position to fulfil" should be deleted. Nevertheless, he agreed with the previous speaker's point of view that the situations in sub-paragraphs (a) and (b) were not quite the same.

Mr BONELL (Italy) expressed satisfaction with the present text. The words "is not in a position to fulfil" covered the case in which the principal did not deliver the goods. If the principal did not perform his obligations, he wondered whether it would be correct to give the third party the right of recourse against the principal in a matter which was of little importance to the third party.

Mr GONDRA (Spain) proposed that the text should read "where the principal fails to fulfil his obligations under the contract of sale or the agent for any other reason fails to fulfil or is not in a position to fulfil his obligations to the principal".

Mr VAN RENSBURG (South Africa) pointed out that the principal was not bound under the contract of sale until the third party had taken action under Article 15 (2) (b). It was only after the conditions under paragraph (2) (b) had been fulfilled, and after notice had been given to the principal, that he became liable under the contract of sale.

The CHAIRMAN asked whether the Committee wished to approve Article 15 (2) (b), replacing the words "has not fulfilled" in the fourth line by the words "fails to fulfil".

Article 15 (2) (b) was approved as amended.

The CHAIRMAN took up the additions to paragraph (2) (b) proposed by the delegations of the USSR (CONF.6/3 Add. 1, page 1) and Czechoslovakia (CONF.6/C.1/W.P.36).

Mr KUCERA (Czechoslovakia) explained that if the third party could exercise rights against the principal, it was reasonable to limit the latter's responsibility to the extent of the profits obtained by the principal through the action of the agent.

Mr SWART (Netherlands) said that the principal should not be protected at the expense of the third party and he was not in favour of any limitation of direct action by the third party.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) seconded the amendment proposed by Czechoslovakia.

Mr TERADA (Japan) wondered what kind of defence the principal could raise against the third party. According to the text the principal could only raise those defences which the agent could set up against the third party.

Mr CUKER (Czechoslovakia) emphasized that his delegation's proposal was intended to preclude the principal from direct recourse when he received no benefit from the acts of the agent.

The CHAIRMAN wondered what the situation would be when the agent carried out an unprofitable transaction.

Mr CUKER (Czechoslovakia) replied that the situation would be different, as it would be linked to the principal's instructions to the agent, whereas when the agent acted within the scope of his authorisation and yet the principal received no profit, he did not see why the third party should have such a right.

Mr RIABIKOV (Union of Soviet Socialist Republics), introducing his delegation's amendment, drew attention to the link between paragraph (2) (b) and paragraph (4) of Article 15. The purpose of the amendment was not to eliminate the direct link between the principal and the third party, but to harmonise the text and the practical and legal considerations in the USSR, which were explained in the document his delegation had submitted.

The meeting rose at 8.10 p.m.

12th meeting

Tuesday, 8 February 1983 at 9.35 a.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.12

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (Study XIX - Doc. 63, CONF.6/3 Add. 1 and Add. 2, CONF. 6/4)

Article 15 (continued)

Paragraph (2) (b) (continued)

The CHAIRMAN recalled that the Committee had before it proposals from the Turkish and Czechoslovak delegations (CONF. 6/C.1/W.P.15 and 36 respectively) and the proposal from the delegation of the USSR (CONF.6/3 Add.1, page 1) which had been introduced at the previous meeting.

Mr ÖSZUNAY (Turkey) introducing the proposal in CONF. 6/C.1/W.P.15, said that equity between the interests of the third party and the principal would be better maintained if the third party could set up all the defences against the principal which the agent was entitled to raise against the principal, in view of the fact that the principal was entitled to raise against the third party all the defences which the agent might set up against that party and all those defences the principal might raise against the agent.

The CHAIRMAN observed that the present draft had been adopted by the Rome meeting of Governmental Experts. The apparent imbalance was explained in paragraph 73 of the Explanatory Report (Study XIX - Doc. 63). The intention of the drafters had been to leave the third party in the same situation as before the action had been brought. In that situation, the third party would under no circumstances be entitled to avail himself of the rights

of the agent against the principal.

Mr ÖSZUNAY (Turkey) withdrew his proposal.

Mr CUKER (Czechoslovakia), introducing his delegation's proposal in CONF.6/C.1/W.P.36, observed that it had been agreed in Article 15 (1) (b) that in the case of contracts of commission the acts of an agent should bind only the agent and the third party. The intention of his proposal was to exclude cases falling under that paragraph from the provision in paragraph (2) (b).

Mr JOVANOVIĆ (Yugoslavia) supported the Czechoslovak proposal. It was general practice in developing countries to work through commission agents, who had the experience and expert knowledge which small enterprises, such as agricultural or industrial co-operatives, lacked in such countries. The possibility of the third party taking direct action against the principal was prejudicial to the interests of enterprises of that nature. They had no control over the contract concluded between the agent and the third party. Various Common law concepts had been accepted in the Convention. A balance should be maintained between the Common law and the Civil law. Protection of the principal should also find a place in the Convention.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) supported the Czechoslovak proposal.

The CHAIRMAN observed that enterprises could protect themselves by instructing their agents in the sense of Article 15 (7) and by the judicious selection of agents. States could also avail themselves of Article 5.

Mr SWART (Netherlands) endorsed the Chairman's observations.

Mr BONELL (Italy) said that paragraph (2) (b) was not intended to protect developed countries against developing countries. It was the logical concomitant of paragraph (2) (a). Furthermore, the economic realities of international trade argued for the accept-

ance of both. It was not the case that all third parties invariably came from developed countries whereas all principals were in developing ones.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) pointed out that paragraph (2) (b) might produce unexpected results when taken in conjunction with Article 11 which had already been accepted by the Committee.

Mr KARSTEN (United Kingdom) enquired whether an action could be brought against the principal if he had instructed his agent to apply the exception provided for under Article 15 (7) and the agent had failed to do so. If an action could be so brought, would the defence be one which the principal could set up against his agent.

The SECRETARY-GENERAL of the Conference suggested that in such a case it might be argued that the agent was not acting within his authority and that therefore Article 15 did not apply at all.

Mr BONELL (Italy) did not agree with such an interpretation. Rather, the principal's defence against his agent could also be raised against the third party.

Mr JOVANOVIĆ (Yugoslavia) said that he doubted whether an international court of arbitration would accept the view that an agent who had omitted to insert limiting clauses in a contract with a third party had failed to fulfil his obligations to the principal. The interpretation must be based on the text as it stood.

Mr MUCHUI (Kenya) supported the Czechoslovak proposal, for the reasons given by the Yugoslav representative.

Mr PLANTARD (France) pointed out that if the principal had no obligations towards the third party and if he selected an agent who subsequently went bankrupt, the third party would have no recourse in the event of machinery which he had purchased proving defective.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) said that the manufacturer's guarantee was another issue.

The CHAIRMAN observed that when the agent was the technical as well as the legal representative of the principal, it was the agent who gave the guarantee.

The SECRETARY-GENERAL of the Conference enquired whether the delegation of the USSR could accept paragraph (2) (b) as it stood if Article 11 (2) was deleted.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) replied that any derogation from the rule that all instructions must be in writing was unacceptable. In reply to a further question from Mr SEVON (Finland), he said that if the Czechoslovak amendment to Article 15 (2) (b) were accepted, his delegation would not feel the need to proceed with its own proposal in CONF.6/3 Add. 1, page 1.

The CHAIRMAN put to the vote the Czechoslovak proposal (CONF.6/C.1/W.P.36).

The proposal was rejected by 15 votes to 14 with 8 abstentions.

The CHAIRMAN invited the Committee to resume consideration of the USSR proposal in CONF.6/3 Add.1, page 1.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) said that he could agree to the deletion of the concluding phrase of his proposed addition to paragraph (2) (b), namely: "that is to say acting as a principal".

Mr BONELL (Italy) could not understand the necessity for the USSR proposal. He appreciated the monopoly position of that country's foreign trade entities, but a similar situation might arise with State-owned holdings in other countries, including his own. It was clear that no agency relationship existed between the Soviet

foreign trade entities and firms in the USSR. There could, therefore, be no question of direct action against such firms.

Mr SEVON (Finland) agreed with the previous speaker. There were however three ways of meeting the concern of the USSR delegation on the matter: a) it could be noted in the summary record that delegations were unanimously of the opinion that USSR foreign trade entities could not normally be regarded as agents within the meaning of the Convention; b) the Committee might issue a common understanding on the interpretation of key words, as the UNCITRAL Conference at Hamburg had done; or c) if there was a need for something to appear in the Convention itself, the proper place was Article 1.

Mr SVIADOSTZ (Union of Soviet Socialist Republics) said that to avoid false interpretations, it should appear in the Convention.

Mr SANDVIK (Norway) said that the point was already covered in Article 15 (7), the text of which might perhaps be strengthened.

Mr SWART (Netherlands) concurred and said he would withdraw his delegation's proposal to delete paragraph (7). The USSR formulation was not acceptable to other States.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) said his delegation wanted a general rule to be enunciated. The case by case solution suggested by the Norwegian representative was not adequate.

Mr VAN RENSBURG (South Africa) said he could not vote for the USSR proposal as it stood.

Mr DUCHEK (Austria) agreed that that proposal had some defects. He hoped that the Convention could include some explicit rule concerning the role as principals of the trading agencies of the centralised-economy countries.

The CHAIRMAN put the USSR proposal to the vote.

The USSR proposal was rejected by 22 votes to 7 with 6 abstentions.

The CHAIRMAN asked which delegations were in favour of the Finnish proposal for a "memorandum of common understanding", to the effect that State trading agencies and monopolies should be considered as principals and not agents?

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) said that the drafting of paragraph (2) (b) might be improved to reflect the idea that his Government might be a principal, or sometimes a third party or even an agent.

Mr FARNSWORTH (United States of America) suggested that discussion of the Finnish proposal should be deferred until that delegation had presented a written text of its proposed "memorandum of understanding".

The CHAIRMAN said that the delegations concerned should try to produce a satisfactory text for paragraph (2) (b), taking due account of the proposed Australian amendments.

*The meeting was suspended at 11.20 a.m.
and resumed at 11.55 a.m.*

Paragraph (3)

The CHAIRMAN invited the United Kingdom representative to comment on his proposed amendment to paragraph (3).

Mr KARSTEN (United Kingdom) referred to his delegation's proposal (CONF.6/C.1/W.P.35), which read: "As soon as the parties have received such notice, the agent may no longer exercise his rights against the third party, and the third party or principal may no longer discharge his obligations by dealing with the agent". His delegation remained open-minded about the question, but thought that its amendment would be a useful addition.

Mr TERADA (Japan) said he supported the United Kingdom proposal, which should be referred to the Drafting Committee as it made clearer at least the relations between the third party and the agent as an outcome of the direct action.

The CHAIRMAN said he was not sure that the United Kingdom proposal would solve the problem.

Mr BENNETT (Australia) said he supported the United Kingdom proposal.

Mr SWART (Netherlands) said he was inclined to leave the text as it stood.

Mr GONDRA (Spain) said he could support the United Kingdom proposal, but suggested that the language of the second clause might be amended to read "no direct action may be brought against the third party and the principal unless notice . . . etc."

Mr SWART (Netherlands) agreed with the Spanish delegate that notice should be made a requirement. Concerning the United Kingdom proposal, he said that the principal should be mentioned in the first part.

Mr KARSTEN (United Kingdom) said that his delegation had only the third party in mind; it wished to prevent the agent and the principal from suing the third party in the same matter.

Mr SEVON (Finland) said the United Kingdom proposal was not as simple as it seemed; he would support the text as it stood.

The CHAIRMAN put the United Kingdom amendment, subject to redrafting, to the vote.

The United Kingdom amendment was rejected by 12 votes to 11 with 12 abstentions.

Mr GONDRA (Spain) repeated his proposal, which would read

roughly: "No direct action may be brought unless notice is given to the agent or principal, as the case may be".

The CHAIRMAN said that the Spanish proposal would be dealt with by the Drafting Committee. He invited the Committee to consider paragraph (4).

Paragraph (4)

Mr BENNETT (Australia) said his delegation proposed the deletion of that paragraph, as it seemed impossible to provide any adequate sanctions against the failure of the agent to communicate the name of his principal to the third party.

The CHAIRMAN said that even if paragraph (4) was *lex imperfecta*, i.e. impossible to enforce, it should be included as indicating a responsibility under the law.

Mr PLANTARD (France) agreed with the Chairman that even if that provision was imperfect in law, it should be included as indicating a legal obligation on the part of the agent.

Mr SWART (Netherlands) agreed with the French representative. The Australian proposal was much too drastic. Why should the agent be given the right to keep the name of his principal secret?

Mr VAN RENSBURG (South Africa) said that his country followed the principle *ubi ius ibi remedium* and a writ of mandamus could always be got from the court to require the agent to disclose the name of his principal as his legal duty.

Mr BENNETT (Australia) feared that the nature of the obligation was such that it would probably be unenforceable in the common law countries.

Mr HAFEZ (Egypt) thought it necessary to attach some sanctions to paragraph (4) or else to delete it altogether.

Mr ALBAKREY (Iraq) said he favoured retaining the paragraph as it stood.

Mr MAGNUSSON (Sweden) said he agreed with the French and Netherlands representatives that paragraph (4) would be useful even if there might be some doubts about sanctions.

Mr STÖCKER (Federal Republic of Germany) said he supported the text as it stood.

The CHAIRMAN put paragraph (4) to the vote.

Paragraph (4) was approved by 19 votes in favour, 7 against and 6 abstentions.

After a brief discussion, the CHAIRMAN put to the vote a proposal by the Netherlands to enlarge the obligation of the agent to communicate the name of his principal to the third party.

That proposal was approved by 17 votes to 7 with 9 abstentions.

The meeting rose at 1.10 p.m.

13th meeting

Tuesday, 8 February 1983 at 3.00 p.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.13

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (Study XIX — Doc.63, CONF.6/3 Add. 1 and Add. 2, CONF.6/4)

Article 15 (continued)

Paragraph (4) (continued)

The CHAIRMAN said that his attention had been drawn to a small difference between the English and French texts of the paragraph. For the French words "parce que le représenté n'exécute pas les siennes", the English read: "by reason of a breach of duty on the part of the principal".

As the United Kingdom delegation had indicated to him that the English text should conform to the French, he suggested that the Drafting Committee should be asked to make the necessary change in the English text to that effect.

It was so agreed.

The CHAIRMAN noted that in CONF.6/3 Add.1, page 1, the Soviet Union had proposed the addition of a clause at the end of both paragraph (2) (b) and paragraph (4) of Article 15. As the proposal had not been approved in respect of paragraph (2) (b), he asked whether the USSR wished to maintain its proposal in connection with paragraph (4).

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) said that it was of great importance to his delegation. To meet some of the objections that had been raised he was prepared to revise the

proposed addition to read: "unless it results from the contract with the third party that the agent undertook to bind himself". In other words, the object was to ensure that in such a case the agent could not escape the obligations he had assumed.

The CHAIRMAN pointed out that that case was covered by the rule in paragraph (1) (b) of Article 15. Paragraph (2) dealt with an exception to that rule, and the USSR proposal represented an exception to the exception, which in substance restored the situation referred to in paragraph (1) (b).

He recalled that at the previous meeting it had been agreed in connection with an earlier paragraph that interested delegations could prepare, for later consideration by the Committee, what had been called a "memorandum of common understanding" to the effect that State trading monopolies, whether in the Socialist or in other countries, were not considered agents. That solution could be extended to include paragraph (4). The memorandum, if approved, would not constitute a reservation but an indication to those applying the Convention of the intent of the Conference.

In reply to a question by Mr KARSTEN (United Kingdom), Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) explained that in his country exports were effected by a central organisation which bought the export goods from the producers concerned. The organisation was thus clearly not an agent. When, however, it came to imports requested by Soviet industries, the central organisation might be regarded as an agent. His delegation felt that it was the importing organisation that should be held fully responsible and should not be able to shift its responsibility to a particular industry.

Mr KARSTEN (United Kingdom) said that, in view of that explanation, he agreed that State trading countries could be excepted under paragraph (1) (b) from paragraphs (2) and (4).

In reply to a question by Mr ROGNLIEN (Norway) as to whether State trading organisations had a monopoly or whether a product could be exported or imported through other channels, Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) said that it was the

Council of Ministers that accorded authorisation to trade with foreign countries. In principle, there was one organisation for a given product, but in every case it would be a State organisation.

Mr ROGNLIEN (Norway) observed that the issue raised could affect countries other than Socialist countries that had foreign-trade monopolies.

The CHAIRMAN said that what was needed was a formula that would cover both Socialist countries and other countries having State trading monopolies.

Paragraph (4) was approved subject to later consideration of a memorandum of common understanding or the possibility of reservations.

Paragraph (5)

Mr SWART (Netherlands) said that in view of the lack of support for his delegation's proposal concerning paragraph (4), he would withdraw its proposal regarding paragraph (5). He asked, however, why paragraph (5) did not follow the style of paragraph (4). It could read: "Where the agent is precluded from fulfilling his obligations to the principal by reason of a breach of duty on the part of the third party, the agent shall communicate . . .". Perhaps it was a matter of drafting that could be referred to the Drafting Committee.

The SECRETARY-GENERAL of the Conference explained that, as he understood it, the duty of disclosure did not extend to cases where there was an independent breach of his obligations by the agent. The difference in wording could be explained by the fact that whereas under paragraph (5) what was of importance was the actual failure of the third party to fulfil his obligations, paragraph (4) only applied in cases where there was no independent breach of the agent's obligations so that it was necessary to speak of his being precluded from fulfilling his obligations by reason of the breach of duty on the part of the principal.

Mr SWART (Netherlands) felt that paragraph (5) should clearly mention the failure of the agent to fulfil his obligations to the principal owing to non-fulfilment by the third party.

The CHAIRMAN suggested, in view of the Secretary-General's explanation, that the Netherlands formulation could be used if the words "to the principal" were omitted.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) wondered why those words should be omitted, since in the given case the obligations were to the principal.

Mr DUCHEK (Austria) did not consider the Netherlands proposal a matter that should be left to the Drafting Committee. In his view the text was quite clear as it stood.

The Netherlands proposal was rejected by 13 votes to 4 with 14 abstentions.

Paragraph (5) was approved unchanged.

Paragraph (6)

The CHAIRMAN noted that the Netherlands delegation proposed the deletion of paragraphs (6) and (7) (CONF.6/3 Add.2, page 4).

Mr SWART (Netherlands) considered that the paragraphs introduced unnecessary complications. The situations they envisaged were already covered by earlier provisions of Article 15, and by Article 5 (2).

Mr GONDRA (Spain) observed that paragraph (6) seemed to require a kind of diabolic proof, i.e. something that it would be practically impossible to prove.

Mr KARSTEN (United Kingdom) suggested that paragraph (6) could be amended to the effect that the principal could not exer-

cise the rights of the agent against the third party if he had been aware that the third party would not have entered into the contract if the latter had been aware of the principal's identity.

Mr HAUSHEER (Switzerland) said that paragraphs (1) (b) and (6) led to the same result. The only difference was that paragraph (1) (b) related to the agent and paragraph (6) to the principal. If paragraph (6) were omitted, the case would still be covered by paragraph (1) (b).

The CHAIRMAN put the Netherlands proposal to omit paragraph (6) to the vote.

The Netherlands proposal was rejected by 19 votes to 6 with 8 abstentions.

Mr JOVANOVIC (Yugoslavia) expressed support for the United Kingdom suggestion.

Mr MUCHUI (Kenya) and Mr PLANTARD (France) considered it interesting but too complicated.

The United Kingdom suggestion was rejected by 20 votes to 3 with 9 abstentions.

Mr VAN RENSBURG (South Africa) wished to draw the Drafting Committee's attention to the need to identify "he" in the English text. In the third line, paragraph (6) should read "... if the third party had been aware . . . , he would not have entered . . .".

Mr TERADA (Japan) thought that the wording of paragraph (6) should be guided by that of paragraph (2) (a).

The CHAIRMAN said that that suggestion could be referred to the Drafting Committee.

Paragraph (6) was approved, subject to possible changes by the Drafting Committee.

Paragraph (7)

Mr SWART (Netherlands) said he would not press his proposal for omission of paragraph (7) (CONF.6/3 Add.2, page 4), although he considered the provision to be unnecessary.

Mr ALBAKREY (Iraq) suggested, with a view to harmonising the Czechoslovak and Norwegian proposals, that the paragraph should read: "An agent may agree with the third party expressly or implicitly that the provisions of paragraph (2) of this article shall not apply".

Mr CUKER (Czechoslovakia) pointed out that the instructions of the principal to his agent were an internal matter and the third party should be protected against an unpleasant surprise, possibly many months after the transaction. That was why the phrase concerning instructions should be omitted (CONF.6/C.1/W.P.5). What concerned the internal relations of the principal and his agent should be excluded from the Convention.

Mr DUCHEK (Austria) agreed but pointed out that it would then be necessary to modify Article 5 (2).

Mr JOVANOVIC (Yugoslavia) agreed with the proposal by Czechoslovakia since it was not the function of the Convention to protect the principal from his agent. The paragraph, however, was needed as it was necessary to allow for the possibility of exclusion of the provisions of paragraph (2).

The CHAIRMAN expressed his hesitation about the proposal. If the agent had, without instructions from his principal, excluded the possibility of direct action, he had acted outside the scope of his authority, and the case would be covered by Article 15 (1). However, it was necessary to include Article 15 (7) also because an exclusion without authority did not exceed the power relating to sale. Only in that context could Article 15 (7) make sense.

Mr MUCHUI (Kenya) fully shared the views of the Chairman.

Even if the agent and the third party made an agreement as mentioned in Article 15 (7), it would not be binding on the principal if he had not authorised the agent to do so, and so the third party would not be protected from unexpected direct action. Such instructions from the principal to the agent might well be deemed an internal matter, but if the provisions of the Convention were to be meaningful, they could not entirely ignore the internal relations between principal and agent.

The CHAIRMAN added that when Chapter IV of the Convention was discussed it would be seen that it was difficult to avoid dealing with such relationships.

Mr SWART (Netherlands) considered that the question at issue went beyond internal matters and concerned the question of whether the agent and the third party could deprive the principal of the right of direct action. That would be contrary to the provisions of Article 5 and so Article 15 (7) should be accepted as it stood.

Mr CUKER (Czechoslovakia) stressed the importance of distinguishing between authorisation and internal instructions. The Convention should not cover the latter. Article 15 (1) covered cases where the agent acted within the scope of his authority and Article 16 provided for the defence of the principal in cases where the agent acted without authority.

Mr ALBAKREY (Iraq) wished to amend his earlier suggestion — the word “instructions” should be replaced by “within his authority”.

Mr MUCHUI (Kenya) did not see the need for Article 15 (7) if the assumption in any case was that the agent was acting in accordance with the instructions of the principal.

Mr. VAN RENSBURG (South Africa) said that it was clear that “instructions” must refer to something other than the “authority” referred to in Article 15 (1). It seemed that authority related to the

contract between the agent and the third party whereas instructions related to an ancillary matter, namely whether Article 15 would apply or not. The points advanced by the representatives of Norway and Austria were not valid as such a categorical approach was impossible when the internal instructions had an effect on the external relationship. Clearly, paragraph (7) should be accepted as it stood.

Mr KARSTEN (United Kingdom) advocated focusing on the issue of principle raised by Czechoslovakia and deciding first what result was desired in the situation envisaged, and then on how it could be achieved.

In view of the fact that the third party had relied on the agent's apparent authority in making the agreement, it would be wrong to allow the principal to sue the third party; therefore, as to the principle, he agreed with the Czechoslovak proposal. If the deletion were accepted, the desired result would be achieved.

The CHAIRMAN pointed out that if the proposal were accepted, Article 5 would have to be reconsidered so as to avoid contradictions.

Mr KARSTEN (United Kingdom) agreed. It would be necessary to reflect on the whole question of apparent authority.

The CHAIRMAN proposed that a vote be taken on the Czechoslovak proposal.

The proposal was rejected by 15 votes to 12 with 5 abstentions.

Mr MUCHUI (Kenya) felt that agreement should be express or implied; therefore he supported the proposal made by the USSR.

Mr SWART (Netherlands) had difficulty in accepting the inclusion of the word "implied" in the second part of the paragraph. If it were used there, it could be deemed to apply elsewhere also.

Ms BUURE-HÄGGLUND (Finland) wondered whether the suggestion previously made by the Norwegian delegation was supported by the USSR.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) replied that he was against the use of the word "implied".

In response to a question from the CHAIRMAN, Mr ALBAKREY (Iraq) withdrew his proposal.

In the absence of any support for the proposal to include the words "express or implied", paragraph (7) was approved as it stood.

The meeting was suspended at 4.50 p.m. and resumed at 5.15 p.m.

Article 16

The SECRETARY-GENERAL of the Conference briefly introduced the provisions of Article 16.

Paragraph (1)

The CHAIRMAN pointed out that the delegations of Costa Rica and Congo were both absent. Referring to the comment on paragraph (1) by Costa Rica (CONF.6/3, page 7), he asked if the Committee wished to include a reference to a time limit in paragraph (1).

In the absence of any comment, the matter was closed.

Referring to the proposal by the delegation of Congo (CONF. 6/3, page 5), Mr VAN RENSBURG (South Africa) asked for an explanation of the exclusion of cases where the agent binds only himself in paragraph (1). If it were deleted, the effect would be as if the authorisation had been given from the start and the provisions of Article 15 (2) would apply.

The CHAIRMAN said he thought it was to protect the third party from direct action by the principal in cases where he had been given to believe that the agent only was bound to him.

Mr SWART (Netherlands) pointed out that there was also the case in which the third party would not have recourse against the agent with whom he believed he had a contract as a result of later ratification by the principal. It was very difficult to justify a provision which allowed the third party to be surprised in such a way.

Mr GONDRA (Spain) shared the doubts of the South African representative and appreciated the difficulty of having ratification in a case where, for example, a commission agent exceeded his authority. The explanation of the provision in paragraph 84 of Study XIX — Doc. 63 was not very convincing.

Mr VAN RENSBURG (South Africa) remained unconvinced by any of the explanations given. If the paragraph were taken literally it meant that even if a commission agent or an agent acting for an undisclosed principal exceeded his authority in the slightest degree, the provisions of Article 15 would not apply.

Conversely, if the exception were deleted, the result would be to remove the lack of authority as though there had been authority from the beginning. The effect then would be that only the agent and the third party would be bound and the exception should therefore be deleted.

The SECRETARY-GENERAL of the Conference explained that the exception had been added because in a former provision adopted in 1972 there had been no exclusion in the then Article 29 (1) which had been followed by a provision enabling a third party who was unaware of the lack of authority to withdraw from his obligations at any time before the principal's ratification was given. That text had given rise to the fear that a third party might withdraw from his obligations even to the agent in a commission agency situation.

Mr CUKER (Czechoslovakia) drew attention to the proposal

of his delegation (CONF.6/C.1/W.P.6). He supported deletion of the exception.

Mr BENNETT (Australia) said that while he could accept the provisions of the paragraph relating to unauthorised acts of the agent, there was a lack of logic in the reference back to Article 15 (1), which related to authorised agency.

Mr KARSTEN (United Kingdom) said that he agreed with the Australian delegate that there was a problem of logic. Care must be taken when considering the deletion, which — if made — would imply removing the exception, not only in the case of commission agents, but also in the case of undisclosed principals. It should further be borne in mind that, in practice, it was frequently merely a matter of degree as to whether an agent was acting without authority or was acting with authority but in excess of it. He wondered whether it would be appropriate to make two exceptions to the basic principle that a third party was entitled to know with whom he was contracting and whether an agent was authorised. It was perhaps too radical a step to combine both the doctrine of ratification and the doctrine of the undisclosed principal in that way.

Mr VAN RENSBURG (South Africa) said that the present wording of Article 16 (2) made it clear that there was no longer any possibility of an implication that a third party might, even after ratification by the principal, withdraw from a sales contract concluded by him with a commission agent acting without authority — the argument put forward in Study XIX — Doc. 63, paragraph 84 for the exclusion. Concerning the United Kingdom delegation's comment, the real fact was that, if Article 16 (1) was considered from the third party's point of view, where the agent acted outside his authority, the third party would not be allowed to rely on Article 15 (2) and take direct action. Where the principal had ratified, the third party would in any case be in no worse a position than he would have been had the principal given authorisation from the beginning. The question of degree, where an agent has exceeded his authority, was a type of matter which courts were required to

adjudicate upon every day and in practice paragraph (1) would only apply in relation to Article 15 where authority has been exceeded in some respect since in all cases there had to be at least some semblance of authority. He supported the Congolese proposal to delete the exception.

Mr PLANTARD (France) said that he had been convinced by the arguments of those delegations in favour of deletion. Generally speaking, negotiations in international trade should be encouraged and an agent should not be prevented from taking a risk which might well be expected to be ratified by the principal and be beneficial for all three parties.

Mr JOVANOVIĆ (Yugoslavia) said that if it was in fact the general intention that a contract of commission might become a contract of agency in the context of Article 16, it would be appropriate to make the deletion. However, his opinion was that the original intention had been a more modest one and did not entail the question of direct contract.

Mr VAN RENSBURG (South Africa) said that the effect of the last sentence of paragraph (1) would not be to provoke a change in the context of the agency but, in given circumstances, in accordance with Article 15 (2), to allow direct action. Any surprise element would be the same whether authority had been given from the beginning or whether limited authority had been given at the beginning and subsequently extended.

Mr KARSTEN (United Kingdom) said that the arguments of previous speakers had convinced his delegation and it was therefore prepared to support making the proposed deletion.

The amendment was approved by 18 votes to 10 with 4 abstentions.

Mr CUKER (Czechoslovakia) introduced his delegation's proposal for amendments to Article 16 (CONF.6/C.1/W.P.6) in order better to protect the third party. The proposal comprised two main

elements: (1) a distinction should be made between an agent acting without authority and an agent acting outside the scope of his authority, in the latter case the principal being required either to express his disapproval of the act of the agent or to ratify it, and (2) there should be a time limit between taking notice of an act by the agent and ratification by the principal to avoid undue delay.

Mr JOVANOVIC (Yugoslavia) said that in order to avoid confusion a reasonable time limit should be introduced, since silence on the part of the principal might otherwise be considered as implied ratification.

Mr ROGNLIEN (Norway) said that he agreed with the Czechoslovak delegation that the present text might lead to an imbalance in the situations of the principal and the third party and in that respect its proposal coincided somewhat with the Norwegian proposal (CONF.6/3, pages 12-13). The present text put the third party at a disadvantage in cases where the principal had an option to ratify, in that he had to act prior to any ratification by the principal in order not to be bound by the ratification and had to act on the hypothesis that the principal would in fact ratify. Thus the principal would have a unilateral advantage to speculate on the development of the market before deciding whether or not to ratify. To avoid such a situation the principal should be required to ratify within a reasonable time and, in a case where ratification was unduly late, the third party should be in a position to refuse to accept ratification by giving prompt notice to the principal. He therefore supported the principle behind the Czechoslovak proposal for a reasonable time limit.

Mr BENNETT (Australia) said that he could see the need for some distinction to be drawn between the two cases — i.e. agents acting without authority and agents acting outside the scope of their authority. He wondered what the position would be in the case where an agent acted without authority, binding only himself.

Mr KARSTEN (United Kingdom) said that while it was easy to

see the theoretical distinction between the two cases, it was difficult to apply that distinction in practice. The only clear case in practice would be a person acting without authority who was also a stranger to the principal and had never been authorised to act on the principal's behalf, a case which in itself was not important enough to justify a special rule. In other cases it would be difficult to differentiate between cases where an agent had acted without authority or where he had exceeded his authority.

It would be difficult to make the distinction in a case, for example where an agent, who on several previous occasions had made contracts with third parties on behalf of a principal whom he had previously consulted prior to making each contract, on one occasion made a contract on behalf of the same principal without such prior consultation. Because of the practical difficulty his delegation was against making the distinction proposed.

Mr SANDVIK (Norway) said that his delegation shared the view of the United Kingdom delegate that it was difficult in practice to make such a distinction and would be reluctant to introduce it in the text.

Mr SEVON (Finland) said that he had been convinced by the United Kingdom argument that it would be difficult to make a distinction. Moreover, such a distinction would complicate the Convention to the extent that it would become difficult to operate under it.

The CHAIRMAN invited the Committee to vote on the first element of the Czechoslovak proposal.

The amendment was rejected by 27 votes to 3 with 3 abstentions.

The CHAIRMAN suggested that the Committee should consider the Norwegian proposal on paragraph (2) (CONF.6/3, pages 12-13), with the possibility of subsequently reconsidering paragraph (1) and the second element of the Czechoslovak proposal (CONF.6/C.1/W. P.6), should that be considered necessary in the light of the current

discussion.

It was so agreed.

Paragraph (2)

The CHAIRMAN, in reply to a request for clarification from Mr VAZE (India), confirmed that it could be taken that there was effectively an element of relating back to the date of acceptance, an element which would no doubt be brought more into evidence during the discussion on paragraph (2) in connection with the Norwegian proposal, so that it might not be necessary subsequently to consider whether explicit reference to the time of that act should be included in the last sentence of paragraph (1).

Mr VAN RENSBURG (South Africa) said that the argument that with the present text the third party would be at the mercy of a principal who might speculate on the markets was not valid because, should the third party not know that the agent was not acting with due authority, he would continue to act on the basis of the contract of sale since, as far as he would be concerned, no ratification would appear to be necessary. In such a case the third party would only discover an absence of authority if he should have occasion to sue the principal in connection with the contract of sale, in which case his situation would be the same under paragraph (2) in its present form or in the form proposed by the Norwegian delegation. In the event of the third party discovering the absence of authority, he might give notice of his refusal to become bound, in accordance with the present paragraph (2), whereas if he knew from the beginning that there was no authority, the last part of paragraph (2) would apply, and in neither case would he be at the mercy of the principal. He preferred the text as it stood to either of the proposals since the introduction of so vague a time requirement would lead to the problem of proving in a court what was or was not a due or reasonable time. The wording of the paragraph as it stood would make the position easier for the third party, who would be in a position to specify what was reasonable time.

The CHAIRMAN said that he was of the opinion that, with the text as it stood, application at least of the Swiss rules or interpretation based on the principle of good faith would arrive at a position similar to that which the Norwegian delegation was proposing expressly to state.

Mr CUKER (Czechoslovakia) said that it was important to protect both parties and that could be achieved with greatest ease by amending paragraph (1), as proposed by his delegation.

Mr KARSTEN (United Kingdom) said that he supported the spirit of the Czechoslovak proposal on that point because, with the text as it stood, protection for the third party was insufficient and the onus was on that party to protect himself in advance from possible ratification. By way of illustration, an example might be given of a purchasing representative of a large organisation (the third party) dealing on one occasion with an agent, through whom he had conducted business for some time, being told subsequently by the agent that the latter had not obtained the principal's full authorisation for the business in hand and that the contract could not therefore proceed. In order to maintain good relations with the agent, the third party might decide to take no action. It would scarcely seem reasonable in such a case if, some two years later, the principal decided to ratify the contract.

Mr SANDVIK (Norway) said that the Czechoslovak and Norwegian proposals were an attempt to give the third party the right to refuse ratification should he discover that the principal was speculating at his expense. He had not been convinced by the arguments of the South African delegate; in cases where the third party only became aware of the lack of authority when the principal tried to repair the situation by means of ratification, the third party ought to have the right to defend himself. It would be preferable to make the necessary drafting changes in paragraph (2), since any amendment in paragraph (1) might unnecessarily affect the drafting of the remainder of the article.

In reply to a question from the CHAIRMAN, he agreed that although the suggested new sentence of his delegation's proposal for

paragraph (2) should be considered by the Committee, the proposed addition to the first sentence, placed in square brackets in the proposal — “but this later comes to his attention” — could be a matter for the Drafting Committee.

Mr MAGNUSSON (Sweden) said that his delegation was prepared to support the principle behind the Norwegian proposal, although the precise text might be further considered in the Drafting Committee.

Mr MUCHUI (Kenya) also agreed with the principle underlying the amendment, although the text required redrafting.

Mr KARSTEN (United Kingdom) proposed that the Committee should take a decision of principle, leaving the place in the text and the wording to be decided by the Drafting Committee. In his view the amendment could be inserted in Article 16 (1).

Mr FARNSWORTH (United States of America) said that the Drafting Committee, of which he was Chairman, would require precise instructions regarding the drafting.

Mr SANDVIK (Norway) did not agree that the amendment could be inserted in paragraph (1).

Mr SWART (Netherlands) did not consider that there was any practical problem at issue since he doubted whether any person would wait an undue time for ratification.

The amendment to Article 16 (2) submitted by the delegation of Norway was approved by 16 votes to 14 with 2 abstentions, subject to eventual drafting amendments.

The CHAIRMAN asked the Czechoslovak delegation whether, in the light of approval of the Norwegian amendment, it still wished to insert its amendment in paragraph (1).

Mr CUKER (Czechoslovakia) considered that his delegation's

amendment was still relevant since paragraph (2) only dealt with cases where the third party knew or ought to have known of the lack of authority.

Mr KARSTEN (United Kingdom) said that if the Czechoslovak amendment were approved, thereby setting out a general principle in paragraph (1), paragraph (2) might be restricted. He therefore suggested that there should be a separate proposal.

Mr SANDVIK (Norway) did not see any substantive difference between the amendments proposed by his delegation and Czechoslovakia as far as the onus placed on the third party was concerned and he proposed that the text should be sent to the Drafting Committee.

Mr FARNSWORTH (United States of America) replied that it would be difficult for the Drafting Committee to reconcile the Czechoslovak amendment, which would be generally applicable, with the rather more limited Norwegian amendment.

Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) expressed his support for the Czechoslovak amendment.

The CHAIRMAN considered that the concern expressed by the Czechoslovak delegation was covered by the Norwegian amendment because "unduly late" implied "without undue delay".

Mr MUCHUI (Kenya) saw no substantive difference between the Czechoslovak and Norwegian amendments and he considered that they could both be inserted.

Mr VAN RENSBURG (South Africa) pointed out that putting a general rule first and subsequently specifying requirements was a well-known procedure when drafting legislation. However, he preferred the Norwegian amendment because the principal might be tempted to take advantage of the clause concerning ratification without undue delay.

Mr FARNSWORTH (United States of America) suggested that, since the Czechoslovak delegation had stated that the Norwegian amendment did not meet its concern, it could be moved to paragraph (1) or become a separate paragraph.

Mr CUKER (Czechoslovakia) thought that the amendments proposed by his delegation and Norway could both be inserted. He wondered whether the reference to "such reasonable time" at the end of paragraph (2) of the present text meant the same thing as "unduly late" in the Norwegian proposal.

Mr HAUSHEER (Switzerland) proposed that a vote should be taken on the Czechoslovak proposal.

Mr GONDRA (Spain) emphasized that both proposals had the same objective, namely specification of the time for ratification. The proposal to introduce a general principle implied that late ratification would not be valid, although the Norwegian amendment did not provide for such effect. The delegations of Czechoslovakia and Norway should consult and propose a joint formula.

Mr VAN RENSBURG (South Africa) was convinced that the effects of the Norwegian and Czechoslovak proposals would be the same as far as the first two sentences of paragraph (2) were concerned, but there was a considerable difference between the third sentence of paragraph (2) of the Norwegian amendment and paragraph (3) of the Czechoslovak amendment.

Mr SANDVIK (Norway) did not see any need for a reference to a time limit in paragraph (1).

Article 16 (1) and the first two sentences of paragraph (2) were approved as amended by the delegation of Norway.

The CHAIRMAN said that following approval of paragraph (1) and the first two sentences of paragraph (2) it would be necessary to amend the last line of paragraph (3) of the Czechoslovak amendment to read "expiration of a reasonable time".

Mr VAN RENSBURG (South Africa) proposed that the text following the words "... to the principal ..." in the penultimate line of the Czechoslovak amendment be deleted and the following words inserted: "if the ratification is given within a reasonable time".

Mr CUKER (Czechoslovakia) preferred the wording proposed by the Chairman.

Mr BENNETT (Australia) wondered what was the justification for preventing ratification when a contract had been partly performed. He considered that there should be further time for reflection on the Norwegian proposal and that it should be taken up again at the next meeting.

The meeting rose at 8.05 p.m.

14th meeting

Wednesday, 9 February 1983 at 9.30 a.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.14

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (Study XIX - Doc. 63, CONF.6/3 Add. 1 and Add. 2, CONF.6/4)

Article 16 (continued)

Paragraph (2) (continued)

The CHAIRMAN recalled that at the end of the previous meeting the representative of Australia had expressed some misgivings concerning the Norwegian proposal to insert a new sentence between the two sentences of paragraph (2) (CONF.6/3, page 13).

Mr BENNETT (Australia) said that after discussion with other delegations, he now understood better the intent of the Norwegian proposal, which was not to allow the third party to change his mind as to his acceptance of ratification. He doubted, however, whether the proposed sentence conveyed that intent. Since ratification could be implied by whole or partial performance, it was not clear why performance should prevent the third party from refusing to accept an unduly late ratification.

Mr SWART (Netherlands) reiterated his suggestion that the Drafting Committee should be asked to clarify the proposed sentence.

Mr SANDVIK (Norway) said that for the reasons given by other delegations, his delegation was prepared to omit the proviso concerning performance from the Norwegian proposal.

On that basis, the sentence proposed by Norway was approved.

Paragraph (2), as amended, was approved.

Paragraph (3)

Paragraph (3) was approved without change.

Paragraph (4)

Mr SANDVIK (Norway) explained that the Norwegian proposal to reword paragraph (4) (CONF.6/3, page 13) was based on Article 24 of the Vienna Sales Convention.

Mr SWART (Netherlands) saw no objection to the proposal. He suggested that in the English text the Drafting Committee should change "by any other way" to "in any other way" and repeat the word "ratification" before "comes".

Mr SEVON (Finland) supported the Norwegian proposal because it added to the clarity of Article 16.

Mr MOULY (France) stated that as between "when notice of it is received by the third party" and "reaches the third party", he preferred "reaches", whose meaning was clearly understood in the ordinary law of practically all countries.

Mr SANDVIK (Norway), accepting the suggestion, revised the Norwegian proposal accordingly.

The Norwegian proposal for paragraph (4) was approved with the drafting changes suggested by the representatives of Norway and France.

Paragraph (5)

Paragraph (5) was approved.

Paragraph (6)

Mr JOVANOVIĆ (Yugoslavia) suggested that it should be specified that ratification would be effective as from the creation of the corporation.

The CHAIRMAN said that the point would be referred to the Drafting Committee but he thought that it was one which would be settled by the law of the State governing the corporation's creation.

Mr GONDRA (Spain) observed that the English word "corporation" had a much narrower meaning than the French "personne morale".

Mr FARNSWORTH (United States of America), speaking as Chairman of the Drafting Committee, said that the term "corporation or other legal person" could be used.

Mr KARSTEN (United Kingdom) asked what was the purpose of paragraphs (5) and (6). He wondered whether they might not conflict with provisions of the Hague Convention on agency.

The CHAIRMAN observed that until someone could identify such a conflict, the matter need not be pursued. Paragraphs (5) and (6) went back to the very origin of the work on the proposed Convention.

Paragraph (6) was approved subject to the drafting changes indicated.

Paragraph (7)

The CHAIRMAN suggested that the Drafting Committee examine whether there should be a reference in paragraph (7) to Article 11.

Mr CUKER (Czechoslovakia) explained that his delegation's proposal for rewording the second sentence of the paragraph (CONF.6/C.1/W.P.6) pursued the objective of greater clarity.

The CHAIRMAN recalled that similar wording had been proposed for Article 9 (1) in CONF.6/C.1/W.P.3 and had been rejected after a full discussion. He asked whether there was any support for the Czechoslovak proposal in respect of paragraph (7).

There being none, paragraph (7) was approved without change.

Proposal for a new Article 17bis by the delegation of Norway

The CHAIRMAN thought it would be convenient at the present juncture to consider the Norwegian delegation's proposal for the insertion of a new article (CONF.6/3, page 14) which it had numbered "Article 17bis". It would, in principle, impute the risks involved in the transmission of a communication under Chapter III to the intended recipient.

Mr ROGNLIEN (Norway) said the proposal was not a matter of substance. It simply followed Article 27 of the Vienna Sales Convention in stating a general rule for notices and communications un-

der Chapter III while allowing for exceptions where so expressly provided in the chapter. The "Note" to the Norwegian proposal indicated the provisions that would be concerned.

Mr SWART (Netherlands) thought that it was a matter that should be left to national law. Every country had a legal rule on the question.

Mr BENNETT (Australia) noted that the proposal would operate in respect of only three paragraphs. As he had pointed out on a previous occasion, two of them, paragraphs (4) and (5) of Article 15, contained no sanction and the proposal would therefore be meaningless in respect of them. That left only paragraph (2) of Article 16, and he doubted whether such a general rule was really needed for that case.

The CHAIRMAN asked whether there was any support for the Norwegian proposal for an Article 17bis.

There being none, the Norwegian proposal was deemed rejected.

Article 17

Paragraph (1)

The SECRETARY-GENERAL of the Conference, introducing Article 17, noted that the doubt which had been raised in the Committee of Governmental Experts as to whether Article 17 applied only in situations where ratification was possible under Article 16 (see Study XIX - Doc. 63, Explanatory Report, paragraph 92) had been resolved by the amendment of Article 16 (1) (CONF.6/C.1/S.R.13). Although paragraph (2) of Article 17 was not strictly necessary, it had been decided to retain it to avoid the risk of an extensive interpretation of paragraph (1).

Mr CUKER (Czechoslovakia), in introducing his delegation's amendment to paragraph (1) (CONF.6/C.1/W.P.7), said that the phrase "... place the third party in the same position as he would

have been in" lacked precision and would not always be feasible. He therefore proposed the more specific formulation "either performance or damages, including loss of profit".

The CHAIRMAN suggested that the inclusion of a reference to specific performance and to loss of profit should be discussed separately.

Mr BENNETT (Australia) observed that in Australia the courts would hesitate to grant the Common law remedy of specific performance which was available only in cases where the court could ensure compliance with its order. It would be difficult for Australia to become a party to the Convention if it referred to performance in Article 17.

Mr JOVANOVIC (Yugoslavia) noted that in the former Austrian Empire, the third party had the choice of bringing an action either for performance or for compensation. In cases where the former was not feasible, a sum of money was awarded in lieu which generally exceeded the amount which could be recovered by way of compensation.

Mr DUCHEK (Austria) was not in favour of any reference to performance. In practice, it would often be difficult or impossible for the agent to comply. Furthermore, it was only possible to have performance of a contract. In many cases, if the agent was acting without authority, there would be no valid contract either between the principal and the third party or between the agent and the third party. The only practical remedy was compensation.

Mr SWART (Netherlands) was satisfied with the present text of the paragraph.

Mr VAN RENSBURG (South Africa) said that in South Africa it was always possible to obtain an order for specific performance. However, it would seem illogical to South African lawyers to consider such a remedy in the case under consideration, since it had never been the intention of the agent or the third party that the for-

mer should incur liability under the main contract. The action against the agent would lie for breach of implied warranty of authority. He could not therefore support the Czechoslovak amendment.

Mr ALBAKREY (Iraq) suggested that the paragraph should be amended to read ". . . shall, failing ratification, be liable to place the third party in the same position as he would have been in . . . of his own authority, either by performance of the contract, if possible, or by compensation".

The CHAIRMAN put to the vote the question of whether a reference to performance should be included in Article 17 (1).

The proposal was rejected by 22 votes to 5 with 10 abstentions.

The CHAIRMAN invited the Committee to consider the desirability of including a reference to loss of profit.

Mr SWART (Netherlands) said that he had always thought that compensation would include loss of profit.

Mr BONELL (Italy) said that the exact amount of damages awarded would depend on the circumstances of the case. The type of liability incurred by the agent under Article 17 or corresponding national legislation might include loss of profit. There was no need to be specific.

Mr SWART (Netherlands) wondered whether the current text might not be simplified.

Mr SEVON (Finland) considered the Czechoslovak formulation too absolute. It was not the case that the third party always was, or should be, entitled to compensation. Any suggestion of simplifying the text should be treated with caution.

The CHAIRMAN said that in the light of the discussion, he took

it that the Committee wished to approve the text of Article 17 (1) as it stood.

It was so agreed.

*The meeting was suspended at 11.15 a.m.
and resumed at 11.40 a.m.*

Paragraph (2)

Mr ROGNLIEN (Norway), introducing his delegation's amendment to Article 17 (2) (CONF.6/3, page 13), said that paragraph (2) (a) was designed to clarify the relationship between Article 17 (1) and Article 14 (2). If the third party chose, in accordance with the latter, to bring an action against the principal on the grounds of apparent authority, he was clearly, under the terms of Article 17 (1), in the same position as he would otherwise have been. But it should be made clear that the agent was not liable if the third party, having that option, did not choose to avail himself of it.

Mr BONELLI (Italy) agreed that if the third party succeeded in binding the principal under Article 14 (2), he should not be allowed to claim compensation from the agent under Article 17 (1). However, if the principal's initial reaction to an approach from the third party was unfavourable, the latter should have the option of refraining from an action under Article 14 (2) and suing the agent under Article 17 (1). The outcome of Article 14 cases was always uncertain, whereas the third party would have a very good claim for compensation against the agent in view of the attitude adopted by the principal. The Norwegian amendment would allow the third party to pursue that claim only if his action against the principal failed. Therefore he did not support it.

Mr TERADA (Japan) observed that the Norwegian amendment to Article 17 (2) was consistent with the proposed Norwegian amendment to Article 14 (2). However, it was not consistent with

the text of Article 14 (2) as adopted. The current text of Article 17 (2) should be retained.

Mr MUCHUI (Kenya) endorsed the comments of the Italian representative with regard to the difficulty of bringing a successful action under Article 14.

Mr ROGNLIEN (Norway) said that the Italian and Kenyan representatives had made valid points, but in his opinion had put in question the whole system of Article 17. There might be doubts that the agent had acted without authority and it might be necessary to sue the principal. The problem was the need to choose on what facts to base a suit.

Mr VAN RENSBURG (South Africa) said that his delegation felt that Article 17 concerned a question of damage, of whether any loss had been suffered or not. He preferred to leave the text as it stood.

Mr BENNETT (Australia) said that he agreed with the representative of South Africa. He pointed out that a third party who wished to invoke Article 17 by referring to Article 14 (2) would have to convince the court that he had suffered damage. That might be difficult in view of the fact that the third party had an opportunity to enforce the contract against either the agent or the principal. He could not support the Norwegian proposal.

Mr DUCHEK (Austria) said that Article 17, as it stood, would work to the advantage of a third party acting in good faith. The question would depend on whom the third party elected to sue, the principal or the agent, and in what country the suit was brought. Some countries might rule that the agent had authority conferred by implication, others not. The third party should be allowed to choose whether to sue the agent or the principal. He opposed the Norwegian proposal.

Mr SWART (Netherlands) said that he was not convinced that it was necessary to give the third party a choice. He would hesitate

to support the Norwegian proposal concerning Article 17 (2) because of the difficulties caused by the onus of proof.

The CHAIRMAN put to the vote the Norwegian proposal that there should be an express reference to Article 14 (2) in Article 17 (2).

The Norwegian proposal was rejected by 28 votes to 2 with 8 abstentions.

The CHAIRMAN invited comments on the proposed Norwegian amendment to Article 17 (2) (CONF.6/3, page 13).

Mr ROGNLIEN (Norway) said that there was a certain obligation on the part of the third party to verify the fact that the agent had authority. In his proposal, the burden on the third party would be less than in Article 17 (2).

Mr SWART (Netherlands) said he could sympathise with the suggestion that too much should not be required of the third party. However the words "ought to have known" were very flexible.

Mr MUCHUI (Kenya) agreed there was some merit in the Norwegian proposal, as it tended to lighten the burden on the third party.

The CHAIRMAN put the proposed Norwegian amendment to Article 17 (2) to the vote.

The proposed Norwegian amendment was rejected by 21 votes to 2 with 14 abstentions.

Article 17 (2) was approved as it stood.

Order of provisions in Chapter III

The CHAIRMAN pointed out that there had been proposals by

the delegations of Japan and Turkey to combine certain articles in Chapter III and to make the chapter more systematic.

Mr TERADA (Japan) introduced his delegation's proposal (CONF.6/C.1/W.P.9) to amend Article 13 and to incorporate the present Article 15 in the new Article 13. His delegation's main concern was with the problem of the burden of proof, and he thought that the principle laid down in Article 15 should be adopted.

The CHAIRMAN said that the question of proof would be given a liberal interpretation in some legal systems, like his own, but he was aware that other systems might be more severe.

Mr FARNSWORTH (United States of America) said that he would hesitate to begin combining articles, but there was some merit in the Japanese proposal and it would be desirable to reword Article 13 to conform to Article 15.

The SECRETARY-GENERAL of the Conference suggested that Article 13 might be redrafted to read: "When an agent acts on behalf of a principal within the scope of his authority, the acts of the agent shall directly bind the principal and the third party to each other, unless the third party neither knew nor ought to have known that the agent was acting as an agent, or it follows from the circumstances of the case, for example, by reference to a contract of commission, that the agent undertakes to bind himself only".

Mr SEVON (Finland) said he had no difficulty with the Secretary-General's suggestion and proposed that it be referred to the Drafting Committee.

Mr BONELL (Italy) agreed that the Secretary-General's suggestion would clarify matters.

Mr TERADA (Japan) said he could also accept the Secretary-General's suggestion. He wondered whether drafting changes might also be needed in Articles 11 and 16.

Mr SWART (Netherlands) said he saw some merit in the Japan-

ese proposal and thought it should be considered by the Drafting Committee, together with the suggestion of the Secretary-General.

Mr BONELLI (Italy) said he supported the amendment to Article 15 (1) proposed by the Norwegian delegation (CONF.6/3, page 12).

The CHAIRMAN said that that was simply a matter of drafting. He asked the Committee if there was any objection to the text suggested by the Secretary-General.

There was no objection to the text suggested by the Secretary-General.

The CHAIRMAN asked whether there was support in the Committee for the Japanese proposal to combine Articles 13 and 15.

The Committee did not support the Japanese proposal.

Mr PLANTARD (France) said he was still convinced there was much merit in the Japanese proposal and hoped that the Drafting Committee would not exclude the possibility of combining Articles 13 and 15.

Mr ÖZSUNAY (Turkey) suggested that Article 15 was a normal continuation of Article 13, while Articles 14, 16 and 17 dealt with the acts carried out by an agent without authority. The articles should be renumbered accordingly.

The CHAIRMAN said that he supported that view.

The meeting rose at 1.10 p.m.

15th meeting

Wednesday 9 February 1983 at 3.00 p.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.15

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (Study XIX - Doc. 63, CONF.6/3 Add. 1 and Add. 2, CONF.6/4)

CHAPTER IV - TERMINATION OF THE AUTHORITY OF THE AGENT

Articles 18, 19, 20, 21 and 22

The SECRETARY-GENERAL of the Conference briefly introduced the provisions of Chapter IV.

The CHAIRMAN drew attention to the amendments concerning Chapter IV submitted by the delegations of Finland and Sweden (CONF.6/C.1/W.P.38), the Netherlands (CONF.6/3Add.2, page 4) the Permanent Bureau of the Hague Conference on Private International Law (CONF.6/4, page 3), the People's Republic of Congo (CONF.6/3, page 5) and Turkey (CONF.6/C.1/W.P.17, 18 and 19). He suggested that the amendment proposed by Finland and Sweden should be taken up first because if it were approved it would have an incidence on Articles 18 and 19.

Mr SWART (Netherlands) said that his delegation's proposal was similar to that of Finland and Sweden. Termination of authority was to a large extent a question of relations between the principal and the agent which were not dealt with under the Convention. Differences in national law made it difficult to compile an exhaustive list of cases in which the agent's authority could be terminated.

Mr PELICHET (Hague Conference on Private International Law) emphasized that if Article 18 were approved it might lead to considerable difficulties. This article was illogical: it concerned the termination of authority within the meaning of the Convention, even though the latter did not deal with relations between the agent and the principal. It was the contract itself or the law applicable to the relations between the principal and the agent, the law determined by the rules of conflict of the judge seized of the case, which would decide the causes of the termination of authority. If therefore the applicable law recognised a cause which is not mentioned in Article 18, or if one of the causes of termination listed in Article 18 was not recognised by the applicable law as a ground for the termination of authority, the parties to the contract or the judge would be faced with an impossible situation. Thus Article 18 stated that authority was terminated on revocation by the principal or upon death of the principal or the agent, but there were legal systems in which authority was not automatically terminated by unilateral revocation by the principal or upon the death of the principal or agent. For the aforementioned reasons the Permanent Bureau proposed the deletion of Article 18 and the redrafting of Article 19. However, he considered that the amendment submitted by the delegations of Finland and Sweden deserved careful consideration.

Mr MAGNUSSON (Sweden) explained that the Finnish and Swedish delegations considered that the present text placed too much emphasis on the internal relations between the principal and the agent and their amendment was intended to stress the external relations. It was also their view that the list in Article 18 was incomplete and that the relationship between Articles 18 and 19 was not clear.

Mr ALBAKREY (Iraq) could not support the amendment proposed by the Finnish and Swedish delegations because it did not cover all cases of termination. The amalgamation of Articles 18 and 20 combined the enumeration of cases and the effect of termination, which should be kept separate. The amendment did not deal with the case of death and since laws differed on that ques-

tion he proposed that sub-paragraph (d) should be amended to read "when the principal or the agent under the applicable law dies or ceases to exist or loses his capacity". Articles 18 and 19 could be combined by adding a new sub-paragraph (e) stating "when the applicable law so provides".

Mr VAZE (India) agreed that all possible cases were not covered, but there was one case in which authority could not be terminated at all, namely when it was coupled with an interest; if the agent had an interest in the subject matter of the agency, in the absence of a specific contract the agency could not be terminated to the prejudice of that interest.

Mr ROGNLIEN (Norway) considered that the amendment proposed by the Finnish and Swedish delegations contained interesting elements, but the proposals by the Netherlands and the Hague Conference on Private International Law were too narrow. It was necessary to indicate the main cases for termination but some questions should be left to national law. He fully endorsed paragraph (1) (a) of the Finnish and Swedish proposal, but in paragraph (1) (b), while the agent's capacity to act should be mentioned, it should be dependent upon the knowledge of the third party. The principal's loss of capacity to act was not always evident because large companies still had the capacity to act even if the principal himself died. In his view the capacities of the principal and the agent should be dealt with in separate paragraphs.

Paragraph (2) of the amendment was not clear. If it were intended that the words "even if this is not the case . . ." should cover situations other than revocation or renunciation the wording should be more explicit. The text contained in sub-paragraph (b) of the original text was not covered by the amendment. Finally, sub-paragraph (d) of the original text could be covered by a reference to the applicable law.

Mr PLANTARD (France) said that his delegation was very much in favour of the proposal of the Hague Conference on Private International Law (CONF.6/4, page 3) because it considered the question of termination of authority to stem entirely from the internal

relationship. It was important to distinguish between the termination of the relationship between the principal and the agent which was exclusively an internal relationship, and the effect that such termination might have in regard to the third party. The draft text dealt with the first distinction in Articles 18 and 19 in a way which was not logical; the basic principle, which should be stated first, should be that contained in Article 19 — that the agent's authority should be terminated in accordance with the applicable national law. Article 18 was apparently an attempt to add a number of cases where, even if the applicable law did not make provision for termination, the agent's authority would be terminated. Of that article, sub-paragraphs (a) and (b) seemed to be self-evident and consequently superfluous whereas sub-paragraphs (c) and (d) concerned rules in the context of the principal-agent relationship. He had reservations about the substance, particularly of sub-paragraph (c), because under French law there were cases where both parties must be in agreement in order to revoke a contract, and unilateral revocation was not possible without the risk of incurring substantial damages.

He could not accept the joint Finnish-Swedish proposal for that reason and also because it was unacceptable in principle, since it dealt with termination in relation to the third party without it being clear that authority in the context of the principal and the agent was also terminated. The first sentence of the proposed amendment could mean that although revocation might not be valid in the internal relationship, it would have effect vis-à-vis the third party, where the latter had been notified. There was nothing to prevent a principal notifying a third party of revocation, even where such revocation did not have effect in relation to the agent.

Mr BENNETT (Australia) said that the issue was very complex and consequently his delegation was inclined to adopt a pragmatic view. While it would have preferred to leave the issue to be settled by the applicable law, it was conscious of the need to avoid further reducing the scope of the Convention. It did not support the joint Finnish-Swedish proposal, which was a middle-of-the-road solution. Such a solution might have the undesired effect of increasing the complexity of the situation, since, while there remained, at least

in theory, the possibility of a court holding that for internal purposes the Convention was not applicable, the Convention might apply and the authority be terminated as far as the external relationship was concerned. Although his delegation would prefer to rely mainly on Article 19, it would be prepared to accept the present Article 18, with the deletion of sub-paragraph (d).

Mr STAUDER (Switzerland) said that his delegation supported the joint proposal in principle. It had been rather surprised at the plea by the French delegation in favour of the applicable law, since it saw the purpose of the Convention as being to advance the unification of law. The principal merit of the proposal was that it eliminated any doubt that the article might be dealing only with the internal relationship. It became evident that what was involved was not only the internal relationship but, more important, the termination of authority to act.

Comparing the proposal with the original draft Article 18, he noted that sub-paragraphs (a) and (b) had been omitted, and, while he agreed with the deletion of sub-paragraph (b), he wished to know why sub-paragraph (a) had been removed. In relation to the new Article 18, sub-paragraph (b), he wished to know whether there could be any possibility of tacit termination of authority, which would seem to be excluded by the use of "made known" in the first paragraph, and, if so, whether it would be covered by paragraph (2). The English text seemed to be the more explicit in that respect. On a question of drafting, he observed that, at the end of paragraph (2), the English text referred to "facts" in the plural, while the French text used the singular "fait", and that the English text would seem to be the clearer. For cases which could not be dealt with under the uniform law, reference to the applicable law was, of course, necessary and he therefore supported the Turkish proposal to include such a provision as a new paragraph of the proposed new Article 18.

Mr ARON (Romania) said that in the interests of uniformity it would be desirable to define the cases where the agent's authority was terminated. However, in practice such a task was difficult and in that respect he was in agreement with the Netherlands delega-

tion and the observer for the Hague Conference. Nevertheless, Article 19 should be retained in order to complement the provisions of Article 18. Even though in some cases Article 18 had a bearing on the internal relationship, its paragraphs should be retained in view of the context of the use of the Convention, which would be consulted not only by legal experts but by others engaged in international trade. His delegation was in favour of Article 18, including sub-paragraph (d), and Article 19 as they stood.

Ms COLLACO (Portugal) said that the merit of the joint proposal was that it did not attempt to regulate termination directly, as did Articles 18 and 19 as they stood, but was an attempt to regulate the problem from the point of view of the third party, an approach which was appropriate in the context of the scope of the Convention limited by Article 1. While there must always be some reference to the internal relationship, which was the origin and termination of authority, the main issue was to decide how far it was possible to achieve unification regarding it insofar as it affected the external relationship. A pragmatic approach should be adopted, in the sense that the third party point of view should be maintained with, at the same time, an attempt to reach agreement on those rules where it was possible to achieve unification. In that sense more rules could no doubt be added to those already contained in the new Article 18 of the joint proposal.

Mr VAN RENSBURG (South Africa) said that, bearing in mind that the Convention was concerned fundamentally at that stage with relations between the principal and the third party and between the third party and the agent, the important elements were whether there was authority or not and what form authority took. To set out the circumstances for termination of authority would be a very lengthy process in view of the different provisions in national law and any attempt to do so at the current stage would not be timely. The only possible solution would appear to be to accept the proposal either of the Netherlands delegation or of the Hague Conference. The Committee would not be shirking its duty if it left the question of termination to be regulated by the applicable law and dealt with the consequences of termination in the Convention.

Mr SWART (Netherlands) said that the proposal of the Hague Conference was very similar to that of his own delegation and that he could accept the former. Concerning the joint proposal, although it also followed a similar direction to that of his delegation, it was not entirely consistent; if it was decided to deal only with the third party relationship, it was not necessary or desirable to distinguish cases of termination as it did. Article 20 of the text as it stood was much shorter, clearer and more precise in its aim than was the proposed Article 18 (2). He found the new Article 18 difficult to accept, not only because of the possibility mentioned by the Indian delegation that a power of attorney might be irrevocable, but also because he doubted that it would be possible in all cases where the principal or agent lost capacity to act that authority would be terminated with relation to the third party. Any attempt to list cases where authority would be terminated and where there was general agreement would merely be a statement of the present state of affairs and would not accomplish any real unification of law.

Mr STÖCKER (Federal Republic of Germany) said that he shared the pragmatic view of previous speakers. The main advantage of the Convention should be that its application would make the application of national law superfluous, and that advantage was diminished to the extent that the Convention itself referred to the applicable law. His delegation was in favour of drafting based on an enumeration of substantive rules, as was now the case under Article 18, while bearing in mind that it was not possible entirely to avoid reference to the rules of national law, for which reason it was also in favour of retaining Article 19, although the drafting of that article might be improved. It therefore supported Article 18 as it stood, with the exception of sub-paragraph (d), which should be deleted to avoid complexity, and the cases which it had covered dealt with in Article 19.

Mr GONDRA (Spain) said that he shared the views of the Netherlands delegation and of the observer for the Hague Conference. At the present stage it would be possible for delegations to agree only on a very few cases of termination, which were in any case so evident that they were already universally accepted, so that

there would be no real advance in the unification of law in that area. Of the sub-paragraphs of the present Article 18, only (a) and (b) were not controversial. Therefore, since in any event very many cases must still be left to national law, he supported limiting the area to be covered in the Convention to those conditions under which causes of termination as provided by national law produced an effect in relation to the third party, in accordance with Article 20 as is stood.

Mr ÖZSUNAY (Turkey) said that of the proposals under discussion his delegation supported retaining the present Article 18, sub-paragraphs (a), (b) and (c), and amending sub-paragraph (d) in accordance with the Norwegian proposal.

Mr MACAPAGAL (Philippines) agreed with the representative of the Federal Republic of Germany. It was of the utmost importance that the Convention lay down clearly and precisely the provisions for termination of the authority of the agent. Article 18 was clear and any aspects not included in it were covered by Article 19.

Furthermore, it was unthinkable that a party should enter into a contract with an agent without finding out the extent of his authority; therefore sub-paragraphs (a) and (b) were satisfactory. Sub-paragraph (c) should include a provision for the renunciation or revocation to be communicated to the third party.

Sub-paragraph (d) was also very important to cover cessation of capacity in the event of death.

He supported the acceptance of Articles 18 and 19 on the lines contained in the draft Convention.

Ms BUURE-HÄGGLUND (Finland) replied to some of the questions raised by delegates in connection with the joint proposal of Sweden and Finland.

One delegation had asked why the proposal omitted Article 18 (a) of the draft Convention and what happened with regard to tacit termination of authority. She believed that both those issues were included in the proposed Article 18 (1) (a). If not, it was merely a question of drafting. The representative of Norway had also asked about the lack of knowledge of the third party in connection with

paragraph (1) (b) of the proposed text and that question required closer attention and further discussion.

As to the hesitations expressed by the French representative, who had stressed the importance of termination of authority between the principal and the agent as a prerequisite for termination of authority of the agent *vis-à-vis* the third party, she suggested that to meet his hesitation it would be necessary to draw up a more complete Convention regulating the internal relationships also, which was not the intention of the present Convention.

Undoubtedly the proposal needed to be modified to eliminate any ambiguities and to add some specifications in relation to paragraph (1) (b) in the light of the discussions but she felt that it provided a more logical approach to the question than the present draft provisions. Furthermore, it promoted a unification of law, as against the proposals by the Netherlands and the Hague Conference.

Mr MAGNUSSON (Sweden) added that while it was possible of course to make some changes in paragraph (1) of the proposal, he believed that most cases were covered in paragraph (2).

There were perhaps cases of termination of agency which should be effective on the third party even if the conditions laid down in paragraph (2) were not completely complied with — that would depend how much emphasis was placed on the words “knew or ought to have known”.

Naturally, the proposal could be improved but the underlying approach would be a useful one.

*The meeting was suspended at 5.15 p.m.
and resumed at 5.40 p.m.*

The CHAIRMAN suggested that the Committee should decide whether it favoured the approach proposed by the Netherlands, and supported particularly by the Hague Conference and France, to lay down a number of cases where authority *vis-à-vis* the third party had terminated or whether it wished to maintain the approach set out in the draft Convention, possibly amended by the proposal

made by Finland and Sweden.

By 16 votes to 8 with 5 abstentions it was decided to maintain the approach set out in the draft Convention.

Article 18

Sub-paragraphs (a) and (b)

Sub-paragraphs (a) and (b) were approved as they stood.

Sub-paragraph (c)

Mr PLANTARD (France) reiterated his objection to sub-paragraph (c); the last part of the text provided for unilateral revocation regardless of the terms of the contract entered into. That was not only illogical but contrary to the terms of the Convention.

The CHAIRMAN pointed out that some delegations considered that such a revocation should have effect on the third party and wished to admit that principle.

Mr STAUDER (Switzerland) pointed out that the authority could be revoked even if the contract was irrevocable. He would accept that contradiction, which might result under certain systems in payment of damages by the principal.

It was decided by 20 votes to 1 with 6 abstentions to approve sub-paragraph (c) as it stood.

Sub-paragraph (d)

Mr ROGNLIEN (Norway) advocated deletion of the sub-paragraph and incorporating the content in Article 19 if that were retained. The wording he preferred if sub-paragraph (d) were to be retained was contained in his delegation's proposal (CONF.6/3, page 5).

Mr JOVANOVIC (Yugoslavia) said that the sub-paragraph was partly covered by Article 19. In view of the fact that the reasons for cessation of capacity of legal and natural persons could be very different in the Socialist countries, the provision ought to be re-drafted with that fact in mind. His preference was for deletion of the sub-paragraph.

Mr ÖZSUNAY (Turkey) said that after hearing the comments made by the Norwegian delegate, he favoured deletion of the sub-paragraph. He concurred with that delegation's view on Article 19 also — historically Article 19 dealt mostly with bankruptcy but it could be deleted and repositioned as a sub-paragraph under Article 18.

Mr McCARTHY (Ghana) supported the deletion of sub-paragraph (d) of Article 18 and the retention of Article 19.

It was decided by 19 votes to 5 with 7 abstentions to delete Article 18 (d).

Mr SWART (Netherlands) wondered whether sub-paragraph (c) might prevent certain States whose law provided for irrevocable powers of attorney from ratifying the Convention.

The CHAIRMAN thought that authority could be considered as being revoked in relations with the third party but not in internal relationships. Perhaps it was possible to include wording to the effect that the authority related to the third party.

Mr SWART (Netherlands) objected that if mention were made of termination *vis-à-vis* the third party, the Convention would lose much of its value.

The CHAIRMAN replied that the Committee had been fully aware of the implications when it made its decision; reference should be made to paragraph 99 of the Explanatory Report.

Mr VAN RENSBURG (South Africa) explained that he had been

able to support the provision because the situation feared by the Netherlands representative was extremely unlikely to arise in an international contract.

Articles 19 and 20

Mr ROGNLIEN (Norway), introducing his delegation's amendment to Article 19 (CONF.6/3, page 15), said that it would be useful for the parties to have some idea of the grounds for termination of authority covered by national law. The list was not exhaustive and the examples might be differently arranged.

Mr DUCHEK (Austria) said that he might have favoured the idea if the Committee had decided to retain Article 18 (d). Since it had been deleted, he saw no advantage in listing a few obvious examples.

Mr SWART (Netherlands) said he would prefer to relegate examples to the Explanatory Report.

Mr ÜNAL (Turkey) noted that Article 19 had originally dealt with bankruptcy. He too was not in favour of including examples.

The CHAIRMAN asked the members of the Committee to indicate their preference for maintaining the text of Article 19 as it stood or for adding examples with the following results:

Those in favour of the current text: 27

Those in favour of adding examples: 1

Abstentions: 5

The text of Article 19 was approved on first reading.

Mr ÜNAL (Turkey) introduced his delegation's proposal to incorporate Article 19 into Article 18 as its concluding paragraph (CONF.6/C1/W.P.18).

Mr JOVANOVIC (Yugoslavia) supported the proposal.

Mr ROGNIEN (Norway) expressed the view that Article 20 should precede Article 19, because the former related only to termination of authority under Article 18. Under Article 19, the relevance or otherwise of the third party's knowledge of facts depended upon national law. It did not apply, for example, in cases of bankruptcy or illegality. That distinction could not be maintained if Article 19 was incorporated in Article 18.

Mr PLANTARD (France) supported the Turkish proposal, but felt that Article 19 should appear in the opening sentence of Article 18 which would then read: "For the purposes of this Convention, the authority of the agent is terminated when the applicable law so provides and when:".

Ms BUUREHÄGGLUND (Finland) supported the Norwegian representative's interpretation of Article 20. She therefore endorsed his suggestion that the order of Articles 19 and 20 should be reversed. She would vote against the Turkish proposal.

Ms MEDINA (Angola) preferred the retention of Article 19 in its present position. It was not sufficient to leave the matter to applicable national law, because, as was explained in CONF.6/C.1/W.P.17, the death of the principal might have different effects on the authority of the agent under different civil and commercial codes. An attempt should be made to find a standard formulation for the effects of the termination of authority.

Mr FAL (Turkey) did not approve the French proposal to incorporate Article 19 in the first paragraph of Article 18. The present sub-paragraphs of that article dealt with general grounds for the termination of authority. Article 19 dealt with other grounds. Logically, therefore, it should appear as the last sub-paragraph. Similarly, while Articles 18 and 19 were concerned with grounds for termination of authority, Article 20 dealt with the effects of such termination on the third party. The present order of articles should therefore be retained.

Mr GONDRA (Spain) said that there must be a general, uniform rule relating to the effect on the third party of the termination of the agent's authority and that rule should appear in Article 20. The matter could not be left to national law.

Mr FARNSWORTH (United States of America) supported the proposal advanced to reverse the order of Articles 19 and 20. Article 20 could state, in respect of the three obvious grounds for termination listed in Article 18, that knowledge of the facts must reach the third party before they could take effect. It would be foolhardy to seek to impose a uniform rule governing all the other grounds for termination covered in Article 19. They should be left to the applicable national law. From the standpoint of the third party, the issue was whether the facts took effect as soon as they occurred or when they came to his knowledge.

Mr SWART (Netherlands) said that one article should cover all the grounds for termination. If it was desired to introduce exceptions into Article 20, which was a general article, the text should plainly state what they were. Reversing the order of the articles was not a sufficiently clear indication.

Mr MAGNUSSON (Sweden) supported the proposal to reverse the order of Articles 19 and 20. To make the matter clearer, Article 19 might be amended to read: "The authority of the agent is also terminated with effect for the third party when the applicable law so provides".

Mr GONDRA (Spain) endorsed the comments of the Netherlands representative.

Mr FARNSWORTH (United States of America) was of the view that some redrafting could allay the concern of the Netherlands representative. However the proposal to reverse the order of articles constituted a greater change from the existing text than the Turkish amendment and should be voted upon first.

Mr PLANTARD (France) proposed the deletion of Article 20.

The fact of the termination of authority was established in Articles 18 and 19, which he regarded as adopted, and consequently the agent must be acting without authority, a situation covered by Article 14. Article 20 was a vestige of a draft Convention which had originally been much more complex.

Mr VAN RENSBURG (South Africa) said that his first choice would be the adoption of the French proposal to delete Article 20, which conflicted with Article 14 (2). If that proposal did not command sufficient support, the only solution was to refer specifically in Article 20 to the cases to which it applied. They were, in his opinion Article 18, sub-paragraphs (a) and (c). It was not sufficient merely to reverse the order of Articles 19 and 20.

Mr SWART (Netherlands) said he was not convinced by the argument which had been advanced. He felt that Article 20 was the most important article in the whole chapter.

Mr KARSTEN (United Kingdom) said that his delegation had been convinced by the representative of France that Article 20 should be deleted. It was more appropriate that Chapter IV should come before Chapter III because Chapter II dealt with the creation of internal authority. If necessary, the Convention could then deal with the termination of internal authority and then move on in a final chapter to the case where the agent acted without internal authority. The Convention could deal with the creation and termination of authority in one chapter.

The CHAIRMAN said the Committee had before it a formal proposal by France, supported by South Africa and the United Kingdom, to delete Article 20. He put that proposal to the vote.

The proposal to delete Article 20 was rejected by 24 votes to 4 with 7 abstentions.

The CHAIRMAN asked the Committee whether Article 20 should be transferred to a place preceding Article 19.

Mr ROGNLIEN (Norway) said that he felt that Article 19 should come after Article 20 or perhaps Article 21.

The CHAIRMAN said the Committee should decide whether Article 19 should include some explanation that it governed not only the reasons for the termination of authority but also the effects of such termination.

Mr SWART (Netherlands) feared that that suggestion would give Article 19 quite a different meaning and might be misused for a different purpose. If there was a new proposal for dealing with Article 20, it should be discussed separately and ought not to affect Articles 18 and 19. He pointed out that the Turkish proposal dealt only with Articles 18 and 19.

The CHAIRMAN said he could not agree with Mr Swart.

Mr FARNSWORTH (United States of America) asked whether the Committee could not vote on the question of whether Article 20 should be placed before Article 19. That would avoid the problem of the Netherlands delegation and the texts could then be referred to the Drafting Committee.

The CHAIRMAN thought that the Committee should discuss Articles 18 and 19 first. He could agree to putting Article 20 before Article 18. Article 19 should be left as it stood, subject to an indication of the causes of termination. Article 19 had nothing to do with Article 20.

Mr ROGNLIEN (Norway) said that the purpose of his proposal had originally been not to separate Articles 18 and 20 by Article 19 because he felt that the rule in Article 20 should not necessarily apply to Article 19. It should be left to the Drafting Committee to transfer Article 19 to some place after Article 20.

Mr SWART (Netherlands) agreed that the question could be left to the Drafting Committee.

The CHAIRMAN noted that some delegations felt that a change of order had substantive implications, while others did not. In his view, the Committee should decide on two questions of substance: (1) should Article 20 state specifically that it related to the cases referred to in Article 18?; and (2) should Article 19 be worded to cover not only the reasons for the termination of authority but also the effects of such termination?

Mr GONDRA (Spain) observed that the vote on Article 18 had not been completed. Concerning Article 19 and the Turkish proposal, the Committee should decide whether it wished to introduce a reference to the causes of termination. It would also have to take a decision on the question of Article 20.

Mr SWART (Netherlands) said it was clear from the text of Article 19 that it was closely related to Article 18 and could not be separated from it. He proposed that the Committee vote first on the Turkish proposal to incorporate Article 19 in Article 18.

The Turkish proposal was rejected by 16 votes to 11 with 4 abstentions.

The CHAIRMAN said that Article 19 would stay where it was and that the substance of Articles 18 and 19 was no longer subject to discussion. He then invited delegations to comment on the Norwegian proposal concerning Article 20.

Mr ROGNESEN (Norway) said that his proposal was simply to put Article 20 before Article 19, without changing the wording of the former.

Mr SWART (Netherlands) said he opposed the proposal to reverse the order of the articles. He could accept Article 20, subject to the addition of the phrase: "Unless the national laws referred to in Article 19 provide otherwise".

Mr ROGNESEN (Norway) said he could accept that amendment.

Mr DUCHEK (Austria) said that it might give the impression that the applicable law could apply to the cases already covered by Article 18.

The CHAIRMAN said there might be misunderstandings, but not if the formula first proposed by Norway to the effect that Article 20 referred expressly to the cases covered by Article 18 were to be adopted.

Mr FARNSWORTH (United States of America) said he could not imagine that what was involved was anything other than a purely drafting matter. He urged that the Committee proceed to a vote.

The CHAIRMAN put to the vote the proposal to include in Article 20 a reference to the cases governed by the national law mentioned in Article 19.

The proposal was rejected by 16 votes to 9 with 7 abstentions.

The CHAIRMAN asked whether the delegations considered the question of the sequence of the articles in Chapter IV a matter of substance or one which could be referred to the Drafting Committee.

Mr ROGNLIEN (Norway) thought it a matter of substance and reiterated his proposal that the order of Articles 19 and 20 should be reversed.

Ms BUURE-HÄGGLUND (Finland) said that she had originally favoured reversing the order of the two articles. The vote just taken, however, had the effect of maintaining the wider scope of Article 20 and therefore it would no longer be logical to place it before Article 19.

Mr SWART (Netherlands) agreed that the last vote had in effect decided the issue.

It was agreed not to change the order of Articles 19 and 20.

Article 21

The CHAIRMAN drew attention to the Turkish proposal (CONF. 6/C.1/W.P.19), calling for the deletion of Article 21 because it was considered to be in contradiction with Article 20.

Mr ÜNAL (Turkey) pointed out that Article 21 represented an exception to the general rule laid down in Article 20. As was stated in paragraph 106 of the Explanatory Report, Article 21 was designed to protect the principal, who might not even know who the third party was. Although under Article 17 an agent who failed to inform the third party of the termination of his authority and continued to act without authority would be liable for compensation to the third party, in many cases he would not be financially able to do so. In his delegation's opinion Article 21 deprived the third party of the protection he enjoyed under Article 20. In view of the contradiction, Article 21 should be deleted.

Mr KARSTEN (United Kingdom) supported the Turkish proposal.

The CHAIRMAN observed that it was not the approach of the Convention to protect the third party against an insolvent agent. It was for the parties to the contemplated transaction to weigh the risks they ran before concluding the transaction. However, the Committee could, if it wished, adopt a different approach.

Mr SWART (Netherlands) said, with regard to Article 21, that his country had recently enacted the same rule in its law and he was convinced that it was a good rule.

Mr ÜNAL (Turkey) said that he would modify the Turkish proposal in order to make it more acceptable to the Committee. He proposed that only the last clause – "even if the third party has no notice of it" – should be deleted. It unnecessarily emphasized the weakened position of the third party.

Mr ROGNLIEN (Norway) considered that such a deletion did not affect the substance of Article 21. The matter could be left to the Drafting Committee.

The CHAIRMAN felt that, in view of the psychological emphasis involved, it was more than a mere drafting change.

Mr SWART (Netherlands) said that although the final words were not necessary, they would be useful precisely for emphasizing that Article 21 was an exception to Article 20. He therefore favoured their retention.

Mr KARSTEN (United Kingdom) felt that the situation under discussion was probably the most important case where the third party needed to be informed by the agent of the status of his authority. His delegation would therefore assume sponsorship of the proposal to delete Article 21 which had been abandoned by the Turkish delegation. To retain Article 21 would be to make a very large hole in Article 20.

Mr JOVANOVIĆ (Yugoslavia) and Mr BENNETT (Australia) supported the United Kingdom proposal to delete the entire article.

Mr McCARTHY (Ghana) supported the revised Turkish proposal.

The United Kingdom proposal to delete Article 21 was rejected by 17 votes to 9 with 5 abstentions.

The Turkish proposal to delete the final clause of Article 21 was rejected by 15 votes to 7 with 9 abstentions.

Article 21 was approved without change.

Mr MOULY (France) asked whether it was not true that under Article 20 in combination with Article 21 the termination of the agent's authority produced effects for the third party in only a single case, namely in the case of apparent authority, i.e. absence of

authorisation, when the termination of that apparent authority was not known to the third party. If that was so, he wondered whether it would not be better to replace the two articles by one which stated the case in positive terms.

The CHAIRMAN said that he was not sure that the effects of the two articles were so limited. If there were no comments on the idea, he would ask the Drafting Committee to examine the matter and see whether the suggested simplified solution was feasible.

Article 22

Mr BENNETT (Australia) said that the article seemed to deal with the internal relationship between the principal and his agent, even though it could be argued that there might be effects for the third party. He questioned whether it should be included in the Convention.

Mr GONDRA (Spain) said that although there was much to be said for the Australian representative's point of view, he was also interested by the observation in paragraph 107 of the Explanatory Report that there would be a certain interest for the third party to be aware that the agent remained authorised to protect the principal from damage.

Mr SWART (Netherlands) said that he shared that point of view.

The Australian proposal to delete Article 22 was rejected by 23 votes to 3 with 3 abstentions.

Article 22 was approved.

The meeting rose at 7.50 p.m.

16th meeting

Thursday, 10 February 1983 at 5.00 p.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.16

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (Study XIX - Doc. 63, CONF.6/3 Add. 1 and Add.2, CONF.6/4, CONF.6/D.C.1)

Proposed Article 2 bis

Mr STÖCKER (Federal Republic of Germany) introduced his delegation's proposal to insert Article 2 bis (CONF.6/C.1/W.P.39). Although the courts of his country were well aware of the advantages of having uniform international rules on agency, it was nonetheless felt that the fragmentary character, resulting from the restricted scope of application of the Convention, would be an obstacle to its application in practice. It was not understood why it dealt only with authority to conclude a contract of sale. The requirement that the agent should have his place of business in a Contracting State was also questioned, since it would mean that the Convention would not apply where the agent had his place of business in a State which had not ratified the Convention. Such restrictions might well affect the success of the Convention because it might mean that States would not speedily ratify it and in the initial period it would seldom be applicable, even in Contracting States.

He had not been convinced by those delegates arguing that a clause as proposed was superfluous because in his opinion the Convention would, once ratified, become a binding international treaty in all its provisions, including those limiting the scope of application, unless there was an optional clause providing otherwise. The clause would help to reconcile the different points of view of those who were concerned that the scope of the Convention should not be too broad and those who would like to have an extended scope, thus encouraging speedy ratification by States.

The objective of the first paragraph of the proposed article was to give a Contracting State an unlimited option unilaterally to extend the scope of application of the Convention, whereas the second paragraph provided two important examples intended to make clear in which direction the optional clause should be used by Contracting States. In all cases, exercise of the option should be the object of a declaration by the State concerned in order for other States and the parties concerned to foresee the effect of such exercise. Unilateral extension of the scope of application would not seem adversely to affect the interests of other States since, in the absence of an optional clause, national rules of law would apply; indeed it could be expected to contribute to legal harmony. The principles of reciprocity would not be involved since the Convention concerned the relationship not between States but between parties. While the exact drafting and position of the article in the Convention might give rise to further discussion, he hoped that it would be possible to reach a decision of principle on the inclusion of such an article.

Mr ROGNLIEN (Norway) said that his only objection to such an addition was that it covered only one sort of extension of the Convention and that there could be others which States might wish to make on ratification. Extension as suggested need not in fact be dealt with in the Convention but could be made at the ratification stage and it was not therefore absolutely necessary that a clause should be added expressly to that effect. Should it be thought appropriate to add such a clause, it should allow extension of scope of application generally to situations not covered by the text of the Convention.

Mr SWART (Netherlands) said that while he was not convinced that an article as proposed was entirely necessary, paragraph (1) would probably have the advantage that the depository State would then be under the obligation to inform other Contracting States of extensions of scope. He had no objection to the proposed paragraph (2), although it did not seem to be strictly necessary. Should it be inserted, the words "for example" might replace "in particular" and other drafting improvements might be made following

examination by the Drafting Committee. He was willing to support the insertion in principle.

Mr MOULY (France) said that he was concerned that the possibility of declarations of unilateral extension might create uncertainty as to the scope of the Convention generally in that parties might not be sure in what circumstances the Convention would be applicable.

The CHAIRMAN said that he would take it that, if there was no objection, the proposal was accepted in principle and that the text should be referred to the Drafting Committee.

It was so agreed.

SECOND READING OF THE DRAFT CONVENTION (CONF.6/D.C.1)

CHAPTER I — SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1 (second reading)

The SECRETARY-GENERAL of the Conference, speaking on behalf of the Chairman of the Drafting Committee, referred delegates to CONF.6/D.C.1, which contained the proposals by the Drafting Committee for Articles 1-13.

Article 1 remained unchanged, except for the deletion of "international" in paragraph (1). The Drafting Committee had considered two areas of drafting, which were (1), the wish expressed to improve the alignment of the French and English expressions "... has authority or purports to have authority ..." and "... a le pouvoir d'agir ou prétend agir ...", but had not found a suitable alternative, and (2) the proposal to harmonise Article 1 throughout by means of the use of a word such as "governs" but it had found difficulty in finding an adequate formula, particularly in French.

Ms COLLACO (Portugal) believed that the English text reflected more faithfully what was desired whereas the French text was

further away. She suggested that the French text should read "... a le pouvoir d'agir ou prétend avoir le pouvoir d'agir ...".

Mr MOULY (France) expressed surprise at the suggestion since the Drafting Committee's concern had been to align the English text on the French, not *vice versa*.

Mr PELICHET (Hague Conference on Private International Law) pointed out that the relevant paragraph in the Hague Convention on the law applicable to agency contained the words "purported to act ...". Therefore he could not see why there should be any objection to them in the present Convention.

Mr KARSTEN (United Kingdom) proposed that Article 1 (1) should read: "This Convention applies where one person, the agent, acts or purports to act on behalf of another person, the principal, for the purpose of concluding a contract of sale of goods with a third party". Only a slight change would be required in the French text where "... a le pouvoir d'agir ..." would read "... agit ...".

His proposal was based on three reasons, first, the English version was technically defective as it did not cover the case of an agent acting for an undisclosed principal and acting without authority; such an agent did not purport to act as he had not disclosed the existence of a principal. Technically that was an omission from Article 1 of the present draft which could be rectified by including "... acts ..." and "... agit ...".

Secondly the present formulation meant that the scope of the present Convention would be narrower than that of the Hague Convention which covered the type of case he had cited.

Thirdly, his proposal would result in exact alignment between the two language versions.

Mr MOULY (France) approved the suggested wording wholeheartedly.

Mr BONELL (Italy) could not support the proposal. Under his national law the wording would broaden the scope of the Conven-

tion to include cases such as that of "negotiorum gestio" or that of an agreement entered into between two parties of which one reserves the right for a specified time limit of naming the person for whom he is acting when, at the time of the agreement, he possibly does not even know whom that person will be.

Those two cases were quite different from an agency relationship.

He much preferred the wording suggested by the delegate of Portugal.

The CHAIRMAN pointed out that the two cases mentioned were very rare in international transactions; even if Article 1 allowed a broad sphere of application the rest of the Convention would make it clear which cases could be included.

Mr DUCHEK (Austria) pointed out that the proposal put forward by the United Kingdom had already been discussed in the Drafting Committee where opinion had been divided on the question. He had been interested to note that in explaining his proposal the United Kingdom delegate had used the word "authority" although that was one word that he did not wish to include in paragraph (1). With regard to the United Kingdom delegate's example concerning an undisclosed principal and an agent without authority, it was his understanding that an agent, whether or not there was an undisclosed principal and whether or not he had authority, acted on behalf of someone else. He wondered what was the meaning of the word "purport"; the agent did not purport to act on behalf of someone else — he in fact did act on behalf of someone else whether or not there was authority.

Mr MOULY (France) could not share the concern expressed by the delegate of Italy. The first example he had given was covered by Article 16 and the second example was a matter of agency covered by the Convention. The retention or deletion of the words "has authority" would not resolve the problem.

Ms COLLACO (Portugal) thought that the United Kingdom proposal had the merit of establishing uniformity of the English

and French texts, but from the point of view of substance she shared the concern of the delegate of Italy that it broadened the text to an unacceptable degree. In her view, the best solution would be to approve the English text in CONF.6/D.C.1 and to use the equivalent wording in French.

Mr SWART (Netherlands) did not think that the difficulties mentioned by the Italian delegation were insurmountable and he was prepared to accept the United Kingdom proposal. He concluded by pointing out that it was also possible to follow the text of the Hague Convention.

The CHAIRMAN read out the corresponding text in the Hague Convention: "the agent has the authority to act, acts or purports to act on behalf . . .".

Mr PELICHET (Hague Conference on Private International Law) emphasized that the United Kingdom proposal was close to the text of the Hague Convention except for the question of "has authority to act" which in the Hague Convention concerned internal relations.

Mr KARSTEN (United Kingdom) had no objection to adding "the agent has authority to act" since it might meet the concern expressed by the Austrian delegation as well as producing parallelism with the Hague Convention. It had been his delegation's intention to widen the meaning of the text and he could not agree with the Austrian delegate's interpretation of the meaning of the words "purports to act". With regard to the substantive point made by the Italian delegation, he pointed out that Article 9 did not refer to the unauthorised agent. As for the point that *negotiorum gestio* would come within the Convention, in his view it was right that it should do so. Both *negotiorum gestio* and the *falsus procurator* were covered by the Hague Convention.

Mr SEVON (Finland) urged the Committee to refer Article 1 back to the Drafting Committee if it were dissatisfied with the text rather than to try to do the work of the Drafting Committee

all over again.

By 25 votes to 9 with 2 abstentions Article 1 as contained in CONF.6/D.C.1 was adopted without amendment.

The meeting rose at 6 p.m.

17th meeting

Friday, 11 February 1983 at 11.25 a.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.17

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (CONF. 6/D.C.1)

Article 2 (second reading)

Mr FARNSWORTH (Chairman of the Drafting Committee) pointed out that the Drafting Committee had made three main changes in Article 2:

- 1) the insertion of the word "only" in the first line of paragraph (1) and in the second line of paragraph (2);
- 2) the rephrasing of paragraph (2) with a positive rather than a negative wording;
- 3) the addition at the end of paragraph (2) of the words "and if the requirements of paragraph (1) are satisfied". Concerning the words in square brackets in paragraph (2) "at the time of contracting", the members of the Drafting Committee had been equally divided and the question should be decided by the Committee of the Whole.

The CHAIRMAN invited delegations to comment on paragraph (1).

Paragraph (1) was adopted without comment.

The CHAIRMAN invited delegations to comment on paragraph (2).

Mr ROGNLIEN (Norway) thought that the words "at the time of contracting" should be included in Article 2, although they could be deleted in other parts of the Convention.

Mr FARNSWORTH (Chairman of the Drafting Committee) said the views on that point in the Drafting Committee had been divided: some had thought that the phrase should be included; others had agreed that it should be included but with the same wording as the Vienna Sales Convention ("at any time before or at the conclusion of the contract"), while still others had been opposed to its inclusion.

The CHAIRMAN noted that the French words "lors de la conclusion du contrat" were not as broad as the English version.

Mr MOULY (France) observed that if the third party knew that the agent was acting as an agent, it would be unnecessary to use the French wording "lors de la conclusion du contrat".

Mr SWART (Netherlands) said that the problem was the same in all articles: if the phrase was omitted in one article, it should be omitted in the present article as well, or else it would give rise to an *argumentum a contrario*.

The CHAIRMAN put the phrase in square brackets "at the time of contracting", to the vote.

The phrase "at the time of contracting" was adopted by 19 votes to 10 with 4 abstentions.

Mr KARSTEN (United Kingdom) observed that the French representative agreed that the French text should be interpreted in the same way as the English. If the French-speaking delegates were satisfied, the French text could be left as it was.

Paragraph (2), as a whole, was adopted.

Article 3 (second reading)

Mr FARNSWORTH (Chairman of the Drafting Committee) drew attention to the words in square brackets at the end of paragraph (1) (e) "or by virtue of an appointment by creditors". The Drafting Committee had taken no action on that phrase, which had been proposed by the United Kingdom delegation, as it might involve a question of substance.

Mr SEVON (Finland) supported the inclusion of the phrase proposed by the United Kingdom delegation.

Ms COLLACO (Portugal) said that some words seemed to be lacking in the French text.

Mr MOULY (France) said there was no equivalent in French for the English expression "quasi-judicial authority". "Administrative authority" would be too broad, as it would also include local authorities, such as mayors of towns, etc.

Ms COLLACO (Portugal), Mr PELICHET (Hague Conference on Private International Law), The CHAIRMAN, Mr MOULY (France), Ms MEDINA (Angola) and Mr SEVON (Finland) engaged in a short discussion which concerned the French text only.

The CHAIRMAN put to the vote the original wording of paragraph (1) (e), leaving aside for the moment the words in square brackets.

The original text of paragraph (1) (e) was adopted by 23 votes to 3 with 10 abstentions.

The CHAIRMAN invited delegations to comment on the words in square brackets at the end of paragraph (1) (e) which had been proposed by the United Kingdom representative.

Mr SWART (Netherlands) said he had no objection to the United Kingdom proposal, but suggested that it be slightly enlarged to read: "or by virtue of an appointment by a meeting of creditors".

Mr MACAPAGAL (Philippines) supported that suggestion.

Mr BENNETT (Australia) said he preferred the United Kingdom proposal as it stood, without any reference to "a meeting of creditors".

Mr GRETTON (United Kingdom) said that under United Kingdom law a bank could, in certain cases, exercise the right to manage the business of a company. He preferred his delegation's original wording.

The CHAIRMAN put to the vote the words in square brackets proposed by the United Kingdom delegation.

The United Kingdom proposal was rejected by 13 votes to 9 with 12 abstentions.

Mr KARSTEN (United Kingdom) noted that, in sub-paragraph (d), for the English "on behalf of" the French text had "au nom de". Elsewhere the English phrase was rendered by "pour le compte de".

Mr MOULY (France) said that "au nom de" had a more extensive meaning, which was what Article 3 required.

Mr SWART (Netherlands) suggested that it would be enough simply to say "for".

It was so agreed.

Mr MOULY (France) indicated that the French text would then read "... habilitation légale ou judiciaire à agir pour des personnes qui...".

Paragraph (1) of Article 3 was adopted as amended.

Mr FARNSWORTH (Chairman of the Drafting Committee) indicated that the Drafting Committee had not accepted the suggestion to insert the word "applicable" before "rule of law" in paragraph (2). The provision would obviously not contemplate an inapplicable rule of law.

Paragraph (2) of Article 3 was adopted.

Article 4 (second reading)

Mr FARNSWORTH (Chairman of the Drafting Committee) indicated that no changes had been made in Article 4.

The CHAIRMAN noted that the English text began with the words "For the purpose of this Convention" whereas Article 8 began with "For the purposes of this Convention".

Mr ROGNLIEN (Norway) suggested that it would be simpler to omit the introductory phrase in both articles.

Mr SWART (Netherlands) opposed that suggestion.

The CHAIRMAN, after consulting the Committee, noted that there was no support for the Norwegian suggestion.

Mr DUCHEK (Austria) noted that the word was "purposes" in the initial draft. Clearly, the singular was due simply to a typing error, and the plural should be restored.

With that correction, Article 4 was adopted.

Article 5 (second reading)

The CHAIRMAN noted from the summary records that the Committee had agreed that Article 5 and Article 7 would begin with the words "The principal or the agent on the one hand and the third party on the other". He asked why there was now a difference.

Mr FARNSWORTH (Chairman of the Drafting Committee) said that in examining the initial draft, particularly the French text, the Committee had considered it possible to propose a simpler formulation. It has also been suggested that "as between themselves" added nothing, but since the Drafting Committee was divided on that point, those words appeared in square brackets. In Article 7, the introductory words mentioned by the Chairman had been retained because of the difference in substance between the two articles.

In reply to a question by the CHAIRMAN, Mr ROGNLIEN (Norway) explained that the French and Norwegian delegations deemed it necessary to make the drafting proposal contained in CONF. 6/C.1/W.P.41 because the text proposed by the Drafting Committee, especially if the words "as between themselves" were excluded, would indicate that the principal would not be bound by an agreement between the third party and the agent, but that of course was not the case, for he would be bound by the agent acting within his authority. The Franco-Norwegian proposal was designed to make the situation easier to understand. Admittedly, the proposal did not deal explicitly with the case of apparent authority, but that was left to Article 14(2). If, however, it was desired to cover that aspect in the present article, it would be necessary to go back to the formula "the principal or the agent on the one hand and the third party on the other . . .".

Mr BONELL (Italy) pointed out that neither the Drafting Committee's text nor the Franco-Norwegian text addressed a major difficulty. Under either one of them, the agent and the third party could agree on a derogation affecting the interests of the principal, for example in respect of Article 9 (1), which referred solely to

the relations of the principal and the agent. Under the two texts now before the Committee, the agent and the third party could invoke Article 5 to nullify the will of the principal that the agent should act only on the basis of express authorisation. Such a problem could not arise under Article 5 as it had appeared in the initial draft of the Convention (Study XIX — Doc. 63).

A similar problem now existed in the case of Article 7.

Mr VAN RENSBURG (South Africa) recalled in connection with the Franco-Norwegian proposal that Article 15 (7), dealing with a similar matter, used the wording "an agent, in accordance with the express or implied instructions of the principal . . .". He suggested that it would be better in the second sentence of the joint proposal to say "if the agent has acted outside the scope of his instructions . . .".

Mr CUKER (Czechoslovakia) favoured the Drafting Committee's text but proposed deletion of the words "as between themselves", since the agent acting within his authority could agree to derogate on behalf of the principal from any provision of the Convention. He could also accept the Franco-Norwegian proposal, adding however the words "unless the principal ratifies the act of the agent".

Mr SWART (Netherlands) said that on balance he preferred the text proposed by the Drafting Committee, including the words "as between themselves".

The CHAIRMAN felt that it would be useful to determine what support there was for the text of Article 5 that had been referred on first reading to the Drafting Committee, i.e. the initial draft of Article 5 (1) as modified by the Norwegian amendment (CONF.6/3, page 9).

That text was rejected by 12 votes to 5 with 19 abstentions.

By 19 votes to 8 with 7 abstentions it was decided to keep the words "as between themselves" in the text proposed by the Drafting Committee.

The CHAIRMAN asked whether it was now necessary to choose between the Drafting Committee's text and the Franco-Norwegian proposal.

Mr TERADA (Japan) felt that the Committee should address itself to the important point raised by the representative of Italy before finally deciding on Article 5.

Mr KARSTEN (United Kingdom) observed that the large number of abstentions on a previous vote indicated a lack of interest in either of the texts before the Committee. He supported the Italian representative's suggestion to put the initial draft of the article to the vote.

The CHAIRMAN said it would not be a good precedent at this stage to reopen the debate on the initial text of Article 5 or to put it to the vote after it had been modified on first reading and again by the Drafting Committee. He was however in the Committee's hands. He suggested that the interested delegations might raise the issue, if they wished, before the Conference.

Mr ROGNLIEN (Norway) observed that the inclusion of the words "as between themselves" meant that the agent and the third party could not bind the principal by a derogation agreed between themselves. He thought that the Committee should therefore be given an opportunity to adopt the Franco-Norwegian proposal.

Mr SWART (Netherlands) pointed out that that proposal would have the effect of nullifying the decision just taken to retain the words "as between themselves". It would mean reopening the debate and was not a good procedure.

The CHAIRMAN, after asking how much support there was for putting the Franco-Norwegian proposal to the vote, noted that only three representatives had so signified.

Article 5 was adopted unchanged and without the square brackets.

Article 6 (second reading)

Mr FARNSWORTH (Chairman of the Drafting Committee) said that the comma after "and" in paragraph (1) of the English text should be removed. He pointed out that the words "as well as to ensure" in the initial English text were an inadvertent departure from the wording of the corresponding article of the Vienna Convention, which was now restored in the Drafting Committee's text.

Article 6 was adopted.

Article 7 (second reading)

Mr FARNSWORTH (Chairman of the Drafting Committee) said that the article retained the formula approved on first reading for the introductory words of paragraph (1) which were repeated in paragraph (2) through the use of the word "they". The change made by the Drafting Committee in Article 5 was not repeated in Article 7 because the former referred to agreeing and the latter to being bound.

Mr MOULY (France) having proposed that the Committee revert to the initial draft of the article, the CHAIRMAN said that it would not be equitable to accept such a procedure for Article 7, after having refused it for Article 5.

Mr BONELL (Italy) said that he did not think that delegations were very happy with Articles 5 and 7. He suggested a vote on Article 7.

The CHAIRMAN saw no need for a vote since the Drafting Committee's proposal was the only one under consideration.

He asked why in the French text the words "ought to have known" were rendered by "devaient avoir connaissance". Elsewhere, in Article 2 (2) for example, "nor ought to have known" was rendered by "n'était pas censé connaître".

Mr MOULY (France) said that the difference was necessitated

by the use of the positive formulation in the one case and of the negative in the other.

Article 7 was adopted.

The meeting rose at 1.05 p.m.

18th meeting

Friday, 11 February 1983 at 3.00 p.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.18

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (CONF. 6/D.C.1 and D.C.3)

Article 8 (second reading)

Mr FARNSWORTH (Chairman of the Drafting Committee) said that the Drafting Committee's proposal omitted the words "... which the agent has concluded or purported to conclude ..." as there was no necessity for the Convention to cover situations where negotiations had taken place but no sale had been concluded. Moreover, the new draft was in line with Article 1 which related to sales concluded.

The Drafting Committee had also felt that its proposed wording in square brackets at the end of sub-paragraph (a) had the same meaning as the present text and could be used throughout the Convention.

Ms COLLACO (Portugal) favoured maintaining the wording in the Drafting Committee's text.

It was decided to remove the square brackets from Article 8 (a).

With that modification, Article 8 (a) was adopted.

The CHAIRMAN pointed out that in spite of a slight difference between the French and English versions the text of Article 8 (b) reproduced that of the Vienna Sales Convention.

Article 8 (b) was adopted as it stood.

Article 8 as a whole was adopted as modified.

CHAPTER II – ESTABLISHMENT AND SCOPE OF THE AUTHORITY OF THE AGENT

Article 9 (second reading)

Article 9 was adopted as it stood.

Article 10 (second reading)

Article 10 was adopted as it stood.

Article 11 (second reading)

Mr FARNSWORTH (Chairman of the Drafting Committee) pointed out that the words "... of this Convention" had been deleted; that had been done throughout the draft.

In the first line "that allows" had been changed to "which allows".

Paragraph (2) had been subdivided into (a) and (b) for ease of reading.

The CHAIRMAN drew attention to the fact that the English text read "... the effect ..." while the French text read "... les effets ..."

The SECRETARY-GENERAL of the Conference pointed out that in Article 5 the French text had been amended to read "... l'effet...".

Mr MOULY (France) suggested that the same change be made in Article 11.

It was so decided.

Referring to paragraph (2), Mr KOSCHEVNIKOV (Union of Soviet Socialist Republics) expressed his concern at the legal effects of the paragraph which imposed a severe restriction on the general rule laid down in paragraph (1). It might result in a situation where, without having given authorisation, the competent entity in the Soviet Union found itself linked by an agency contract with a third party who, under Article 15 (2) (b), could take action against that entity as the principal. His national legislation did not permit that situation and therefore paragraph (2) was unacceptable and should be deleted.

The CHAIRMAN pointed out that the time for substantive discussion was over — the second reading concerned drafting only. In any case the question of making a reservation to Article 15 would be discussed later. He had noted the concern of the USSR delegation. It could perhaps be returned to later in plenary.

Ms MEDINA (Angola) said that any contradictions should be eliminated during the overall reading of the Convention and she wondered if contradictions might perhaps arise between the Final Clauses stating that neither the buyer nor the seller could be treated as an agent, already approved by Committee II, and the present text with regard to knowing that the agent was acting as an agent.

The CHAIRMAN thought that there were two separate situations according to whether the entity was considered to be an agent or not. In any case, it could be decided in any particular circumstances which was the principal and which the agent.

Mr SEVON (Finland) agreed with the Chairman. He saw no contradiction between the two situations.

Mr GUEORGUIEV (Bulgaria) stated that in accordance with his delegation's proposal, it had been decided by vote to request the Drafting Committee to draft Article 11 (2) to read: "devait connaître ou est en mesure de connaître".

The CHAIRMAN confirmed that statement. The Drafting Committee had decided to use "knew or ought to have known" throughout the English text but in the French text "connaissait ou devait connaître" in a positive statement, as in Article 11, and "ne connaissait pas ou n'était pas censé connaître" in a negative one.

Mr GUEORGUIEV (Bulgaria) pointed out that there was a wide divergence between the different situations: Article 7, for example, concerned "usage" which was widely known and practised whereas Article 11 concerned knowing whether the agent was an agent. The latter was a much more difficult problem.

At the request of the CHAIRMAN, Mr FARNSWORTH (Chairman of the Drafting Committee) explained that the Committee had had the Bulgarian proposal before it but found the wording submitted in the new text preferable.

In the absence of any further comment, Article 11 was adopted.

Article 12 (second reading)

Mr FARNSWORTH (Chairman of the Drafting Committee) explained that that Committee had carefully examined Article 12 in the light of Articles 10, 11, 16 (7) and X and found that the reference to telex and telegramme neither appeared relevant nor enhanced the provisions therein at any point. Furthermore, Article 12 had not been drafted with a view to solving problems raised by modern communications where, for example, information appeared on a screen but was subsequently deleted.

Therefore, the Drafting Committee recommended deletion of

Article 12.

The recommendation of the Drafting Committee to delete Article 12 was adopted.

CHAPTER III – LEGAL EFFECTS OF ACTS CARRIED OUT
BY THE AGENT

Article 13 (second reading)

Mr FARNSWORTH (Chairman of the Drafting Committee) recalled that the Japanese delegation had stated that the positive or negative formulation of the phrase "the third party knew or ought to have known" would in his country have an effect on the burden of proof. The Committee of the Whole had therefore suggested that the Drafting Committee should try to recast the phrase in the negative. The Drafting Committee had first attempted to do so in Article 11 (2) but the result had proved unacceptable in English, French, Spanish and German. The Drafting Committee had produced a negative version in the present article and in Article 15 (1) (a). However, some members of the Committee had expressed a preference for the original text of Article 13, which was consequently submitted in square brackets. It should be recorded in the Explanatory Report that the intention of the drafters not to take up any position about the burden of proof remained unchanged.

Mr SANDVIK (Norway) expressed a preference for the original text.

Mr BONELLI (Italy) thought that the new text more clearly laid down the rule and then grouped the exceptions together.

Mr MOULY (France) said that the negative form produced uncertainty in French. In France, regulations were couched in the positive form.

Mr TERADA (Japan) expressed concern about maintaining con-

sistency between Articles 13 and 15.

The CHAIRMAN put to the vote the choice between the two texts, with the following result:

In favour of retaining the original text: 14.

In favour of adopting the new text: 10.

Abstentions: 10.

The original text of Article 13 was adopted by the Committee on second reading.

Mr TERADA (Japan) said that his delegation would have preferred the Drafting Committee's negative formulation. He asked that it should be recorded in the summary record that the formulation adopted gave no indication as to the burden of proof.

Mr FARNSWORTH (Chairman of the Drafting Committee) stated that it was the understanding of the great majority of the members of the Drafting Committee that neither text affected the burden of proof.

Article 15 (second reading)

Mr FARNSWORTH (Chairman of the Drafting Committee) noted that the Committee had proposed that the order of Articles 14 and 15 be reversed. He therefore suggested that the text of the two articles be considered first and their relative order second.

It was so agreed.

Paragraph (1)

Mr FARNSWORTH (Chairman of the Drafting Committee) said that on the proposal of the Committee of the Whole, the Drafting

Committee had deleted from paragraph (1) (a) the phrase "at the time of contracting".

The CHAIRMAN noted that there were similar references in Article 2 (2) and Article 8. The Netherlands representative had indicated that if such references were retained in those articles, they should also appear in subsequent articles.

Mr BONELL (Italy) favoured the retention of the phrase when it was needed. However, the situation was identical with that in Article 13, which had been adopted without such a phrase. For the sake of consistency, he was against retaining it in Article 15.

Mr BENNETT (Australia) proposed that the word "if" should be removed from the sub-paragraphs and placed before the colon in the main sentence.

Mr KARSTEN (United Kingdom) and Mr BONELL (Italy) agreed.

The Australian proposal was adopted by 28 votes to 1 with 8 abstentions.

Mr KARSTEN (United Kingdom) proposed that in paragraph (1) (b), the concluding phrase should read "to bind himself only", as in Article 13.

It was so agreed.

Mr KARSTEN (United Kingdom) wondered whether it would not be possible to dispense with Article 15 (1), the substance of which was covered by Article 13.

The CHAIRMAN recalled that the proposal to amalgamate Articles 13 and 15 had already been rejected.

Article 15 (1), as amended, was adopted.

Paragraph (2)

Mr FARNSWORTH (Chairman of the Drafting Committee) said that the Committee had made three types of changes in the paragraph. First, there were minor stylistic changes for the sake of clarity, such as recasting "the rights which he has against the agent" to read "the rights which the third party has against the agent". Secondly, and also for the sake of clarity, the order of the sentences in sub-paragraphs (a) and (b) had been inverted. Thirdly, in paragraph (2) (a) a reference had been inserted to the third party's failure of performance, in accordance with the Australian amendment to that effect.

Mr SWART (Netherlands), supported by Mr SANDVIK (Norway), expressed his preference for the original sentence order in paragraph (2) (a) and (b).

The sentence order proposed by the Drafting Committee was adopted by 34 votes to 3 with 2 abstentions.

Mr SEVON (Finland), supported by Mr STÖCKER (Federal Republic of Germany), observed that the opening words of the two sub-paragraphs should not begin with a capital letter.

It was so agreed.

Mr STÖCKER (Federal Republic of Germany), supported by Mr MAGNUSSON (Sweden), observed that there should be a full stop at the end of paragraph (2) (b).

It was so agreed.

Mr SEVON (Finland) enquired whether in the French text the same expression should not be used in both sub-paragraphs to translate the English phrase "is not in a position to".

It was agreed that the phrase "n'est pas en mesure" should be used in both cases.

Mr BONELL (Italy), supported by Mr SWART (Netherlands), proposed that in the third line of paragraph (2) (a), the phrase "to the principal" should be inserted after "fulfil his obligations", for the sake of clarity.

It was so agreed.

Mr MOULY (France) requested that his objection to the re-introduction into the French text of the phrase "envers le représentant" should be recorded in the summary record.

Article 15 paragraph (2), as amended, was adopted.

The meeting rose at 4.25 p.m.

19th meeting

Friday, 11 February 1983 at 4.50 p.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.19

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (CONF. 6/D.C.3)

Article 15 (second reading continued)

Paragraph (3)

Mr FARNSWORTH (Chairman of the Drafting Committee) said that the Committee had agreed with the Spanish representative that the paragraph should make it quite clear that notice of intention was an essential condition of exercising the rights referred to in paragraph (2).

The CHAIRMAN observed that the English text now differed markedly from the French text, which had remained virtually unchanged.

Mr MOULY (France) said that the phrase "*conformément au paragraphe 2*" seemed to refer to *intention* and not to "droits".

After discussion, Mr ANTONETTI (France) proposed that the opening phrase should read: "*Les droits définis au paragraphe 2, peuvent être exercés seulement si l'intention en est notifiée . . .*".

Article 15 paragraph (3), as amended, was adopted.

Paragraph (4)

Mr FARNSWORTH (Chairman of the Drafting Committee), introducing the text proposed for paragraph (4), said that the Drafting Committee, in an attempt to follow the French text more closely, had replaced "precluded" by "unable".

Mr SWART (Netherlands) said that the word "fails" might be preferable to "unable" in the interests of conformity with paragraphs (2) and (5).

Mr FARNSWORTH (Chairman of the Drafting Committee) observed that in the French text the expression used in paragraph (4) was not the same as in paragraphs (2) and (5).

Mr BONELL (Italy) said that he supported the use of "fails" in order to avoid introducing a word different to that used in other paragraphs and because "unable" might be understood in either an objective or a subjective sense.

Mr MOULY (France) said that "unable" had been introduced into the English text in order to bring it into line with the French text, which it had been thought was the better adapted. If the English text were to be changed to "fails to fulfil", his delegation could accept "*n'exécute pas*" in the French text.

Ms COLLACO (Portugal), while agreeing that any drafting change in the English text should be accompanied by an equivalent change in the French text, said that it might be prudent to consider whether the different expressions in paragraphs (4) and (5) were not intended to cover two different hypotheses.

Mr PELICHET (Hague Conference on Private International Law) said that in the French text the expression used in paragraph (2) was very similar to that used in paragraph (4) and that the English text had "is not in a position to fulfil" in paragraph (2).

Ms COLLACO (Portugal) said that paragraph (2) (a) contained two formulae: "fails to fulfil" and "is not in a position to fulfil". It might therefore be confusing to use only one formula — "fails to fulfil" — in a subsequent paragraph as it might not convey exactly the same meaning.

Mr ANTONETTI (France) suggested that the French text of paragraph (4) might read: "Lorsque l'intermédiaire n'exécute pas ses obligations envers le tiers parce que le représenté n'a pas exécuté les siennes, . . .", which would bring the paragraph into line with paragraph (2) (a).

Ms COLLACO (Portugal) said that "n'exécute pas" would seem to be broader in meaning than "n'est pas à même d'exécuter".

Mr VAN RENSBURG (South Africa) said that paragraph (4) should correspond with paragraph (2) (b), rather than with paragraph (2) (a). In paragraph (2) (b) two different formulae were employed: "fails to fulfil" to cover cases such as those where an agent committed breach of contract, and "is not in a position to fulfil", to cover such cases as insolvency and bankruptcy. Paragraph (4) was concerned with the first question — failure to fulfil.

Mr BONELL (Italy) agreed with the previous speaker that paragraph (4) related to paragraph (2) (b) and that only the first formula — "fails to fulfil" — was necessary in paragraph (4).

Mr SANDVIK (Norway) supported paragraph (4) as proposed by the Drafting Committee because it reflected the meaning accepted by the Committee on first reading.

The CHAIRMAN invited the Committee to vote on the proposal to replace "unable" by "fails" in paragraph (4).

The amendment was rejected by 14 votes to 13 with 4 abstentions.

The CHAIRMAN suggested that, in the interests of alignment in the two versions, the French "le représenté n'exécute pas . . ." might be put into the past tense in order to follow the chronological and more logical order of the English "the principal has not fulfilled . . .".

Mr MOULY (France) said that his delegation preferred to retain the present tense, which was less rigid in the context.

Ms COLLACO (Portugal) suggested that there should be alignment of paragraphs (2) and (4) so as to avoid the different "n'est pas en mesure" in paragraph (2) and "n'est pas à même" in paragraph (4).

Mr PELICHET (Hague Conference on Private International Law) observed that if the French text was amended, the English text should also become the same in both paragraphs.

Mr KARSTEN (United Kingdom) said that it was desirable to have consistency in paragraphs (4) and (5) and that the same wording as in paragraph (2) should be used. As the text stood, however, there would be the option to employ one of the expressions used in paragraph (2) — "fails to fulfil" or "is not in a position to fulfil" — in both paragraphs (4) and (5). The source of the problem of alignment lay in the lack of clarity in paragraph (2), which used the two expressions.

Ms BUURE HÄGGLUND (Finland) said that her delegation found

the appeal for consistency between paragraphs (4) and (5) attractive but wondered if that would be possible since the Netherlands proposal to align paragraph (5) with paragraph (4) by the use of "is precluded", which was made during the first reading, had been rejected. Rejection would seem to indicate that there had been an intention to use different wording.

Mr VAN RENSBURG (South Africa) said that the underlying reason for paragraphs (4) and (5) not following the wording of paragraph (2) would seem to be that the only case where the third party was liable to have his name disclosed was considered to be a case where he committed breach of contract and, likewise, the only case where the principal was liable to have his name disclosed was considered to be where he had committed breach of contract and consequently the agent was unable to perform because he had not received performance from the principal. He was not convinced by that reasoning since paragraph (2) (a) and (b) gave the right of direct action even where the agent was simply unable to perform. It would therefore be logical that if the third party had the right of direct action against the principal, he should also be entitled to obtain the name of the principal and, likewise, if the principal had the right of direct action against the third party, he should also be entitled to obtain the name of the third party. The reasons for direct action should not provide grounds for distinction.

Mr BENNETT (Australia) agreed that paragraphs (2) and (4) should be consistent. The words "fails to fulfil" did not necessarily imply a fault; they simply meant that although the time for fulfilling obligations had passed they had not been fulfilled. On the other hand the agent might not be "in a position to fulfil . . ." before the time for fulfilment occurred. The two aspects overlapped and they should both be included. The underlying principle of paragraph (4) was that a person's name should not be disclosed unless a fault had been committed.

Mr BONELL (Italy) concurred in much of the statement made by the Australian delegation, but it was his view that adding both aspects would create difficulties.

Mr SWART (Netherlands) spoke in favour of the Australian proposal.

Mr MOULY (France) reiterated his preference for the deletion of the words "not in a position".

By 16 votes to 8 with 12 abstentions the first line of paragraph (4) was adopted as follows: "Where the agent fails to fulfil or is not in a position to fulfil his obligations . . .".

Mr MUCHUI (Kenya) did not see the need to retain the words "because the principal has not fulfilled his obligations".

The CHAIRMAN asked whether any delegation endorsed Mr Muchui's proposal.

As this was not the case, Mr MUCHUI (Kenya) withdrew his proposal.

Mr KARSTEN (United Kingdom) proposed that the text should read "Where the third party's rights under paragraph (2) above arise because the principal . . .".

In the absence of any support, Mr KARSTEN (United Kingdom) withdrew his proposal and spoke in favour of the Australian proposal.

Mr FARNSWORTH (Chairman of the Drafting Committee) suggested that the words "Where the agent fails to fulfil or is not in a position to fulfil his obligations to the third party because of the principal's failure of performance" would be analogous to paragraph (2) (a).

Paragraph (4) was adopted as amended by the delegation of Australia and the Chairman of the Drafting Committee.

Paragraph (5)

Mr FARNSWORTH (Chairman of the Drafting Committee) in-

troduced paragraph (5), pointing out that the words "the latter" in the second line should be amended to read "the agent".

Mr SWART (Netherlands) considered that for the sake of uniformity the words "fails to fulfil or is not in a position to fulfil" should also be used in paragraph (5).

Mr SEVON (Finland) disagreed because it would mean reversing a decision already taken by the Committee during the first reading.

Mr SWART (Netherlands) withdrew his proposal.

Paragraph (5) was adopted as amended by the Chairman of the Drafting Committee.

Paragraph (6)

Mr FARNSWORTH (Chairman of the Drafting Committee) introduced paragraph (6) which contained the words "at the time of contracting" in square brackets.

Mr SWART (Netherlands) said that the words in square brackets were unnecessary and should be deleted.

Paragraph (6) was adopted as amended by the delegation of the Netherlands.

Paragraph (7)

Mr FARNSWORTH (Chairman of the Drafting Committee) introduced paragraph (7) in which the penultimate line had been redrafted.

Mr SWART (Netherlands), referring to the second line, asked how an effect could be varied.

Mr BENNETT (Australia) pointed out that the text was incon-

sistent with that of Article 5 as adopted.

The CHAIRMAN saw no inconsistency since paragraph (7) was the application of Article 5 to the special case of direct recourse.

Mr BONELL (Italy) said that the discussion served to underline the difficulties that would arise concerning the text of Article 5 as adopted.

Mr JOVANOVIĆ (Yugoslavia) preferred the original text because that proposed by the Drafting Committee did not make it clear whether total or partial derogation was meant.

The CHAIRMAN was of the opinion that it meant derogation in whole or in part.

Mr VAN RENSBURG (South Africa) endorsed the view expressed by the Australian delegation and hoped that the Committee would take a decision to discuss Article 5 once more.

Mr SWART (Netherlands) was in favour of the original text which was clearer.

By 17 votes to 11 with 7 abstentions it was decided to adopt the text proposed by the Drafting Committee.

The meeting rose at 6.10 p.m.

20th meeting

Saturday, 12 February 1983 at 11.15 a.m.

Chairman: Mr WIDMER (Switzerland)

CONF.6/C.1/S.R.20

Item 8 ON THE AGENDA: EXAMINATION OF THE DRAFT CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS (CONF. 6/D.C.3)

The CHAIRMAN announced that in the absence of Mr Farnsworth, Mr Duchek, Vice-Chairman of the Drafting Committee, would act as its spokesman.

Article 14 (second reading)

Mr DUCHEK (Vice-Chairman of the Drafting Committee) said that the only changes from the original text were the substitution in paragraph (1), as throughout the draft Convention, of the word "where" for "when" as the first word of the sentence and the replacement, for the sake of clarity, in the third line of paragraph (2) of the phrase "and that the agent is acting" for "and that he is acting". There was no change in the French text.

Article 14 was adopted by the Committee.

Article 16 (second reading)

Paragraph (1)

Mr DUCHEK (Vice-Chairman of the Drafting Committee) said that in accordance with the decision of the Committee of the Whole, the Drafting Committee had deleted the reference in paragraph (1) to the provisions of Article 15 (1), so that Article 16 also applied to commission agency cases.

Paragraph (1) was adopted.

Paragraphs (2) and (2 bis)

Mr DUCHEK (Vice-Chairman of the Drafting Committee) said that there were two major changes. The first change resulted from the decision that Article 16 should apply to commission agency. In such cases the term "not bound to the principal" was not appropriate. It had been replaced by "not liable to the principal" which was intended to cover both types of agencies. The second change resulted from the adoption of the Norwegian proposal relating to unduly late ratification (CONF.6/3, page 13). Furthermore, the Drafting Committee had felt that it would be better to split the original paragraph into two, the first paragraph dealing with the effect for a third party acting in good faith and the second ((2 bis)) with the effect for a third party acting in bad faith.

The CHAIRMAN said that in the second line the English phrase "not liable to the principal" was not very close to the French "n'a pas d'obligations". He noted that the English text of Article 15 had referred to "obligations to the principal".

Mr KARSTEN (United Kingdom) said that "not liable to the principal" might be replaced by "under no obligation to the principal". He also suggested that "at the time of the agent's act" would be preferable to "at the time of the act by the agent".

Mr BONELL (Italy) wondered whether there was not some difference in meaning between "not liable" and "under no obligation". In Article 15 (2), the word "obligation" referred to an apportionment of rights and duties, whereas he had understood the reference in the paragraph under discussion to be to subsidiary liability. There was a sharp distinction in Italian law between the two concepts. If the French delegation was satisfied with the French rendering, he suggested that the Drafting Committee's text should be maintained in both languages.

Mr MOULY (France) said that there was no difference in sub-

stance between the French and the English versions.

Mr SWART (Netherlands) supported the substitution of the phrase "under no obligation" in the second line of the English text.

Ms COLLACO (Portugal) was also in favour of that change. She pointed out that in the fourth line of the paragraph, the Drafting Committee had retained from the original text the phrase "bound by a ratification". She inquired whether the same terminology should not be used as that in the second line.

Mr DUCHEK (Vice-Chairman of the Drafting Committee) said that the point had been discussed by the Drafting Committee. The majority had felt that the original terminology could be retained in the fourth line because the sense was that of being bound by ratification, not that of being bound to certain duties, as in the second line.

Mr BENNETT (Australia) preferred "under no obligation" to "not liable". However, the word "bound" in the fourth line should be replaced by the term used in the second line.

Ms COLLACO (Portugal) said she had been convinced by Mr Duchek's explanation and withdrew her suggestion.

The Committee decided by 16 votes to 8 with 10 abstentions to maintain the Drafting Committee's text of paragraph (2) in both English and French.

Mr BONELL (Italy), supported by Mr KARSTEN (United Kingdom) suggested that the opening phrase of paragraph (2 bis) should read: "Where, at the time of the agent's act, the third party

...

Mr PLANTARD (France) said that the amendment was unnecessary, as the word "however" clearly showed that paragraph (2 bis) was a derogation from paragraph (2).

The Committee decided by 21 votes to 7 with 4 abstentions to maintain the Drafting Committee's text of paragraph (2 bis).

Paragraph (3)

Paragraph (3) was adopted as it stood.

Paragraph (4)

Mr DUCHEK (Vice-Chairman of the Drafting Committee) said there had been only a minor drafting change in that paragraph, which involved the addition of a second sentence.

Mr BONELL (Italy) suggested that it might be more appropriate to put paragraph (4) at the end of Article 16.

The CHAIRMAN pointed out that paragraphs (4), (5) and (6) were rather closely linked.

Paragraph (4) was adopted as it stood.

Paragraph (5)

Paragraph (5) was adopted as it stood.

Paragraph (6)

Mr DUCHEK (Vice-Chairman of the Drafting Committee) drew attention to the Drafting Committee's addition of the words "or other legal person" after the word "corporation", a change which affected only the English text.

Paragraph (6) was adopted.

Paragraph (7)

Mr BONELL (Italy) proposed that paragraph (4) should be transferred to the end and become paragraph (7) Paragraph (7)

would become paragraph (6).

Mr SWART (Netherlands) said he could not support that proposal. Paragraph (4) was important and should not be left at the end.

Mr TERADA (Japan) said he was concerned about the use of the word "however" in paragraph (2 bis), since according to the common understanding within the Drafting Committee paragraph (2) had nothing to do with paragraph (2 bis).

The CHAIRMAN suggested that the Committee should adopt paragraph (2 bis), subject to the deletion of the word "however" in that paragraph.

Paragraphs (2) and (2 bis), as amended, were adopted.

Article 16 as amended was adopted.

Article 17 (second reading)

Article 17 was adopted.

The CHAIRMAN observed that the Drafting Committee had wished to bring Article 15 closer to Article 13 and Article 14 closer to Article 16. He agreed with that suggestion.

It was so agreed.

CHAPTER IV – TERMINATION OF THE AUTHORITY OF THE AGENT

Article 18 (second reading)

Mr DUCHEK (Vice-Chairman of the Drafting Committee) said that the Drafting Committee had wished to stress, after lengthy discussions, the fact that the reasons for terminating the authority of the agent referred only to his external as opposed to his internal relations.

Mr SWART (Netherlands) said he was not satisfied with the first sentence in Article 18, as there was a contradiction between Articles 18 and 20. He did not think that the impression should be created in Article 18 that the third party was being dealt with.

Mr BONELL (Italy) said that if there had been a unanimous decision in the Drafting Committee on that point, he would be reluctant to propose a change. However, he also agreed with the Netherlands representative that if there was a reference to the third party in Article 18, there was no reason for not including one in Article 19 as well.

Mr MAGNUSSON (Sweden) said that he supported the view of the Netherlands representative.

Mr GONDRA (Spain), supported by Ms COLLACO (Portugal), proposed that the initial phrase in Article 18 be deleted.

The CHAIRMAN put to the vote the phrase "As far as the third party is concerned" in Article 18.

That phrase was rejected by 22 votes to 3 with 9 abstentions.

Article 18 was adopted.

Article 19 (second reading)

Article 19 was adopted without comment.

Article 20 (second reading)

Mr MOULY (France) proposed that the French text should be amended to read: "L'extinction du pouvoir est sans effet à l'égard du tiers sauf s'il connaissait ou devait connaître cette extinction ou les faits qui l'ont entraîné".

Ms COLLACO (Portugal) said she preferred the French words "la fin du pouvoir" instead of the word "extinction".

The CHAIRMAN said he personally preferred the word "extinction".

Mr MOULY (France) suggested that the word "extinction" should be used everywhere in the French text, even in the chapter heading, instead of "fin du pouvoir".

Ms MEDINA (Angola) said she would prefer the word "terme" in the French text rather than "extinction".

Article 20 was adopted with the amendment to the French version proposed by the French delegation.

Article 21 (second reading)

Mr DASHDONDOG (Mongolia) introduced his delegation's amendment to Article 21 (CONF.6/C.1/W.P.40).

Mr GRÖNFORS (President of the Conference) pointed out that under the Rules of Procedure all proposals concerning matters of substance should be introduced well in advance. During the present second reading, it was impossible to consider more than brief oral amendments of a drafting nature. The proposal could be considered by the Conference.

The CHAIRMAN said he regretted that the Mongolian proposal had not been received at an earlier time.

Mr SWART (Netherlands) proposed that the words "has effect upon" in the third line should be replaced by the word "affects".

Mr KARSTEN (United Kingdom) said he could agree to the Netherlands amendment.

Article 21, as so amended, was adopted.

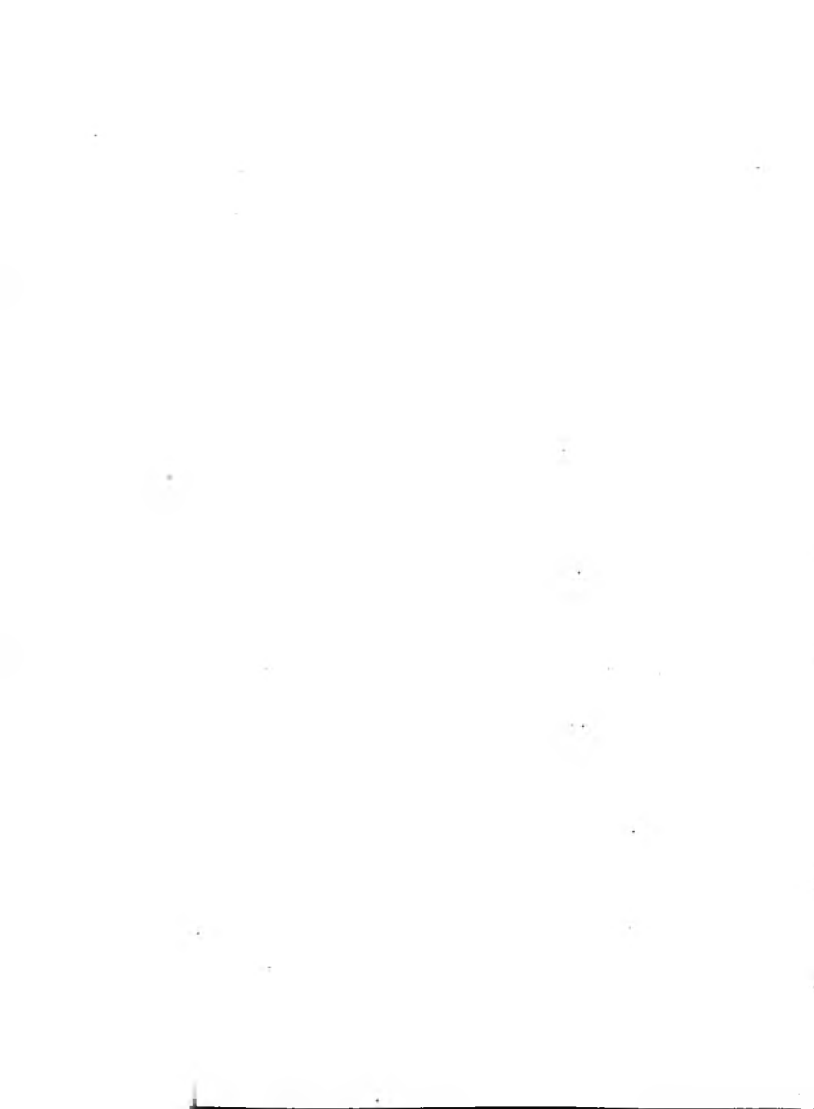
Article 22 (second reading)

Mr PLANTARD (France) pointed out that the words "la fin du pouvoir" in the French text should be replaced by "l'extinction du pouvoir".

Article 22, as amended in the French text, was adopted.

The CHAIRMAN thanked all the delegations in the Committee of the Whole for having brought their work to a successful conclusion.

The meeting rose at 1.15 p.m.



PART THREE

COMPARATIVE TABLE OF THE NUMBERING OF ARTICLES OF THE CONVENTION ON AGENCY IN THE INTERNATIONAL SALE OF GOODS AND DRAFT ARTICLES CONSIDERED BY THE CONFERENCE AND ITS COMMITTEES

17	17	18	6	15, 20
18	18	19	6	15, 20
19	19	20	6	15, 20
20	21	22	6	15, 20
21	22	23	7	
22	23	24	7	
23	22bis		6, 7	
24	24	25	7	
25	25	26	7	
26	26	27	7	
27	27		7	4
28	28	28bis	7	
29	29		7	
30	30	2bis	7	16
31	31		7	
32	32	29	7	
33	33	30	7	
34	34	31	7	
35	35	32	7	
		33	7	

- (1) The Preamble and Articles 21 to 35 of the Convention were considered by the Final Clauses Committee in the course of six meetings for which however Summary Records were not kept.
- (2) Article 12 of the Basic text was deleted by the Committee of the Whole following discussion at its 10th and 18th meetings; Article 21 of the Basic text, subsequently renumbered Article 20, was deleted by the Conference at its 6th plenary meeting following discussion at the 15th and 18th meetings of the Committee of the Whole; Article 28 of the Basic text was deleted by the Final Clauses Committee.