

U.D.P. 1970 - ETUDES: XIX and XXIV
Doc. 44 and Doc. 29

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW
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COMMITTEE OF GOVERNMENTAL EXPERTS ON AGENCY AND

COMMISSION ON SALE OR PURCHASE OF GOODS

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ANALYSIS OF THE REMARKS OF GOVERNMENTS ON THE DRAFT CONVENTION
PROVIDING A UNIFORM LAW ON AGENCY IN PRIVATE LAW RELATIONS OF
AN INTERNATIONAL CHARACTER AND ON THE DRAFT CONVENTION PROVIDING
A UNIFORM LAW ON THE CONTRACT OF COMMISSION ON THE INTERNATIONAL
SALE OR PURCHASE OF GOODS

Rome, April 1970

PART I

DRAFT CONVENTION PROVIDING A UNIFORM LAW ON AGENCY IN PRIVATE

LAW RELATIONS OF AN INTERNATIONAL CHARACTER (LUR)

General Remarks

Fourteen States have stated their views on the Draft Convention, prepared by UNIDROIT, providing a Uniform Law on International Agency.

The Governments of six States (Finland, Norway, Denmark, Sweden, Belgium, Pakistan) consider the Draft, as at present worded, to be acceptable, and believe that it could serve as a basis for discussion by a diplomatic Conference.

Conversely, the Governments of Portugal and Turkey have expressed the belief that the Draft is unsatisfactory; Portugal objects that the subject document fails to reflect modern tendencies in this matter while Turkey finds it is incompatible with several principles and rules of its Municipal Law.

The German Federal Republic, France, Austria and Israel propose that the principles and the provisions contained in this Draft (the same thing was said with regard to the Draft on Commission) be aligned with the principles and provisions contained in the Hague Convention providing a uniform law on the international sale of goods and on the conclusion of international contracts for the sale of goods. The Government of the German Federal Republic would even rather see the object of the Draft restricted to agency in international sales only.

The Government of the United States finds that the Draft should be examined by a Committee to include representatives of all legal systems (particularly of the Common Law system). The U.S. Government objects that the Draft, as now worded, is incomplete and inconsistent with the Draft on the commission contract. The U.S. Government would further like to see that the two Drafts be made to conform with the uniform law on sales.

The Government of the United Kingdom submitted the Draft Convention on agency (together with the Draft Convention on commission contracts) to the judgment of a Committee composed of members of the Law Commission and of the Scottish Law Commission, who made a very careful study of both texts and of the legal principles contained therein. The conclusion reached by this Committee is that none of the two Drafts seems suitable to be introduced, in its present text, into the United Kingdom legal system.

Such a conclusion is the result of a criticism made with respect to both the particular provisions of the two Drafts revealing flaws and discrepancies and the basic principles of these Drafts which appear to be inconsistent with the legal concept of "agency" as viewed in the Common Law system. The distinction between the two Drafts lies essentially in the fact that the uniform law on agency applies (a) if the "agent" acts in the name of the "principal", (b) whether the act performed is or is not a sale, while the uniform law on commission applies (a) if the "agent" acts in his own name, (b) only if a sale contract is involved.

The Committee asserts that such a distinction, whilst reflecting the one, usual in continental laws, between agent and commission agent, is entirely unknown in the Anglo-Saxon system. There is only one institution in this latter system, namely, the "agency", regulating different categories of "agents" (the "factors", included in these, appear to come closest to the commission agent) but which makes no distinction at all according to whether an "agent" acts in his own name or in the name of a "principal". Assuming that these two uniform laws are applicable in the United Kingdom, they would leave an important series of "agency" relationships outside of their sphere of application :

- (a) a considerable number of "commercial agencies" either because they have no connection with contracts of sale, or because they are not practiced professionally;
- (b) the case involving the "undisclosed principal": in Common Law an "agent" vested with the power to act for a "principal" binds the latter to third contracting parties even in cases where he acts in his own name. While the Draft on commission seems to lie on the basis of a similar principle (Articles 19 and 20), the Draft on agency expressly excludes it (see Explanatory Report at page 34), providing for only cases where "a person manifestly acts in the name of another" (Art. 13);
- (c) cases of "agencies created by estoppel or holding out": The Agency Draft is restricted to considering only some of these (Articles 6, 9, 10). Thus, neither of the two Drafts provides for the case of a "principal" who, by means of certain verbal or written indications leads third parties to view a person as his "agent" and consequently can no longer object to these third parties that he, in actual fact, had no intention of conferring on such person the title and the powers of an "agent".

Obviously originating from the Common Law system wherein a single concept exists for all varieties of agencies considering however relationships between "agent" and "principal", between "agent" and third parties and between "principal" and third parties altogether, the Committee refuses to agree to the distinction contained in the basis of the two UNIDROIT Drafts and according to which the uniform law on agency must be confined to regulating relationships between the represented party and third parties, while the uniform law on commission should chiefly consider relationships between principal and commission agent.

The Committee thus finds that each of these two Drafts is incomplete and insufficient and would like to see both the law on "agency" and the law on "commission" regulate the three categories of relationships which, in Common Law, are indifferently originated in all cases of "agency".

On the other hand, even if one were to agree to the basic distinction criticized above, the Committee finds that there are certain flaws.

The Committee stresses that the Draft on commission also contains certain provisions regarding relationships between principal and third parties (contracting party and creditors of the commission agent): the Draft on Agency, for its own part, considers a series of occurrences - decease, loss of capacity, bankruptcy - which put an end to agency (Articles 17, 18, 19, 21); is it to be inferred that these circumstances do not affect relationships between the principal and the agent ?

Likewise, Chapter III, dealing with the extent of agency, should this merely apply to relationships between the agent and third parties without affecting relationships between agent and principal ?

In conclusion, the Committee handed down an unfavourable opinion on the Drafts prepared by UNIDROIT on the grounds that, if they were to be adopted as at present worded, there would be an uniform law (that on commission) applying only to a limited category of contracts concluded by "commission agents", which in any even is not a frequent occurrence in the United Kingdom. On the other hand, as other uniform law (that on agency), covering all cases of "agency", but only applying in cases where the "agent" acts in the name of the "principal".

Thus, neither the former nor the latter of these two laws would be applicable to "agencies" other than "commission agencies" wherein the "agent" acts in his own name but on behalf of others. Likewise, the "agencies for undisclosed principal" and the "agencies created by holding out" would be disregarded.

The Committee admits that the preparation of a draft uniform law covering all aspects of "agency" may not be opportune. Therefore it proposes that there be established, in terms that would be acceptable to both systems resulting from Statute Law and the system resulting from Common Law, a category of "commercial agents" which is of a considerable practical importance in international business. It would thus be expedient to draw up certain rules governing all aspects, including relationships between "principal" and "agent" and relationships between "principal" and third parties and between the latter and the "agent". Such a uniform law could be restricted to "agencies" in international sales.

Regarding relationships between "principal" and "agent", this uniform law on "commercial agency" should apply:

- when at the time the relationship originates the place of business of the "principal" and of the "agent" is in two different (contracting) States;
- in cases where "agency" was established so as to enable the "agent" to effect on behalf of the "principal" an international sale or purchase within the meaning of Article 1 of the uniform law on international sales.

With respect to relationships between the "principal" and the "agent" on the one hand and third parties on the other, instead, the uniform law should apply to cases where the concluded contract constitutes an international sale within the meaning of Article 1 of the uniform law on international sales.



Remarks on the Articles

Article 1

Paragraph 1

The United Kingdom and France propose to restrict the sphere of application of the uniform law, inasmuch as it is considered to be too extensive.

France suggests that the uniform law should only apply in cases where, by reason of the rules on the conflict of laws, embodied in private international law, it is the law of one of the contracting States that becomes applicable.

The United Kingdom takes as a reference the uniform law on sales - and states its preference for the order of submission adopted therein, rather than that appearing in the Draft: Article 2 of the Draft should thus come before the present Article 1, and the wording thereof should be the same as that used in the uniform law on international sales.

Finally it wants the Convention approving the uniform law on Agency to contain a provision - as it is given by Article 3 of the Sale Convention - according to which any contracting state should be allowed to restrict the application of the uniform law to contracting states only.

Paragraph 2

The German Federal Republic and Austria criticize the reference made to the "general principles which are at the basis of this law ..." as the only source of interpretation and observe that

these are too vague and not suitable to fill certain important gaps in the rules provided for by the uniform law such as questions regarding liability, for instance.

The United Kingdom doubts that this reference would lead to a uniform interpretation. The United Kingdom wishes that the wording of the subject rules be identical to that of Article 17-1 of the uniform law on sales.

Finally, the United Kingdom refuses to agree to the suggestion made in the explanatory report, aiming at entrusting UNIDROIT with the responsibility of rendering an opinion in matters of interpretation of the uniform law. The contracting States could in any event forward each year to UNIDROIT any such arbitral awards and judicial decisions as may have been handed down in the subject matter during the year, so that the more interesting awards and decisions could be periodically published.

Article 2

The manner in which this Article defines the "foreign character" outlining cases in which the uniform law should apply is not considered to be satisfactory by the German Federal Republic, Austria, Israel and the United Kingdom.

The German Federal Republic finds that the uniform law should apply only to agency in international sales within the meaning of Article 1 of the uniform law on sales.

Israel and the United Kingdom stress the equivocal and evasive nature of the criterion drawn from the performance of an act in a State other than that wherein the place of business, or, in

default, the place of habitual residence of the principal is to be found. They believe that such a criterion would be satisfactory only in the event that the act performed by the agent reveals in itself a certain international character which would justify the application of the uniform law. The United Kingdom particularly would like to see a better definition of such an act, based on the definition appearing in Article 1 of the uniform law on sales. A similar observation was made with respect to Article 2 of the Draft on Commission.

The observations made by the United Kingdom deal, further, with several points of detail, specific statements and clarifications. Thus, the expression "place of business" ("établissement" in the French version) is considered to be inexact: what would happen, for instance, if the principal or the agent were a commercial company having several branches or subsidiaries throughout the world? Once again it is stressed that the nature of the operation performed per se should be given more relevance. The United Kingdom further wishes that the time to be referred to be better specified for the purpose of ascertaining the respective positions of the principal and the agent.

Article 3

Israel finds that it would be opportune to define the "agency", i.e. the institution that is the subject of the uniform law, rather than the parties to the legal act.

The German Federal Republic and Austria express dissatisfaction over the fact that "unilateral acts" were omitted from the list of any such acts as the agent may perform.

The United Kingdom's commentary reflects this country's fundamental criticism over the basic division of the two Drafts. In Common Law whether the agent acts in his own name or in the name of the principal is an entirely irrelevant fact in that the term "agent" covers, without making any distinction whatsoever, any such persons as may act on behalf of a "principal".

The Government of Israel points out that even if one were to accept this distinction in the definition of agent as "a person performing acts on behalf and in the name of another person", it would still be unsatisfactory in that it is moreover admitted (Article 13) that an agent may act without disclosing the name of the principal. One should, therefore, either delete the words "and in the name" or substitute the conjunction "and" by the conjunction "or".

Israel further proposes that on the definition of "authorization" the expression "... or a situation entailing such a qualification" should be deleted, in that it is deemed to be inconsistent with the provisions contained in Articles 5 and 6 of the Draft.

Regarding the concept and the definition of "authorization", the British commentary points out that there exists an ambiguity because of the fact that the definition given seems to consider only the power conferred by the principal on the agent in respect of the third parties. It would be opportune to consider first the act of the principal per se, from which such power originates.

The United Kingdom finally refuses to admit that the case of the "undisclosed principal" be disregarded.

Article 4

Paragraph 2

Austria finds that the exception raised in the third paragraph is too restricted: Austria wishes that in no event shall the uniform law apply to agency in legal proceedings and action.

The German Federal Republic, Austria, France, Israel and the United Kingdom find that the exception concerning agency on behalf of legal or natural persons, referred to in the explanatory report (page 35) should be expressly worded in the text of the article.

Germany would like to have excluded from the sphere of application of the uniform law not only the organs of the legal persons, but also the agents acting on behalf of corporations devoid of any legal personality.

The United Kingdom, conversely, does not entirely agree with the uniform law not applying at all to relationships between certain organs or company representatives and third parties.

Paragraph 3

The Austrian Government finds that this provision fails to make sense; it is preferable to say that the uniform law shall not apply to agent-principal relationship.

The British Government believes that this self restriction constitutes a serious default in the uniform law: furthermore, no rules were laid down for settling conflicts - if any - arising between the uniform law, the Municipal Law and the conventions concluded by the parties. There is in fact a number of Articles of the Draft

which could be applicable to relationship between the principal and the agent (Article 19 to 22): should the parties be entitled to derogate therefrom?

Article 5

Paragraph 1

The German Federal Republic expresses dissatisfaction over the fact that the Draft omits to provide for two cases of agency, where no authorization has been given, but as far as third parties are concerned: a) where the principal, though being aware of the fact that someone claims to be, and acts as if he were, his agent, fails to do anything to prevent this from occurring; b) where the principal is not aware of, but should take into account that the person acting as his agent, because of the position occupied by him, appears to be, in the eyes of third parties, as his agent.

Paragraph 2

The German Federal Republic, Austria and France propose that this provision be deleted.

France points out that the subject provision may give rise to difficulties in interpretation, particularly in cases where the document providing authority was drawn up in a State other than that in which the transaction involved should be performed by the agent, and, likewise, in cases where such authority provides for the accomplishment of several acts.

The Government of Israel stresses that according to the explanatory report (page 36) the wording "a prescribed form of author-

igation" should be substituted by the following: " a prescribed form for the act to be carried out."

Article 6

France, Israel and the United Kingdom believe that this provision in actual fact constitutes a particular case of authorization and should be embodied in Article 5. The United Kingdom wishes that a clear distinction be made between cases involving express authority and cases where authority to act is inferred from the position in which the principal has placed the agent.

Article 7

Israel suggests that the following paragraph be added to this Article:

"The liabilities of the agent towards the principal and the third party shall not arise unless the agent had the legal capacity to bind himself in this respect".

The Government of Israel further finds that the law applicable to the legal capacity of the principal and of the agent should also be clearly stated in this Article.

Article 8

Paragraph 1

The German Federal Republic and Israel find that the requirement of an "express" authorization is not justified and propose that the validity of an implied authorization be admitted.

Paragraph 2

The German Federal Republic believes that the reference to Municipal Law, in sub-paragraph 1, is too burdensome on the principal. Germany would like to have the subject sub-paragraph deleted.

France would like to have the concept contained in sub-paragraph 2 more clearly specified.

Austria expresses dissatisfaction over the lack of any provisions concerning the agent's liability in cases where he effects a substitution without being so authorized.

Israel believes that a provision of this Article should convey the idea expressed in the explanatory report (page 38): "It is obvious that the agent and his substitute must inform the principal of the change as soon as possible."

The United Kingdom, without raising any objections against the rules contained in Article 8, states it would like to be further enlightened on the following points:

- does the term "substitute" cover the notion of "sub-agent"?
- if this is not so, what happens to the appointment of a deputy-agent?
- in the event of a substitution occurring, shall the former agent still be responsible towards the principal?

Article 9

The German Federal Republic and the United Kingdom were very cautious in expressing an opinion on the advisability of adopting

this provision, and observe in substance that as the extent of agency towards third parties is here involved, one fails to see how such third parties could be in a position to appraise it in the absence of a formal document which should be submitted to them.

Israel suggests that this Article should include the case known as "agency of necessity" and proposes that a provision should be added worded as follows:

"An agent is presumed to be authorized to perform any unforeseeable act reasonably necessary for the protection of the interests of the principal with regard to the object of the agency, whenever the interests of the principal are such that no delay should occur in carrying out the act."

Article 10

United Kingdom's commentary believes that the expression "all such acts as may normally entail this management" is too vague and requires a reference to Municipal Laws and domestic usages.

Article 11

France questions if the presumption established is consistent with practice and if the appointment of several agents does not lead one rather to suppose that each one of them has only a partial duty to accomplish. France would, furthermore, like to see that it be specified that the presumption could be reversed under an express clause included in the document providing authority.

The German Federal Republic proposes that at least in cases where unilateral acts of third parties are to be accepted, authority should be provided for individually.

Israel would like to see the hypothesis of the plurality of principals settled and suggests that the following addition be made:

" If several persons have given authority to an agent in the same act of authorization to carry out the same act on their behalf, it shall be presumed that the act is to be carried out for them jointly."

Article 12

Paragraph 2

The United Kingdom proposes that the following wording be adopted:

"If the agent has exceeded the scope of his authorization, then, subject to the next paragraph of this Article and to Article 15, the principal shall not be bound by the act of the agent."

Paragraph 3

France proposes that the term "restriction", which seems to refer only to an initial limitation, be substituted by the expression "limitation of the agent's powers."

The German Federal Republic and Austria lay stress on a contradiction alleged to exist between paragraph 3 and paragraph 2 of this same article as well as with paragraph 1 of Article 23.

Israel believes that any such act as may come within the scope specified in Article 9 is an act of agency, irrespective of any such restriction as may have been laid down by the principal. Israel comes to the conclusion that this paragraph is confined to specifying that the principal shall not be bound by any such act of the agent as may normally fall within the scope of agency, in cases where the third party has gained knowledge of the existence of a restriction of the scope of the authority.

Paragraphs 3, 4 and 5

The United Kingdom finds that these three paragraphs are not sufficiently clear and are unsatisfactory in their structure; and believes it would be advisable to consider adopting a different wording directed at better setting forth the content thereof.

Article 13

Austria believes this provision to be dangerous inasmuch as it is of such a nature as to lead to a confusion with indirect agency. Austria furthermore criticizes the solution proposed in paragraph 3 as the third party and the agent have been quite willing to deal with the principal or on his behalf.

Israel and the United Kingdom conversely support this provision as it might cover at least the cases of "partially undisclosed principal", and would like to take this opportunity to stress that they believe the Draft should also consider the cases of "undisclosed principal", which are of frequent occurrence and useful in commercial practice.

United Kingdom's commentary appears to be in favour of the provision forcing the agent to disclose within a given time-limit the name of the principal.

Israel and the United Kingdom, on grounds of logic would like to see the expression "... in the name of another person" substituted by the wording "on behalf of another person."

Article 14

The German Federal Republic and Austria state their disapproval of the present wording of this Article. Germany would particularly like to see the Draft clearly specify that, in cases where the legal effects of an act could be affected by a default of consent or by the knowledge of certain circumstances - or by the possibility of gaining knowledge of certain circumstances - the person of the agent should be first considered; in any case, the principal should not be allowed to raise the contention that the agent lacked knowledge when he himself was informed, or should have so been. For comparison, reference is made to Article 7 of the uniform law on sales.

The United Kingdom would rather have this Article deleted inasmuch as it is believed to be not at all clear and of no avail.

Article 15

Paragraph 2

The German Federal Republic, Austria, the United Kingdom and France are opposed to a limitation of the time during which ratification should occur.

France proposes the adoption of the following provision:
"Ratification shall be considered to have legal force even in cases where this act could not be validly implemented at the time it was accomplished, except in such cases where it would adversely affect any such rights as may have been acquired by a bona fide third party."

Paragraph 3

The British commentary suggests that this proposition be generalized for the sake of extending it to all such cases where an agent was either not qualified or not yet in existence.

Paragraph 5

The French commentary proposes that the following wording be adopted:

"The third party and the one who has been bargaining as an agent may agree for the purpose of finding that the contract was not validly concluded ...".

Paragraph 6

Israel proposes that the following provision should be added:

"Where, at the time the act was performed, the third party did not know nor ought to have known, that the agent acted without authority or in excess of his authority, he may, until ratification of the act has been brought to his notice, rescind the contract."

Paragraph 8

France proposes that this paragraph be deleted, in that it is believed to be too compelling for the principal.

Paragraph 9

France recalls that Municipal systems provide for several rules governing the transfer of rights and obligations and suggests that the uniform law should lay down different rules depending on whether a universal succession or a succession between legal persons etc. is involved, or else refer to Municipal law.

Paragraph 10

The British commentary questions the meaning of this provision. Believing that, in view of the general structure of the Draft, it cannot concern relationships between the agent and the principal, it comes to the conclusion that the rules contained in the preceding sub-paragraphs apply in cases of absence of authority, while the subject provision relates to cases where the authority is exceeded. But in this case the following specific statement should be made: "The provisions of the foregoing paragraphs apply also to ...".

Article 16

Austria and the German Federal Republic find this provision unsatisfactory.

The German Federal Republic particularly criticizes the absence of more specific indications. Germany further points out that there here exists a contradiction with Article 8 of the uniform law on bills of exchange and with Article 11 of the uniform law on cheques. This exception should be in any case stressed.

The United Kingdom suggested that the third party should be placed on such position as he would have been had the principal been bound by the act involved.

France proposes that Article 16 and paragraph 2 of Article 24 be deleted and that a Chapter VI be added to the Draft, composed of a single Article to be worded as follows:
"Anyone claiming to be an agent shall be liable towards the third party for any such injury or damage as may have been caused to the latter:

- a) in acting without authority;
- b) in exceeding the limits of his authority;
- c) in acting subsequent to termination of his authority.

Nevertheless, this liability shall not apply in cases where the third party gained knowledge, or should have had knowledge of the fact that the agent lacked the necessary authority, that he had exceeded the limits of such authority or that such authority had come to an end."

Article 17

The United Kingdom states it is on the whole satisfied with the provisions contained in Articles 17 to 26. The United Kingdom proposes, however, in this connection, certain improvements in the wording of the English version of the Draft.

The German Federal Republic believes that the decease of the principal should not be the cause, in every case, of the conclusion of the agency involved. There are certain cases in commercial practice (for instance: a "post mortem" power of attorney to a Bank) where this rule could prove to be embarrassing.

If the sphere of application of the uniform law were to be restricted to international sales, the rule contained in Article 20 would be perfectly adequate to avoid any such unfortunate consequences as may result from Article 7, paragraph 1 thereof.

France also recalls that in its Municipal Law provision is made for cases where the extinction of a physical or legal person does not automatically result in the conclusion of the agency relationship: thus, where the principal is a businessman or a corporation which still has to be wound up.

Therefore, the following suggestions were made:

- a supplementary paragraph added: "By an express agreement between the agent and the principal, the provisions contained in sub-paragraphs 1 and 3 of this Article may be derogated from";
- paragraph 3 should be worded as follows: "if the principal is a legal person, termination of the latter's personality shall cause the agency to cease under the same conditions".

Israel finds that the provisions contained in Articles 17 to 26 are too involved and proposes:

- that Articles 17 to 21 be combined into one sole Article to be worded as follows: "The agency terminates upon the death, loss of capacity or bankruptcy of the principal or the agent, or, in case of bodies corporate, upon their winding up.

Nevertheless, acts carried out by the agent after such termination shall bind the principal, his successors or his estate, if, at the time the act was performed, the third party did not know of the termination.

Notwithstanding the death, incapacity, bankruptcy or winding up of the principal, the agency shall continue in-so-far as is necessary to prevent damage thereby to be caused to the principal, his successors or his estate."

- that Article 22, 23 and 26 be combined into one sole Article to be worded as follows: "The agency terminates when the authorization has been revoked, and insofar as it has been restricted, by the principal, or has been renounced by the agent, and, at the time the act of the agent was performed, the third party knew of the termination.

A third party is presumed to know of the termination of the agency when the authorization has been revoked, restricted or renounced in a measure reasonably similar to that in which it had been created or by a procedure of invalidation, if such procedure is recognised in the country in which the act of the agent is to be performed."

- that Article 3, paragraph 3, Article 26, paragraph 3 and Article 24 should be deleted.

Article 18

France agrees with this provision, provided it is more clearly specified, notwithstanding the fact that the subject rule is inconsistent with the rules of French Municipal Law in the matter.

The United Kingdom finds that the concept of "total loss of capacity" is ambiguous and vague. What matters in the instant case is the capacity to accomplish a given act. The United Kingdom suggests that the following wording be adopted: "If the principal loses his capacity then the authorization shall bind only to the extent, if any, that the principal remains capable of acting in the transaction concerned."

Article 19

Paragraph 1

France suggests that the expression "declaration of bankruptcy" be substituted by "the decree of bankruptcy or any other procedures of collective liquidation."

Paragraph 2

France wishes that reference be made to the concept of opposability to the mass of creditors, in order that a distinction may be reached between any such acts as the bankrupt may accomplish alone and the acts in the accomplishment of which he must be assisted. The agent may validly perform the former but not the latter. Paragraph 2 should therefore read as follows:

"However, any such transactions as may be performed by the agent following an adjudication of bankruptcy, or following all procedures of collective liquidation, shall be opposable to the mass of creditors to the extent to which they would be had they been performed by the agent alone."

However, as also in this case the good faith of the third party ought to be safeguarded, the subject Article should contain the following paragraph 3:

"Transactions performed by the agent following bankruptcy or any other procedure of collective liquidation may be opposed to the mass of creditors only if the third parties did not know of that circumstance at the moment transaction was performed."

Article 20

France proposes that a distinction be made between the person of the official who may die, become incapable or bankrupt, and the enterprise which normally, even in the afore-mentioned circumstances continues its activity. The provision contained in the Draft would appear to be too restricted and would threaten to lead to an automatic, and therefore too strict an application of the principles set forth in Articles 17, 18 and 19.

Conversely, the British Committee believes that this provision is too vague and suggests that the following wording be adopted:

"Notwithstanding the decease, incapacity or bankruptcy of the principal the agent may, excepting in cases where contrary instructions are issued by principal's successors and assigns, continue to act

as agent if a termination of such agency would in all likelihood cause injury or damage to the principal, his successors or assigns or to the mass of his creditors."

Article 21

Only the hypothesis specified in paragraph 3 gave rise to certain queries.

France and the United Kingdom believe this rule to be too strict and would like to see that the principal be offered the possibility of averting it.

Article 22

The German Federal Republic stresses that besides the cases envisaged in Article 25 there are other circumstances involving irrevocable powers of attorney.

The British Commission also questions if, as to the relationships between the principal and the agent withdrawal of authority should be invariably admitted without the agent being accorded any right to compensation. In this connection the Committee envisages an hypothesis where Chapter V would be applicable, as ruled in Common Law systems, to the relationships between the principal and the agent.

Article 23

Austria and France criticize the use made of the term "amortissement" having such a term a meaning only according to the Austrian and Italian legal terminology.

Austria proposes that a reference should be made to the recognition of such a procedure in the other country and not to the validity of the amortization procedure.

France suggests that a) be worded as follows:

"a) - In cases where the document instituting or ascertaining authority was deprived of any effect by a procedure intended for that purpose ...".

The United Kingdom questions the practical utility of the last paragraph in that it appears to envisage a supposition already covered by a).

Article 25

Austria believes this Article to be insufficient to regulate the question of "agency on behalf of the agent or of third parties". Austria also criticizes the rule contained in the latter part of this Article.

France would like to see the two parties of this Article more distinctly separated, the former to express a principle and the latter an exception.

The United Kingdom agrees to accept such a rule reflecting the doctrine of "agency coupled with an interest" such as is known in Common Law.

Article 26

Austria and France repeat the observations already made by them with respect to Article 23.

PART II

DRAFT CONVENTION PROVIDING A UNIFORM LAW ON THE CONTRACT OF

COMMISSION ON THE INTERNATIONAL SALE OR PURCHASE OF GOODS (LUC)

General Remarks

Eleven States have stated their views on the Draft Convention providing a uniform law on the contract of commission on the international sale or purchase of goods.

Finland, Sweden and Denmark confine themselves to observing that the draft, in its present text, may with difficulty constitute a basis for a fruitful discussion by an international conference. Sweden and Denmark particularly stress that the provisions contained in Chapter II of the Draft are far too inconsistent with the principles of their respective municipal laws governing the subject matter.

Exceptions on the merits of the Draft were submitted by Norway and the United Kingdom. (1)

Norway is not inclined to believe that a uniform law dealing merely with commission agency would serve any useful purpose in that a great variety of relationships exist in international business which may be defined, broadly speaking, as intermediate and which, notwithstanding different appellatives, appear to have similar characteristics and requirements. Norway is of the opinion that it would be much more to the point if an attempt were made at drawing up uniform rules governing relationships established by long term agencies of sale, which are of considerable practical importance in international business relations; the present Draft dealing, rather, with the basic rules of mandat, fails to give sufficient relevance to such matters. Certain essential points,

(1) As far as criticism of a general nature set forth by the British Governmental Committee is concerned, reference should be made to the answers relating to the draft on agency.

such as the obligation of notice in cases involving revocation or renunciation of a long term contract, or further, the obligation of paying an indemnity in these same cases, are not dealt with in the Draft.

On the foregoing points Norway relies on two Drafts, one drawn up by the Union Internationale des Agents Commerciaux et Courtiers (September 1965) and the other by the Internationale Liga der Handelsvertreter und Reisenden (June 1965) providing for relations of a nature very similar to commission agency, for the purpose of stressing the important practical aspect of the matter.

The German Federal Republic, Austria, France, Israel, Belgium and Portugal, on the other hand, expressed, on the whole, a favourable opinion even though claiming for a closer co-ordination between articles 1, 2, 3, 4, 6 and 7 of the present Draft and the corresponding articles of the uniform law on sales so that the sphere of application of the two uniform laws may be established better and in a correct and identical manner.

Remarks on the Articles

Article 3

For the sake of greater clarity the United Kingdom suggests that this article be worded as follows:

"The parties to a contract of commission shall be free to exclude the application thereto of Chapter II of this Law, either entirely or partially but may not exclude the provisions of other Chapters of this Law.

"When Art. 26 of this Law applies⁽¹⁾, the commission agents concerned shall be free to exclude the application to the relations between them of Chapter II of this Law either partially or entirely.

"The principal and the third party shall be free to exclude the application to the relations between them of Chapter III and IV of this Law either entirely or partly.

"Any such exclusion may be express or implied."

Article 5

The German Federal Republic suggests that the sphere of application of the uniform law should be extended to any such persons as, during the course of their business activity, are led to perform commission transactions, while the more or less professional character of their activity as commission agents should be disregarded.

The United Kingdom stresses that the definition of a commission agent as a person acting "in his own name" is devoid of any meaning and cannot be introduced into the Common Law system.

(1) In cases where the commission agent has concluded a contract of purchase or sale through the intermediary of another commission agent.

The United Kingdom says it would rather have the personal responsibility and liability of the commission agent be given prominence, and proposes that the following definition be adopted:

"In this law, commission agent means anyone who in the course of his business undertakes to become a party to contracts for the sale or purchase of goods for the account of another (the principal).

Article 6

In cases where a reference to usages is involved, the British Committee discloses its preference for the wording adopted in Art. 9 of the uniform Law on sales. The Committee criticizes the fact that this reference to usages is restricted to the sole relations between principal and commission agent, and observes that if it is admitted that the principal and the third party may derogate from Chapter III, it should likewise also be admitted that usages can be productive of the same effect.

In short, the United Kingdom proposes the adoption of the following new wordings:

"Parties shall be bound by any usage which they have expressly or impliedly made applicable to their contract and by any practices which they have established between themselves.

"They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present Law, the usages shall prevail unless otherwise agreed by the parties

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

Article 8

Paragraphs 1 and 2

Israel and the United Kingdom are of the opinion that the provisions concerning the commission agents' duties and liabilities are incomplete and not sufficiently specified.

Israel suggests that paragraphs 1 and 2 should be combined with Art. 14 and, possibly, with Articles 9 to 11 for the sake of obtaining a single article embodying also a provision of a general scope, stipulating for instance that the commission agent shall act in good faith and avoid conflicts between the interests of the principal, his own and the interests of third parties.

The United Kingdom stated its dissatisfaction over the absence of a provision concerning good faith and professional skill and believes this should be added to the obligation of diligence. The United Kingdom further believes that the obligation concerning information is too strict and that the commission agent should be required to account for his actions only in cases where this is requested of him by the principal or should a particularly important fact occur, or, further, upon his commission being concluded. He should also be asked to give an account of his financial management.

The United Kingdom proposes, therefore, that Art. 8 be reworded as follows:

"The Commission agent shall be bound to use, when carrying out the commission, all the care of a diligent businessman and the skill to be expected of a commission agent in the trade concerned. He must watch over and act in the interest of the principal and follow the principal's instructions.

"The commission agent shall take care of things entrusted to him in connection with the commission, and, at the request of the principal, immediately deliver to him everything which he has a right to claim from the commission agent.

"The commission agent shall inform the principal without delay and by the means of communication usual in the circumstances about the conduct of the commission whenever requested to do so by the principal and, in any event, at the conclusion of the commission and whenever anything occurs which the principal for his own protection has a right to know.

"The commission agent shall keep proper financial accounts of his operations in connection with the commission and submit them to the principal at reasonable intervals and at the conclusion of the commission."

Paragraph 3

The provisions regarding the commission agent's liability do not satisfy either the German Federal Republic, or Israel or the United Kingdom who object that these provisions are vague, in that they do not state what kind of default in execution is envisaged, and are incomplete in that they not provide a system for the compensation of damages.

Israel would like to add to the single Article proposed, resulting from a combination of Articles 8 to 11 and 14, another Article of a general scope, ruling that in cases where the commission agent fails to fulfill his duties and obligations the principal shall be entitled to claim for any such reparations as may be provided for, in cases of breach of contract, by the uniform Law on sales or by municipal law.

The British Committee proposes that paragraph 3 be taken out and replaced by a new article to be worded as follows:

"Where a commission agent fails to carry out his obligations under Art. 8 to Art. 14 of this Law he shall:

- a) forfeit any right to remuneration in respect of the transaction concerned, and
- b) be liable to pay such compensation to the principal as will place the latter in the same position as he would have been, had the commission agent fulfilled his obligations."

Article 9

Austria and the United Kingdom wish that insurance liability be more correctly specified. Austria recalls that the draft on international forwarding agency lays down that in cases where insurance is obligatory and in default of orders given by the principal the forwarding agent shall be bound to secure such insurance coverage at the customary conditions.

On the same basis, the British Committee suggests the adoption of the following wording:

"When the commission agent has been instructed by the principal to insure the goods to be bought or sold under contract of commission, he shall insure them in accordance with such instructions. In default of such instructions the commission agent shall not be obliged to insure the goods save that, where insurance is normal according to the particular trade or business carried out by the commission agent, the commission agent shall be obliged to insure for such amount and for such risks as are normal according to the law and usages in force in respect of such trade or business in the territory where the commission agent has his place of business for the sale or purchase of the goods to be dealt with under the contract of commission."

Article 11

The United Kingdom is of the opinion that the rule contained in this article is an improvement on the provision embodied in the Common Law in the matter of "agency of necessity". The United Kingdom, however, proposes the adoption of certain amendments, particularly suited to vest the commission agent with discretionary powers in cases where a deterioration of the goods occurs consequent on market facts and conditions or as a result of an economic and political situation.

The British Committee proposes, therefore, the adoption of the following wording:

"If the goods to be bought or sold under the contract of commission (or any other goods of the principal) are in danger of perishing while in the control of the commission agent, the commission agent must, if there is no time to wait for the principal's instructions, sell the goods. If the goods to be bought or sold under the contract of commission are subject to such deterioration in quality while in the control of the commission agent as substantially to reduce their value or to involve unreasonable expense in their preservation, the commission agent may sell the goods."

The conditions under which the subject sale should be effected shall be laid down in a supplementary paragraph.

Article 12

Austria proposes that the commission agent's liability be extended to cases where aforesaid commission agent fails to convey the name of his contracting party to the knowledge of the principal.

Article 13

Austria questions the nature of the liability with which the commission agent would be confronted in the case envisaged by this article: may the principal repudiate the contract concluded under such conditions, or is it to be performed by the commission agent at the conditions under which he was authorized to conclude it? Austria further stresses that cases where the commission agent sells at a lower price, or purchases at a higher price, are not provided for. Further, it should be provided that, where a commission agent is successful in concluding a contract at more profitable conditions, the respective benefit should be at the principal.

Article 14

The German Federal Republic and Austria wish that the commission agent be authorized to become a selfcontracting agent, even in the absence of the principal's authorization, in cases where the goods are subject to an official market quotation.

On the other hand the United Kingdom, though stressing that the rule proposed is fairly similar to the system followed in Common Law wishes this rule to be placed within a more general context of the obligation incumbent on the commission agent to act in good faith in respect of the principal. Such a concept could be embodied in Art. 8, or in Art. 14, the commencement of which should thus read as follows:

"Without the express consent of the principal the commission agent may not benefit directly or indirectly from any transaction arising out of the sale or purchase of goods on the principal's behalf."

The British Committee further questions whether the penalty consequent on this rule shall be the nullity of the contract or the payment of compensation for damages, plus interest, to the principal.

Article 15

Israel wishes that the second sentence of this article be taken out.

The United Kingdom recalls that the right of retaining possession and the right of selling constitute an exception and a derogation from the Common Law. The United Kingdom states its willingness, however, to agree provided certain specific statements are made, and proposes that the subject article be revised in such a manner as to represent the principles set forth hereunder:

- a) the right of retaining possession may be exercised by the commission agent over any such goods, or any documents related to these goods, as may be retained by him on behalf of the principal within the sphere of the commission contract and which he has received from the principal or from third parties;
- b) such right of retaining possession is exercised in cases where the principal owes money to the commission agent consequent on the performance of the commission contract;
- c) when this debt has fallen due the commission agent may sell the goods, following notification to the principal of his intention of effecting such sale and [only] after a reasonable time-limit has elapsed.
- d) the manner in which the sale is to be effected shall be specified.

Article 17

The United Kingdom believes that the rules laid down in the Draft on Agency are preferable and should be transposed here. The United Kingdom proposes that it should be in any event set forth, in the first paragraph, that both the principal and the commission agent may terminate the contract at any time. A second paragraph should state the legal consequences of such an act in the various cases that may materialize. Thus, it should be specified that termination can have no effect on any such acts as may already have been performed. In cases involving a commission concluded for a fixed period, or related to a particular transaction, the renouncing party shall, naturally, be liable to indemnify the other party for any such damage as may have been caused by aforesaid renunciation.

The United Kingdom and Israel criticize the differences existing between the provisions relating to the principal's decease or incapacity included in the agency Draft and the commission Draft and wish that cases of bankruptcy or liquidation be also provided for.

Articles 19 - 20

Austria and Norway are of the opinion that these two articles represent a dangerous exception to the principle of "indirect agency". The United Kingdom and Israel, besides proffering certain criticism of form and submitting requests for an explanation, essentially express their dissatisfaction over the fact that the case of "undisclosed principal" has not been clearly provided for in these articles.

The German Federal Republic stresses that the solution proposed is inconsistent with its own municipal law but does not deny that there is an interesting side to the question. The German Federal Republic wishes that the text state if the commission agent must disclose to the principal the name of the third contracting party and, if in the affirmative, at which time.

Israel wants only the principal to bear the consequences of the commission agent's non-performance and consequently suggests that any such defences as the principal may set up against the commission agent shall not be brought against third parties.

Norway particularly fears that these provisions might hinder the commission agent's activity in his capacity of independent and responsible intermediary.

Articles 21 - 22

The United Kingdom suggests that these two articles be combined into one single article and that the fiction introduced by the expression "the same rights as if that thing had been delivered to himself," be done away with. The United Kingdom suggests the adoption of the following wording:

"Goods which are the subject of this contract of commission, even while they remain in the hands of the commission agent, shall not be liable to meet the claims of the commission agent's creditors except to the extent, if any, that the commission agent himself has rights to such goods against the principal, third party or other owner thereof."

Article 23

Austria finds that this provision is complicated and considers it to be of no avail.

The United Kingdom proposes the following different wording:

"The provisions of the preceding Article shall apply notwithstanding that the goods have lost their identity as a result of being mixed with other goods held by the commission agent. In such a case the claims of the various principals and third parties whose goods have contributed to the mass so constituted shall be proportionate to the value of their respective contributions."

Article 24

Still on this point the British Committee proposes the following wording:

"In the event of the commission agent's insolvency the rights which he may have under a contract of purchase or sale shall not pass to his creditors, but shall pass, as the case may require, to the principal or to the third party seller or purchaser."

Article 25

Austria refuses to agree on the provision contained in this Article in that it is a rule concerning a matter of public law and could not, on these grounds, be introduced into the sphere of a uniform law on commission.

Paragraphs 1 and 2

The United Kingdom compares the proposed rules with the British system of "solicitor's accounts". The United Kingdom stresses, however, that the suggested regulation fails to offer sufficient guarantees and does not provide for any penalties in cases where the commission agent neglects to keep this special account in a regular manner: this because the provision included in paragraph 3 is absolutely to be deleted. The British Committee suggests that the following wording be adopted in substitution therefor:

"Principals and third parties dealing with the commission agent in the course of his business as a commission agent shall have the exclusive right to participate in the funds in the special account until they are exhausted. Thereafter they may participate as ordinary creditors in the general estate of the commission agent. General creditors of the commission agent may participate in the funds in the special account only after the claims of the above mentioned principals and third parties have been met."

Paragraph 3

This provision meets with the opposition of the German Federal Republic, of the United Kingdom and of Portugal who object that this rule places the burden of the consequences of the commission agent's irregular conduct on third parties who are in no way involved in or liable for such conduct.

Article 26

The British Committee suggests that this Article should end with the following wording:

"... relations between the two commission agents shall be regulated by Chapter II of the present Law, unless the parties expressly or impliedly exclude it."

Articles 27 and 28

Austria criticizes these provisions which are said to result in the application of the uniform law to relationships other than those normally occurring within the sphere of application of such Law.

The United Kingdom believes that Article 27 lacks accuracy. The United Kingdom criticizes the wording of a) which should not be construed as allowing the principal to treat the second commission agent as a seller in a sales commission or as a purchaser in a purchase commission.

The United Kingdom further stresses that the structure of Article 27 may possibly lead to the result of subtracting from the sphere of municipal law certain situations which should normally be thereby governed and therefore wishes that the requisites of habitual place of residence of the principal and of the successive commission agents be more clearly specified.

