

STUDY XIX - Doc. 48
U.D.P. 1971
Original: French

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

COMMITTEE OF GOVERNMENTAL EXPERTS ON AGENCY AND

COMMISSION ON SALE OR PURCHASE OF GOODS

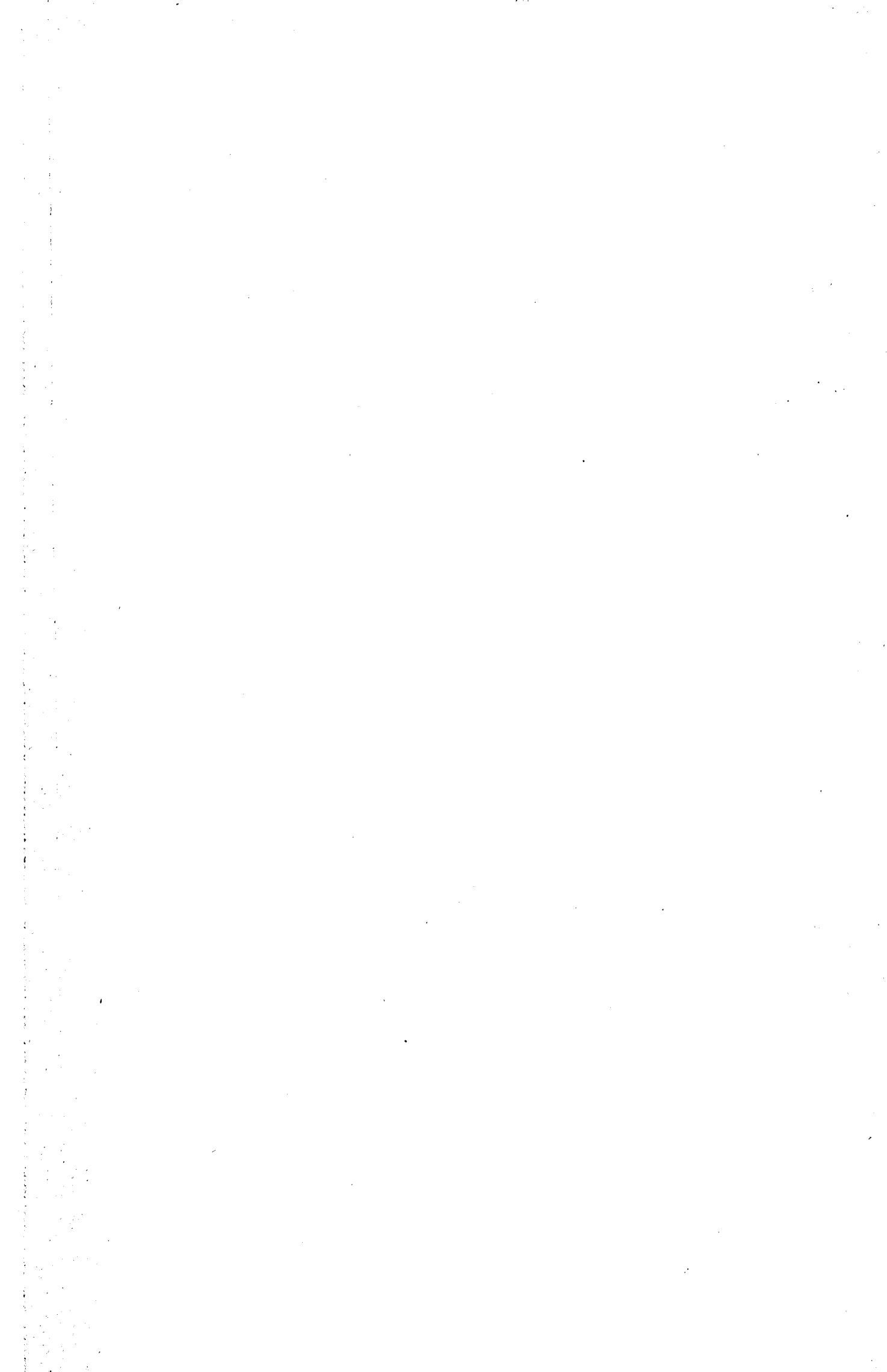
COMMENTARY

of the Secretariat of UNIDROIT

on the draft uniform law on agency of an international character
in the sale and purchase of goods

(Geneva, December 1970, Study XIX, Doc. 47, U.D.P. 1971)

Rome, March 1971



Following up the wish expressed by the Committee of Experts at the time of its first session, a limited working group met at Geneva from 17 to 22 December 1970 to work out a new text of uniform law, taking as their point of departure the preliminary draft which had been presented by the Secretariat of UNIDROIT, and combining the provisions of the earlier drafts on agency and on commission.

The working group, presided over by Mr. Anton (United Kingdom) also included Messrs. Eörsi (Hungary), Farnsworth (USA), Merz (Switzerland), and Sandvik (Norway) who were joined by the Deputy Secretary General of UNIDROIT. The group succeeded in offering a new text to the members of the Committee for consideration (UDP 1971 - Study XIX, doc. 47).

The working group deemed it beyond the scope of its mandate to introduce any changes which might be basically at variance with earlier drafts already agreed upon by the Committee of Experts during its first session. A number of modifications in form and presentation, however, which were in line with the new structure and scope of this particular draft were introduced. Certain articles in particular were modified to conform with the ULIS (Uniform Law on the International Sale of Goods) adopted by the Hague Conference in 1964. Finally, a number of provisions contained in the earlier drafts were deleted whenever they seemed incompatible with the new conception.

In most cases, the present commentary does not go beyond referring to the corresponding provision of earlier drafts in which the rule has already been stated, often with different wording, for each article. Earlier documents (UPL 1961, Study XXIV, doc. 28 for commission, UPL 1961, Study XIX, doc. 43, for agency) may be consulted as background material to the commentaries. The phrase "earlier draft C" refers to the earlier draft of Uniform Law on Contract of Commission, and the phrase "earlier draft R", to the earlier draft of uniform law on agency.

The general outline of the new draft uniform law conforms to that agreed on by the Commission at the time of its first session, with only a slight modification of chapter headings. The working group agreed to change the heading of Chapter II. to read "Establishment and Scope of Agency" instead of "Establishment of Agency". Also, the chapter entitled "End of Agency" was moved to the place of VII and last chapter to follow the chapter devoted to Successive Agents.

Furthermore, it may be noted that the English term "agent" was translated into the French text as "intormédiaire" to avoid using "représentant" which is too specific for the concept adopted in the draft.

CHAPTER I - Sphere of Application and Definitions

Article 1

The text established by the Committee of Experts at the time of its first session (see report: Doc. 46, paragraphs 10 to 23) is dealt with here.

The only modification which is made concerns the introductory statement which is intended to underline the fact that the draft covers only relations governing the international sale or purchase of goods.

Article 2

New definition of the agent, in the meaning of the uniform law, in the light of the orientation decided upon at the time of the first session of the Committee. It differs from the agent who was defined in art. 3 of draft R, and the commission agent who was defined in art. 5 of draft C.

Article 3

The exclusions adopted in this article are those which appear in the ULIS, art. 5, to which conformity was deemed advisable, at least insofar as the exclusions are justified by the special nature of the things which are the object of the contract of sale. A provision of the same nature appeared in art. 5 of the earlier draft C.

Article 4

This provision appears in ULIS article 7. Certain members of the working group judged it to be useless, finding that nothing in the draft led to the assumption that sphere of application should be limited to civil or commercial matters, and furthermore that such a

distinction was alien to quite a number of national legislations. Yet, other members were of the conviction that it might be well to explicitly state the sphere of application of the draft, and specifically with regard to juridical systems, which do not make a distinction between civil and commercial obligations.

Article 5

The first paragraph made up the first statement of article 1 of the earlier drafts R and C.

The second paragraph is borrowed from ULIS in which it makes up article 2. The working group agreed that this reading expressed the idea previously contained in earlier drafts R and C, article 1, statement 2, more satisfactorily. It called the attention of the Committee, however, to the fact that this principle was currently the topic of lively discussion in the United Nations Commission on International Trade Law (UNCITRAL), which has undertaken a critical examination of ULIS with a view to its possible modification.

Article 6

Under a different form and with a more general scope, this article picks up the idea already stated in article 3 of the earlier draft C. It provides that two parties can, between themselves, exclude or modify the rules of the uniform law which effect only their reciprocal relations. They obviously cannot modify those rights and obligations of a third party which were established by the uniform law without the consent of that party.

Article 7

This deals with a different formulation of the idea contained in article 4 of the earlier draft C. The reservation set forth in the second statement of this article was borrowed from article 4 of ULIS which posits an analogous principle. The provision which appears in brackets is meant to state explicitly the notion of "mandatory provision" according to the meaning of that article. The working group was divided on that issue and preferred to let the Committee take sides.

Article 8

This article borrows the reading adopted in art. 9 of ULIS to express the principles which appear in art. 6 of the earlier draft C. Again on this point, the attention of the Committee should be called to the discussions underway at UNCITRAL within the framework of the re-examination of ULIS.

Article 9

The principle expressed in this article appeared in art. 1 Paragraph 2 of both earlier drafts C and R.

The new reading proposed is the one retained by ULIS.

Again on this point, discussions are underway at UNCITRAL.

CHAPTER II - Constitution and Extent of Agency

Article 10

This article deals with the form of the contract of agency.

Paragraph 1 picks up art. 7 of the earlier draft C and states explicitly that the written form is not necessary for the validity of a contract of agency, nor for its proof.

With several modifications, purely of form, paragraph 2 reiterates the second paragraph of art. 5 of the earlier draft R.

Article 11

In this article certain provisions dealing with the scope of the agent's authority, and the manner in which that authority is conferred, are regrouped.

Paragraph 1 takes up the idea already set forth in art. 5, para. 1 of earlier draft R.

Paragraph 2 takes up, in a somewhat expanded form, the idea already set forth in the first paragraph of art. 9 of the earlier draft R.

Paragraph 3 is inspired by paragraph 1 of art. 10 of the earlier draft R. Care was taken to modify the form for the purpose of greater precision.

Article 12

This article takes up the former provisions dealing with those conflicts between the requirements of local law and the provisions of the uniform law which deal with the authorisation of the agent.

Paragraph 1 restates the idea already set forth in art. 5, para. 2 of the earlier draft R.

Paragraph 2 adopts the provision of art. 9, para. 2 of the earlier draft R.

Article 13

The first paragraph states a general rule covering the capacity of the parties.

In order to protect the interests of third parties, paragraph 2 moderates the effects of the rule set forth in art. 7 of the earlier draft R. Two alternative texts appear in brackets, the choice being left up to the Committee by the working group which could not state a clear-cut preference on this point.

Article 14

With a few modifications of form, this article takes up the provisions of art. 8 of the earlier draft R with regard to the substitution of one agent by another. The purpose of the adjunction at the end of paragraph 2 is to set forth explicitly the delimitations of the responsibility of the first agent who undertakes such a substitution.

The working group expressed some hesitation with regard to a), noting, in particular, that the place in which the act has to be carried out can be uncertain, or that there can be several distinct places. Likewise, certain doubts were expressed with regard to topic b), which was judged to be vague.

Article 15

This deals with art. 11 of the former draft R. The working group expressed serious doubts concerning the very foundation of the rule, and deemed it necessary to call the attention of the Committee to this point by placing this provision in brackets.

CHAPTER III - Relations between the Principal and the Agent

Divergent tendencies were manifested within the Committee during its first session. There were some members who wished abolish all provisions dealing with the relations between the principal and the agent, whereas there were others who favored detailed regulation. It was finally decided to insert some provisions which were sufficiently general to make up a framework. It is precisely that which the working group tried to work out in the chapter which takes up, among the provisions of Chapter II of the earlier draft C, those which seemed indispensable.

Article 16

The object of this article is to establish the general obligation of acting in good faith between the parties, as it is expressed in the first two statements. Within this framework, the third statement takes up the prohibition which was contained in art. 14 of the earlier draft C.

Article 17

This article explicitly sets forth the specific obligations of the agent. The first paragraph in part takes up, with slight modifications of form, certain provisions of art. 8, paragraph one

of the earlier draft C. The reference to the "diligent businessman" was replaced by a reference to an "agent in the same situation", to denote the fact that the new draft is not restricted to commercial transactions. The second paragraph takes up a provision which appeared in para. 2 of art. 8 of the earlier draft C.

Article 18

This article deals again with the obligations of the agent. The first paragraph states explicitly, with regard to those matters which are entrusted to him, certain duties already set forth in art. 8, para. 1 and 2 of the earlier draft C.

With different wording, paragraph 2 takes up the provisions of art. 10 of the earlier draft C.

Paragraph 3 takes up art. 11 of the earlier draft C.

Article 19

The usefulness of this article, which corresponds to art. 12 of the earlier draft C, was put in question by the working group which decided to put it in brackets. The wording which appeared at the end of the earlier art. 12 was abolished, the reason being that the general rule concerning that topic had already been stated in art. 8.

Article 20

This deals with art. 13 of the earlier draft C. The working group, however, suggests that the Committee consider the chance of a conflict between that rule and a presumption which, according to certain national laws, might confer on the agent the power to receive payment in behalf of the principal.

Article 21

This article attempts to set forth concisely in one single paragraph, the provisions of art. 18 of the earlier draft C. It provides that the remuneration and reimbursement of the agent's expenses are due according to the conditions provided in the contract whether they be stated explicitly or implicitly. The reference to usage was put in brackets because it was deemed redundant with the provisions of art. 8. The last statement gives the agent in all cases the possibility of reimbursement for all expenses he can reasonably account for. This provision obviously has to be interpreted in connection with the obligations imposed on both parties by the preceding articles and, in particular, by art. 16. The working group did, thus, not deem it necessary to reproduce the provisions which appeared at the end of art. 18 of the earlier draft C.

Article 22

This article regroups, with a wider scope, the provisions aiming at the protection of the agent which were included in articles 15 and 16, paragraph 2, of the earlier draft C.

Article 23

It reproduces articles 16, paragraph 1, of the earlier draft C.

Article 24

This article is an attempt to group the results of an inexecution by the agent of the obligations and duties imposed on him by the preceding articles. It comes from article 8, paragraph 3, of the earlier draft C.

The general rule is set forth in the first subparagraph. The working group remained divided on the advisability of inserting the wording "by fault of his own" which was put in brackets.

a) and b) posit the hypothetical case of a substantial failure, the nature of which would have to be left up to the judge to determine. In such a case by virtue of the combined effect of a) and b), the principal would be released from his obligations toward the agent, subject however, to the rights acquired by third parties.

CHAPTER IV - Results of the act carried out by the agent on behalf of the principal

Articles 25, 26, 27 and 28

With slight modifications of form, the texts decided on by the Committee (see report, doc. 46, paragraphs 24 to 47) are dealt with here.

Without there being a discussion of the contents of these articles, the attention of the working group was called by one of the members to the fact that, according to a continental system of law, should a commission agent acting in his own name come to reveal, before or at the time of the conclusion of the contract, the identity of the person in behalf of whom he is contracting, article 25 would apply. The results would be the establishment of a direct link between the agent and the third party and would be contrary to the very nature of the contract of commission.

Article 29

The provisions of this article stem from art. 16 of the earlier draft R.

The first paragraph corresponds to the first paragraph of the earlier draft with several textual modifications. The working group considered that it would be useful to use greater precision with reference to compensation owed by the agent for damages incurred by his comportment. The working group presented the Committee with a choice of two alternative solutions which appear in brackets.

The second paragraph corresponds to the second subparagraph of art. 16 of the earlier draft R.

CHAPTER V - Relations between the Principal and the Creditors of the Agent

Article 30

In this article the working group attempted to set forth in a conciser way the idea which was already expressed in articles 21 and 22 of the earlier draft C.

Articles 31 and 32

Articles 23 and 24 of the earlier draft C are dealt with herein. Certain members of the working group found a clear understanding of them difficult, and there was a divergence of interpretation. As the meaning of the articles appeared uncertain, and their content open to discussion, the working group felt that it was advisable to put them in brackets so that the Committee might examine them again in substance.

CHAPTER VI - Successivo agents

Article 33

This provision is taken from art. 26 of the former draft C. By applying subparagraph a), the relations between successive agents are governed by the uniform law whenever the preceding have their places of business on the territory of different states, independently of the location of the principal and the third party.

The working group deem it necessary to add a subparagraph b) taking into account the new system which stemmed from article 1 of the

draft. In effect, one of the consequences of the latter is to make the uniform law apply, especially in the relations between the agent and the principal, whenever the third party has his place of business in a State which is different from that of the agent or the principal. It seems logical in such a case to have the uniform law apply also to the relations between successive agents. In such a case, all the relations together will be subject to the same rules.

Article 34

In this article the working group tried to state more clearly and concisely the provisions contained in article 27 of the former draft C.

Article 35

Article 28 of the earlier draft is dealt with herein.

CHAPTER VII -- End of Agency

Article 36

The working group inserted this new article to fill what it considered a gap left by previous drafts which had been silent on the subject of the most common circumstances of the end of contract, i.e. performance or agreement between the parties to end it.

Article 37

For the purpose of a better presentation, the working group wanted to regroup, in this article, the provisions of articles 17, 18 and 19 of the earlier draft R, which dealt with the reasons for the end of contractual relations regarding the person of the principal.

Paragraph 1 correspond to paragraphs 1 and 3 of article 17 of the earlier draft R.

Paragraph 2 corresponds to paragraph 1 of article 19 and to paragraph 1 of article 18 of the earlier draft R.

In different wording, paragraph 3 corresponds to the provision of paragraph 2 of article 18 of the earlier draft R.

In a more general formulation, paragraph 4 regroups the provisions which appeared in paragraphs 2 of article 17 and 3 of article 18 of the earlier draft R.

Article 38

In a reading deemed more precise, this article takes up the provision of article 20 of the earlier draft R.

Article 39

With several modification in form, this article corresponds to article 21 of the earlier draft R and deals with the reasons for the end of contractual relations regarding the person of the agent.

With regard to b) (loss of capacity) the working group hopes that the Committee will consider the opportunity to modify it with a view to perhaps stating more explicitly that it deals with the capacity to enter into a contract.

Article 40

In paragraph 1 of this article, the working group attempted to state in a more general and clearer way, the provisions which appeared in article 17 of the earlier draft C, paragraphs 1 and 2. Furthermore, it introduced (paragraph 2) the case of a restriction in the scope of the contract.

Article 41

In more concise form, this article regroups the provisions which appeared in paragraphs 1 and 2 of articles 23 and 26 of the earlier draft R.

The working group expressed doubt as to the usefulness and timeliness of the provisions appearing in b) and c). It was decided to place them in brackets with the purpose of calling the Committee's attention to this point.

Article 42

In wording deemed clearer, this article takes up paragraph 1 of article 24 of the earlier draft R.

Article 43

In general terms, this article formulates the protective provisions covering third parties which were contained in paragraph 2 of article 24 and paragraphs 3 of articles 23 and 26 of the earlier draft R.

Article 44

Given a more general formulation, this article takes up article 25 of the earlier draft R focusing on notions known in certain systems as "mandat d'intérêts commun" or "agency coupled with an interest".
