

U n i d r o i t

INSTITUT INTERNATIONAL POUR L'UNIFICATION DU DROIT PRIVE

COMMITTEE OF GOVERNMENTAL EXPERTS ON AGENCY AND COMMISSION ON

SALE OR PURCHASE OF GOODS

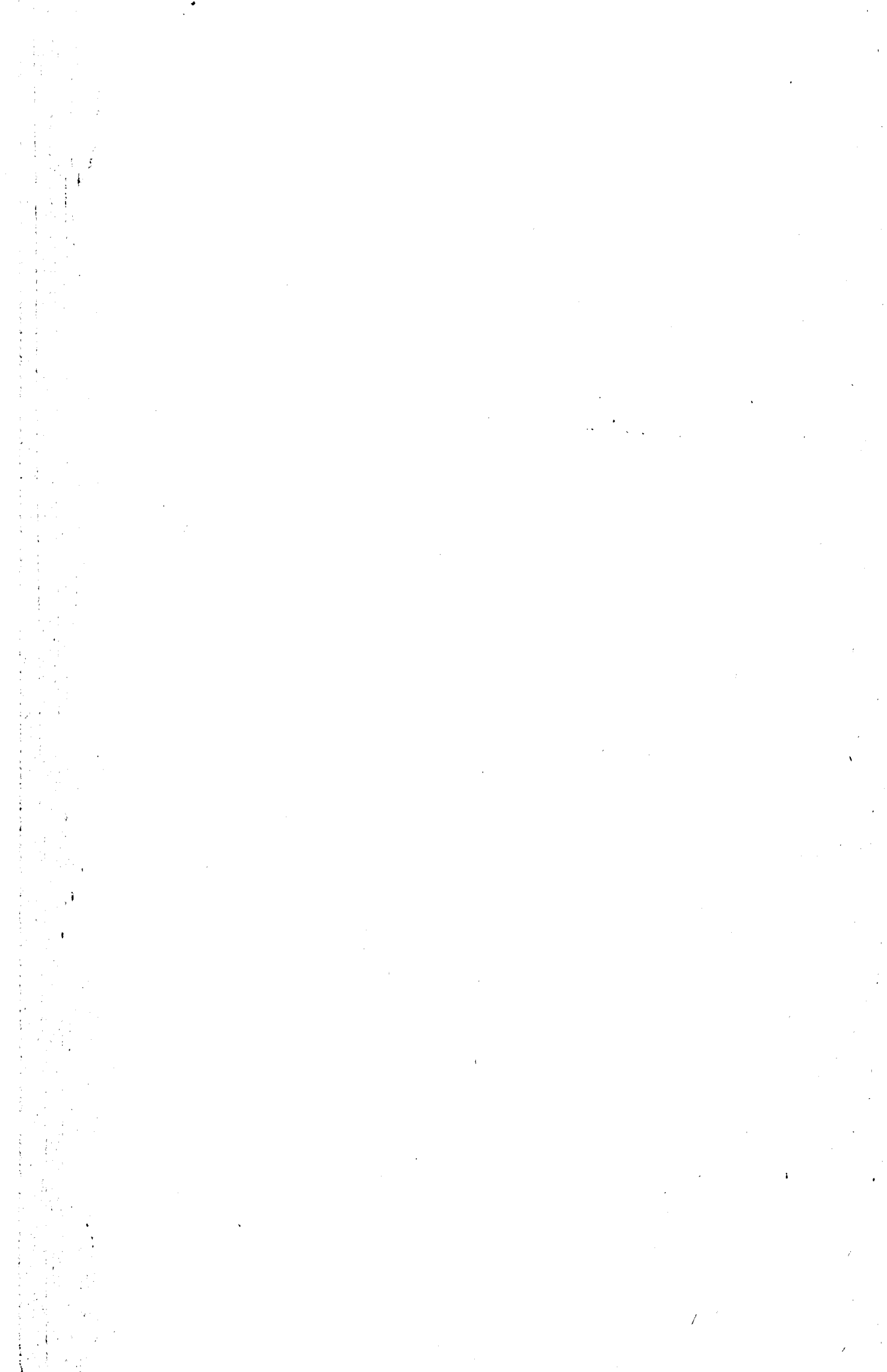
C o m m e n t a r y

of the Secretariat of UNIDROIT

on the Draft Uniform Law on Agency of an International Character
in the Sale and Purchase of Goods (Provisional Draft drawn up by
the Committee of Experts during its second session, Rome, May 1971,

Etudes XIX, Doc. 49)

Rome, July 1971



The second session of the Committee of Governmental Experts on Agency and Commission was held at UNIDROIT offices in Rome from 21 to 29 May, 1971. Representatives from 23 States and observers delegated by two international organisations attended the session. A list of participants is annexed hereto. Mr. Alexander ANTON (United Kingdom) was appointed Chairman of the session, and Mr. Allan Farnsworth (United States) acted as Rapporteur.

In compliance with decisions taken during the first session (see Report on first session, Study XIX, doc. 46), the Committee proceeded with the examination of each article of the Draft Uniform Law which has been drawn up by the restricted working group which had met in Geneva in December, 1970.

The working documents for the session were as follows:

- Draft Uniform Law on Agency of an international character in the sale and purchase of goods (corporeal movables) (draft drawn up in Geneva, Study XIX, doc. 47).
- Commentary of the Secretariat of UNIDROIT on the foregoing draft (Study XIX, doc. 48).

During this second session, the Committee examined articles 1 to 29 of the draft and either adopted or modified them. Certain articles, paragraphs, or wordings on which no agreement could be reached, were nevertheless retained in square brackets and will be re-examined during the next session of the Committee to be held in Rome from 27 September to 2 October, 1971, when the Committee will examine articles 30 to 44 which could not be reviewed during the second session because of lack of time (see the present provisional text of the draft uniform law, Study XIX, Doc. 49).

Therefore, the foregoing third session will be devoted to the re-examination of provisions in square brackets and to the examination of articles 30 to 44.

This Commentary is only intended to pinpoint, at the present provisional state of the draft as a whole, the main changes made by the Committee of Experts to the previous texts and, whenever necessary, the origin of the provisions accepted. The term "former draft C" refers to the earlier draft Uniform Law on Contract of Commission (Study XXIV, doc. 28) and the term "former draft R", refers to the earlier draft Uniform Law on Agency (Study XIX, doc. 43), while the term "Geneva draft" refers to the draft drawn up by the restricted working Committee which met in Geneva (Study XIX, doc. 47).

CHAPTER 1 - Sphere of Application and Definitions

Article 1

This article which sets the sphere of application of the uniform law was discussed at length. Taking as their point of departure the corresponding article of the Geneva draft, the Committee first decided to narrow its scope by stating that the uniform law shall apply when the place of business of the parties is located in Contracting States. The Committee likewise accepted the principle derived from the works of the United Nations Commission of International Trade Law (UNCITRAL) on the Uniform Law on International Sale (ULIS) whereby the uniform law shall apply when the rules of private international law of the forum lead to the application of the law of a Contracting State.

Both concepts are expressed in paragraph 1, in a simplified form as compared to that of the text drawn up in Geneva, and closer to the text proposed by the UNCITRAL Working Group for the ULIS (Art. 1).

Paragraph 2 is intended to submit to the provisions of internal law and not to those of the draft uniform law all relationships between the principal and the agent whenever both have their place of business in the same State (1).

(1) The representative of the Netherlands requested that his proposal to add to paragraph 2 the following sentence be reported in this Commentary:

" 2. Nor shall the provisions of the present law apply when the places of business of the agent and the third party are in the same State and the agent acts on behalf of an undisclosed principal as provided for in art. 27."

Paragraph 3 follows in a simpler form, the text proposed by UNCITRAL for the ULIS (art. 2. b).

Paragraph 4 had been entered in the Geneva text (Art. 1, para. 2) and is likewise derived from the UNCITRAL draft on the ULIS (art. 2. c).

Article 2^{bis}

A provision of this kind had been entered under Article 4 of former draft R, but had not been retained in the Geneva draft. The Committee felt it was advisable to re-enter it in an amended form and in square brackets, for the purpose of discussing it during its next session. Paragraph c thereof was especially debated and must be revised.

Article 3

This article is taken from the Geneva draft and originates from the ULIS draft. Paragraph b) was put in square brackets, since some participants noted that the exclusion contemplated therein which was pertinent in the cases of sale governed by the ULIS, was perhaps unnecessary in agency relationships alone.

Paragraph d) excludes agency in the case of goods sold or purchased by auction as proposed by UNCITRAL in the ULIS text (article 5), in view of the special regulations governing this activity.

Article 4

This article, which has been retained from the Geneva draft, is necessary in the case of legislations where a distinction exists between commercial and civil matters. A similar provision is proposed by UNCITRAL in the ULIS (Art. 2, d).

Article 5

This is a simplified version of the provisions entered in the Geneva draft.

Article 6

This article was taken from the Geneva draft and was accepted by the Committee.

Article 7

The same comments made on Article 6 apply here.

Article 8

The Committee accepted the text proposed by UNCITRAL Working Group for a revision of Article 9 of the ULIS, the only amendment to such text being a simpler version of paragraph 2 thereof.

Article 9

The Committee accepted the text proposed by UNCITRAL Working Group for a revision of Article 17 of the ULIS. Unlike the text proposed in the Geneva draft, which was verbatim the original ULIS text, this provision does not cover gaps in the law, but rather the interpretation by the judge of the provisions of the law.

CHAPTER II - Establishment and scope of Agency

Article 10

This article appeared in the Genova draft.

Paragraph 2, however, was developed so as to specify more in detail the conditions of form or procedure contemplated and to expressly include under b) thereof, possible law requirements in the matter of authorisation or consent necessary for the purpose of conducting an agent's activity (licence).

Article 11

This is a simpler version of the Genova draft. It was put in square brackets for the purpose of being re-examined in connection with Article 26, also put in square brackets. Actually, these two articles could be overlapping to some extent and must be coordinated.

Article 12

The Committee felt that, in view of the new text of Article 10, Article 12 of the Genova draft had become unnecessary and could be deleted.

Article 13

The Committee felt that Article 13 of the Genova draft covering the capacity of the parties, had no place in the uniform law and that it was advisable to delete it, and stated that special regulations on capacity should not be set for the agency contract.

Article 14

This article derives from the Geneva draft. Paragraph 1 a was modified to exclude earlier a and b which were deemed inopportune by the Committee. Paragraph 2 was retained with no changes.

Article 15

This article has been submitted in square brackets in the Geneva draft, and has been deleted by the Committee which felt that the provision set forth therein was questionable; it also noted that the provision had no advantage from a practical point of view, with respect to agency limited to sale and purchase contracts only.

CHAPTER III - Relations between the Principal and the Agent

Article 16

The Committee expanded and made clearer the text of the Geneva draft covering the obligation of the parties to act in good faith. The first paragraph sets the general principle. The second paragraph specifies certain angles of this obligation which pertain to this matter.

Article 17

This article remained unchanged from the Geneva text.

Article 18

This article is the same as that of the Geneva draft except for a few minor modifications.

Article 19

This article is the same as that of the Geneva text, except for a more precise wording. The Committee decided to specify the consequence of the guarantee in a second paragraph.

Article 20

This article sets forth in a more satisfactory version the idea which was contained in the Geneva draft. The words "or other facilities" were put in square brackets as some of the experts felt that they might involve too wide a scope and hinder certain routine trade undertakings of the agent.

Article 21

This article is taken from the Geneva draft.

Article 21 bis

This article was entered by the Committee which felt it necessary to specify together with the obligations of the agent, the obligations of the principal vis-a-vis the agent.

Article 22

This article is taken from the Geneva draft; paragraph b, however, specifies that the agent has a right to withhold only such goods as he holds in connection with the contract.

Article 23

This text is taken from the Geneva draft. The principle set forth therein was accepted by the Committee, however, its form arose some doubts and the article was placed in square brackets for the Committee to discuss it further. In the English text, the expression "as between principal and agent" was likewise questioned since the idea that it conveys was not clear to some experts, and translation into French proved actually impossible. Therefore, these words do not appear in the French text.

Article 24

Here, the Committee did not retain the Geneva text which contemplated special penalties in the case of substantial failure. The Committee rejected this difference and drew up a general provision on damages due by the party at fault to the other party, with no prejudice of any other action which may in the different cases be taken against the party at fault.

CHAPITRE IV - Legal effects of an act carried out by the agent on behalf of the principal

All the articles of this Chapter which form a whole, were reserved by the Committee which intends to re-examine them during its next session.

Article 25

The Committee tried to put together in this article paragraph 1 of Article 25 of the Geneva draft and Article 26 of the same draft, to deal entirely in this heading of the Chapter with the simpler case when the agent acts within the limits of his authority and when it is apparent that he is acting as an agent.

Article 26

Except for some minor modifications of form, this article consists of paragraphs 2 and 3 of the Geneva draft, dealing with the consequence of the absence of authority or of exceeding the limits of authority by the agent.

Article 27

This article is the same as that of the Geneva draft, except for some minor modifications and additions. It was drawn up by a drafting Committee and was not re-examined by the Committee which is to decide on its final form during its next session. However, principles laid down therein are to be deemed as final.

Article 28

Like article 27, this Article was drawn up by a drafting Committee on the basis of the Geneva draft, but it was not re-examined by the Committee at its plenary session. It will therefore be discussed during the next session.

Article 29

This article was drawn up by the Drafting Committee after discussing the Geneva draft, it was not re-examined during the plenary session by the Committee and will therefore be discussed, with regard to form, during the next session.

Chapters V, VI and VII of the Draft (articles 30 to 44) were not discussed during the second session of the Committee. They have therefore remained temporarily unchanged from the Geneva draft, and this commentary is a mere copy of the earlier commentary on the Geneva draft (Study XIX, doc. 48).

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 - Successive 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".

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