ETUDE XIX, Doc. 52
U.D.P. 1972
Original: English

U n i d r o i t

INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW

Preliminary Draft Uniform Law on Agency of an International Character in the Sale and Purchase of Goods

EXPLANATORY REPORT

Rome, April 1972

Explanatory Report

Introduction

UNIDROIT, upon completing the studies it undertook as far back as 1935[1], published in 1961 two draft Uniform Laws on certain aspects of the agent's activity in international transactions.

Whilst the former, concerning agency in private law relations of an international character (U.D.P. 1961 - Et. XIX - Doc. 43) purported to regulate in a uniform manner all cases of "représentation directe", but was nevertheless confined to considering relationships between principal and third party, the latter, dealing with the contract of commission in the international sale of goods (U.D.P. 1961 - Et.XXIV - Doc. 28) principally referred to internal relationships between principal and commission agent, but also included certain provisions on the relationship between principal and third party.

The two UNIDROIT drafts were sent to the Governments of member States in order to obtain their comments. It became clear that the most fundamental criticism of these two drafts was to the effect that the very distinction between agent and commission agent at the root of the two UNIDROIT drafts was unknown within the Common Law systems[2].

A Committee of governmental experts[3] convened by UNIDROIT to end the deadlock suggested narrowing the field in which unification should be attempted. It undertook the drafting of a new uniform law dealing with the practical aspects of agency contracts of an international character for the sale and purchase of goods.

---

(1) The members of the Committees which produced these drafts were: Messrs. Mariano d'AMELIO and Massimo PILOTTI, Presidents; Messrs. Alberto ASQUINI, Algot BAGGE, Luigi BIAMONTI, Sir William GRAHAM HARRISON, Max GUTZWILLER, Eduard MEIJERS, Adolfo RAVA', Guido VON STROBELE, Benjamin Atkinson WORTLEY, members, Mario MATTEUCCI, Secretary General, Alfred FARNER, Deputy Secretary General, Claudio BALDONI and Serafino CERULLI IRELLI, rapporteurs.

(2) See Analysis of the Remarks of Governments, paper U.D.P. 1970, Et. XIX and XXIV, docs. 44 and 29.

(3) See Annex for list of participants.

The rôle of an agent in the international sale of goods is regulated in the different legal systems under various headings, according to the particular relationship existing between the agent and the person on whose behalf he acts and also according to whether or not the agent is to act in his own name vis-à-vis third parties.

According to the first criterion, there appear to be two classes: the independent agent who may nevertheless be bound to his principal by a relationship involving their cooperation over a certain period of time, and the dependent agent who, unlike the former, acts under a link of subordination to the party who is his employer. This second class does not give rise to specific questions in international business relations. It is only in the Common Law countries that the former class of agent is conceived in a unitary manner, although under various headings (factor, mercantile agent, etc.).

As regards the second criterion, Civil Law countries generally draw a distinction between, on the one hand, agents acting in someone else's name (French "agents commerciaux", Italian "agenti", German "Handelsvertreten", Swiss "agent", Belgian "représentant de commerce" Dutch "Handelsagent"), generally described as being in charge of promoting and concluding contracts in the name and on behalf of someone else, and, on the other hand, agents acting in their own name (French "commissionnaires", Italian "commissionari", German "Kommissionäre", Belgian "commissionnaires"), generally described as agents who purchase and sell goods in their own name but on behalf of a principal.

The logical consequence of this distinction is that, in theory, agents belonging to the former class remain personally outside the contracts in the conclusion of which they have participated, while agents belonging to the second class, namely "commission agents", become themselves parties to the contract.

A more careful examination of the legal reality will, nevertheless, show that in spite of these clear-cut general principles, certain departures have been made from this basic structure. On the one hand, there are cases where, even within the structure of the civil law "représentation", the indication of the principal's name is not considered necessary for its normal effect to be produced(1); on the other hand, there are cases where certain normal effects of "représentation" are

---

(1) i.e. Swiss Code des Obligations, Art. 32; German theory of "Handeln für den, den es angeht".

even produced by the intervention of an agent of the "commissionnaire" type, necessarily acting in his own name.(1)

It would hence appear that in spite of the clear differences existing in principle between "commissionnaire" and "représentant", certain considerations of a practical nature tend, particularly in matters of sale, to draw these two categories of agent closer together.

Nor is there a wide gulf between the rules governing the activities of the continental 'représentant' and 'commissionnaire', on the one hand, and the common law agent, on the other, at least in connection with the sale and purchase of goods. It seemed feasible, therefore, to elaborate a set of rules, intended to represent a compromise between the civil law and the common law systems, governing the more important aspects of agency of an international character in the sale and purchase of goods.

It rests on certain basic principles, which may usefully be summarised as follows:

1. Agency is intended to cover any relationship existing between two persons which enables the one (agent) to act on behalf, but not necessarily in the name of the other (principal) (Art. 2);

2. The authority to act on behalf of the principal will usually be conferred expressly upon the agent by contract; it may, nevertheless, also arise from the position which the agent holds with the express or implied consent of the principal (Arts. 11 and 12);

3. In any case, there are certain rights and duties devolving upon the parties in their mutual relations, all of which are only specific instances of the general principle of good faith (Arts. 15 et seq.);

4. Any act carried out by the agent on behalf of the principal will directly bind the principal and the third party, provided that the agent had acted within the scope of his authority and that the fact that he is an agent was disclosed or apparent; thus, it is no longer vital that the agent should act specifically in the principal's name (Art.24);

5. On the other hand, if the fact that a person is acting as an agent is neither disclosed nor apparent at the time of contracting, the contract shall bind only the agent and the other contracting party; only by the subsequent disclosure of the agency relationship may the principal and the third party enter into direct relations, but, in any case, they will be open to all the defences which could have been raised by or against the agent, if the latter had remained a party to the contract (Art. 26).

---

(1) i.e. German HGB, § 392, II; Swiss Code des Obligations, Art.401; Italian Civil Code, Arts 1705, II, 1706, I and 1707.

Commentary on the Articles of the Draft

Chapter I

SPHERE OF APPLICATION AND DEFINITIONS

Article 1

This Article sets out the basic rules on the sphere of application of the Uniform Law.

The present Draft confines itself to agency relationships of an international character in the sale and purchase of goods, a restriction the reasons for which have already been explained in the foregoing introduction.

The term "goods" is nowhere expressly defined in the Uniform Law, although Article 4 provides a negative definition in so far as it excludes from the scope of the Convention intangible movables and ships, vessels or aircraft subject to registration. The French text, however, refers more explicitly to "objets mobiliers corporels".

The basic tests by which the international character of an agency relationship is to be ascertained correspond to those adopted in the new version of Article 1 of ULIS as recommended by the UNCITRAL Working Group on the emendation of the 1964 Convention.

For the purposes of the present law, an agency relationship is considered as being international when at least two of the three parties concerned (principal, agent, third party) have their places of business in the territories of different States (para. 1). In the absence of a place of business, reference is made to the party's habitual residence (para. 4). On the other hand, if, as may often be the case in practice, the business of one of the parties has separate branches in different States, regard should be had to that place which is most closely connected with the relevant transaction (para. 3).

So as not to allow too broad a scope to the Uniform Law, paragraph 1 adds a further requirement for its application: either the States in which the two parties have their places of business (or habitual residence) must both be contracting States or the rules of private international law of the forum must lead to the application of the law of a contracting State.

Paragraph 2 is designed to submit all those agency relationships where both principal and agent have their places of business in the same State to the provisions of the particular municipal law instead of the Uniform Law.

In the French text of Article 1, the word "intermédiaire" appears for the first time - this term will be used throughout the Uniform Law to describe the agent. This term can be used in a broad sense and partakes of no precise legal connotation; it has, therefore, been adopted by the Draft to make it clear that it has in mind not only the traditional 'représentant' or 'commissionnaire' but, indeed, both of them.

Article 2

The present Draft sets out to construct a common groundwork in the field of agency for the purchase and sale of goods, acceptable to both Civil Law and Common Law countries.

It was considered necessary to provide a special definition of the relationship governed by the Uniform Law, especially for those Civil Law countries where there is traditionally a clear-cut distinction between the case of an agent acting in his own name and that of an agent acting in the name of his principal. It is the concept of "an agency relationship" rather than the term "agent" that is defined here, making it clear that the Uniform Law is concerned with such relationships irrespective of the character of the agent himself.

In the French text, it is important to see the expression "rapport de représentation" in the same broad sense as the new concept of "intermédiaire" - to which it refers - and not just as a relationship arising from the technical legal connotation of "représentation".

Articles 3 and 4

These Articles set out two groups excluded from the scope of the present Draft Uniform Law: Article 3 contains exclusions based on the special character of the agency relationship; Article 4 contains those based on the special character of certain types of goods.

In the first category (Article 3), agency in family relationships is excluded because of its quite special nature and because of its limited importance in international relations.

Agency for persons without full legal capacity is not governed by the Draft either: it is by operation of law (statutory and judicial), and not by virtue of any contract of agency, that authority is conferred on the tutors or guardians of persons without full legal capacity.

The exclusion of the relationship between a corporation, association or partnership and its officers or members is explained by the fact that these officers or members act as organs of the corporation, association or partnership, rather than as agents who are extraneous to it; they thus form part of the internal organisation of the corporation, association or partnership and it is only by reference to the position that they hold within the entity to which they belong that one can construe and explain their authority. For similar reasons, the present Draft does not apply to agency relationships arising from any kind of permanent employment under a contract of service. As a matter of fact, the Law is intended to deal only with the relationship existing between a principal and an independent agent; if a contract of service exists between them, the agency will merely form an appendix to it and thus be subject to the specific rules governing the contract of service.

The reason behind the second category of exclusions appearing in Article 4 stems from the desire for coordination between the field of application of the present Draft Uniform Law and ULIS. Both are confined to "corporeal movables", i.e. essentially to those goods that are normally the subject of commercial transactions. Like ULIS (see Article 5 of the same), the present Draft expressly excludes certain types of goods on account of their specific legal character. Thus, it is generally recognised that only in certain cases and in certain respects can stocks, shares, investment securities, negotiable instruments and money be considered as corporeal things and, even then, their circulation is governed by rather exceptional legal rules.

Ships, vessels or aircraft are excluded because, where these various types of transport are of a certain size, they are subject in every country to rules of registration giving them a special character as a result of which they are invariably subjected to special rules.

There still exists some doubt as to whether electricity can be considered as "goods", i.e. as corporeal movables, and this too was, therefore, excluded.

Paragraph (d) excludes agency relationships connected with the sale or purchase of even ordinary goods when these are sold by auction. This exclusion is designed to avoid any uncertainty that may arise in determining whether or not an auctioneer is to be considered as an agent, as a result of the various ways in which he may carry out his business and of the different rules governing this profession in different countries. Moreover, it would be inconvenient if different rules of law applied to the sale of different batches of goods at the same auction because of their different provenance. In practice, however, auction sales are conducted subject to special rules prescribed by the auctioneers themselves, to which their clients expressly or tacitly give assent. In this way, Article 7 of the Uniform Law would often be relevant.

Article 5

An agency relationship for the sale or purchase of goods may be established between private persons as well as between persons in business; in particular, the person acting as agent may or may not be a professional agent.

Several legal systems provide for different legal rules, depending upon whether the parties to the contract or the contract itself have a civil or commercial character (see e.g. the German BGB and HGB, the French Code Civil and Code de Commerce, and the criteria on which their different spheres of application are based).

Like ULIS (see Article 7), the present Draft Uniform Law provides an unitary set of rules to govern agency for the sale or purchase of goods and is therefore intended to apply regardless of the civil or commercial character of the parties or of the contract in a given case.

Article 6

This article stresses that, where applicable, the Uniform Law supersedes other rules of law, municipal as well as international, of the States which adopt it.

The Uniform Law does not purport merely to be a substitute for municipal law on the same matters. It only replaces it in cases where it applies and in those matters which it governs. But if the conditions for its application are fulfilled, the courts of a contracting State must

apply the Uniform Law, even if they would otherwise have been led, by their own private international law, to apply the law of another State, regardless of whether it is a non-contracting State.

Article 6, however, leaves open an extremely delicate problem: in practice, even within "matters governed by the present Law", there may arise questions which are not expressly settled by a specific provision thereof. How should such questions be resolved ? Are individual provisions of the Law to be open to a broad interpretation or, furthermore, to interpretation by analogy so as to extend their application to the solution of such questions, or should such questions rather be resolved by rules of private international law ? As this is essentially a problem involving interpretation and application of the Uniform Law, it will be discussed later, in connection with Article 10.

Article 7

This Article deals with a complex problem. It attempts to reconcile the principle of the autonomy of the contracting parties in this domain with the principle that they should not in so doing prejudice the interests of third parties. On the view that municipal systems will be astute to prevent such prejudice the parties are given the power to choose another system of law to govern their mutual relations. But if they do not choose to adopt the rules of another system as a whole, they may only exclude or vary such provisions of the Uniform Law as affect exclusively their own mutual relations.

Article 8

This article contains a similar provision to that of Article 4 of ULIS; it provides that the parties, in so far as their mutual relations are concerned, may, in accordance with the general rule of Private International Law, elect to make the Uniform Law applicable instead of the municipal law that would otherwise be applicable. However, so as to prevent the parties from making such a choice in fraudem legis, the Draft cuts down this freedom by making it clear that the mandatory provisions of the law which would have been applicable if the parties had not chosen the Uniform Law should not be affected by such a choice.

Article 9

This article differs only slightly from Article 9 of the revised Draft of ULIS, as proposed by the UNCITRAL Working Group on Sales. Article 9 deals with two essentially different problems, paragraphs 1 to 3 dealing with the incorporation of usages and paragraph 4 with the interpretation of contractual terms. But in order to be recognized by the courts, usages must possess certain features as described in this Article.

According to the first paragraph, the parties are only bound by those usages which they have expressly or impliedly made applicable to their contract. Paragraph 2 is ancillary to paragraph 1, and is designed to describe the usages which the parties shall be considered as having impliedly made applicable to their contract. These are of two types :

a) usages of which the parties are actually aware and

b) usages of which the parties should have been aware.

Two tests (one subjective and the other objective) are therefore employed. In both cases, however, they should be usages which are widely known to and regularly observed by parties to contracts of the type involved, in so far as they are usages that purport to supplement or qualify contractual terms.

Paragraph 3 makes it clear that, contrary to the rule prevailing in certain systems of law, usages of which the parties should have been aware but were not necessarily aware are presumed to prevail over the terms of the Law itself, unless the parties make express provision to the contrary.

Paragraph 4 appears to give a different effect to usages for the purpose of interpreting contractual terms. It does not expressly require that the parties are or should be aware of the meaning attached to the corresponding usages. However, one should not forget that paragraph 2 uses an objective test ("... should be aware") to resolve by which usages the parties are bound, and that, in any case, paragraph 4 states ("... unless otherwise agreed by the parties") that preference is to be given to the meaning established expressly by the parties or in the course of their dealings.

Usages both for the purpose of supplementing contractual provisions and for that of interpreting individual terms or expressions are, therefore, only given legal effect if they are or may be considered as part of the parties' agreement.

Article 10

This article uses a wording analogous to that proposed by the UNCITRAL Working Group on Sales to replace Article 17 of ULIS. Experience indicates that any attempt at unification will be frustrated if the uniform rules, once ratified by individual States, are not interpreted and applied by the Courts in an uniform way. With the specific intention of avoiding the Courts referring to meanings and concepts peculiar to their own legal system, the present Article states that in interpreting and applying the provisions of the Uniform Law, regard shall be had to its international character and to the need to promote uniformity in its interpretation and application.

One question, however, still remains: how are the Courts to fill in possible gaps in the Uniform Law ? In theory, there are two possible ways: either by applying the rules and principles of their respective municipal systems or by appealing to the general principles that guided the drawing up of the Uniform Law, namely, those principles suggested by a comparison of the various solutions offered by the different legal systems. Although nowhere is this specifically stated, Article 10, when read in conjunction with Article 6, seems to suggest the second solution. In fact, Article 6 expressly excludes any recourse to municipal law, either directly or through private international law, in matters governed by the Uniform Law; Article 10 adds that in applying it regard shall be had to its international character and to the need to promote uniformity in its application. In conclusion, any question arising in practice that falls within the "matters governed by the present Law" but is not expressly settled by it shall be resolved, first, by an extensive interpretation of the Law's specific provisions, then, by an analogous interpretation of the same and, failing that, by the Court acting as a law-maker, taking as a basis a comparative analysis of the solutions advocated by the different municipal legal systems.

Chapter II

ESTABLISHMENT AND SCOPE OF AGENCY

Article 11

Many legal systems do not require a contract of agency to be made in written form. This solution is followed in the Preliminary Draft, so that writing is here expressly stated to be unnecessary as a pre-requisite either for the validity or for the proof of a contract of agency. Indeed, no requirements of form have to be fulfilled in order to clothe the agency contract with validity. Subject always to the more specific provisions of paragraph 2, an agent may, therefore, be appointed orally and the existence of a valid contract of agency may be proved by parol evidence.

The second paragraph of the Article sets out to deal with those specific cases where the law of the State in which the agent must act lays down some special requirements as to the form or formality for or in connection with the authorisation or as to some official or other consent, such as a licence. Failure by the agent to comply with these requirements brings into operation the sanctions provided by the same law.

Article 12

This article deals with the authority to act as an agent and the first paragraph treats specifically of the facts from which such authority may arise or, where it is not given expressly, be deduced.

This authority may derive from an express act by the principal. It can also be implied from the circumstances, as where the principal has placed another in such a situation that this person would generally be understood to have principal's authority to act on his behalf. Agents authorised to conduct particular trades or businesses or to exercise certain professions normally have an additional implied authority to do whatever is usually or customarily done by persons occupying such positions. Following the example of several legal systems, the Draft has, therefore, expressly admitted the possibility of such an authorisation arising on account of the position held by the agent. For the purpose of such an implied authorisation, it should be observed that such a position does not have to be held with the specifically express consent of the principal, but may equally be occupied with the latter's implied consent.

Thirdly, the conduct of the principal and the circumstances of the case may amount to a holding out or a representation by the latter that the party with whom the third party is dealing is in fact to be regarded as the duly authorised agent of such a principal. This is a concept that bears a close kinship to both the Common Law doctrine of ostensible or apparent authority and the Civil Law doctrines of "Scheinvollmacht", "Procura apparente" and "mandat apparent" as these are found in the German, Italian and French legal systems respectively. This concept imports that the principal, by words or conduct, represents or permits it to be represented that the agent has authority to act on his behalf: the principal, in such a case, is bound by the acts of his agent vis-à-vis anyone dealing with him as an agent on the faith of any such representation. This liability of the principal is co-extensive with the liability of a principal for the acts of an agent who had always possessed actual authority.

The second paragraph of Article 12 treats of the limits of authorisation, affording the agent an additional implied authority to perform all such acts as may reasonably be deemed to have become ordinarily or necessarily incidental to the due performance of the object for which the authority was conferred. This provides for cases of ancillary measures that may often become necessary during the course of the agent's activities, in order to fulfil the purpose of the agency contract, but which, nevertheless, could not have been foreseen at the time of the original authorisation and for which no specific authorisation was, consequently, at that time conferred upon the agent. This paragraph, therefore, permits of a possible extension of the agent's authority in cases where ordinary common sense and commercial expediency would clearly demand as much.

Articles 13 and 14

The Draft draws a distinction in Articles 13 and 14 between the concepts of "sub-agency" and "substitution" and it may be appropriate to examine the two relevant Articles in conjunction with one another.

First, in sub-agency, a second agency relationship is brought into being, subsidiary to the original agency and designed to furnish an ancillary means of realising its purpose; in substitution, no additional agency relationship is created, the purpose being merely to reinforce the subsisting agency by replacing one agent with another.

Secondly, the creation of a sub-agency means that the original agent thereby develops a dual function: first, he remains the agent of the original principal, while, secondly, he becomes the principal of the sub-agent. Being common to both agency relationships, he furnishes the nexus that links one with the other. No such complication in the tripartite scheme of the agency relationship arises from the substitution of one agent for another.

Thirdly, a fresh, independent set of agency duties and liabilities springs from the sub-agency relationship, existing side by side with the agency duties and liabilities arising out of the main agency relationship; in substitution, the original agency subsists and all its duties and liabilities, therefore, devolve in unaltered form upon the substitute.

Finally, it will be seen that the Draft adopts a more restrictive approach to the appointment of substitutes than to that of sub-agents. The agent's power to appoint a sub-agent is limited only by the possibility that the circumstances may indicate otherwise. Article 14, on the other hand, applies a narrower criterion, asserting that the agent may appoint a substitute in two particular sets of circumstances and impliedly, therefore, in no other case. This more restrictive approach to the appointment of substitutes is a function of the fact that in sub-agency situations the agent remains liable to the principal, whereas in substitution the principal loses the right of future recourse against the agent, except in respect of his choice and instruction of substitute (Art. 14, para. 2).

The Draft recognises the commercial reality that the agent should be able to appoint an auxiliary on those inevitable, unforeseeable occasions when such a need arises, for instance, where the initial agency contract contemplated a wide territorial ambit and the agent finds himself unable to be in several places at once.

The qualification imposed by Article 13's unless clause would envisage such circumstances as an express or implied prohibition of sub-agency by the principal. An implied prohibition could arise from the intrinsically personal and confidential nature of the agency relationship, for instance in the case where the agent was chosen for his specialist knowledge and skill in the tasks required under the agency contract.

The relationship between agent and sub-agent is to be the normal relationship of principal and agent. The whole Draft automatically applies to their relationship in accordance with the definition to be found in Article 2. No special provision is made by the Draft to create a contractual nexus between the original principal and his agent's sub-agent; the two agency relationships revolving around the original agent subsist independently of one another.

Under Article 14, the agent is not allowed to appoint another person as his substitute without the express authorisation of the principal. This solution appears to be the more equitable; an agent is normally chosen an account of his personal qualities and this makes it inconceivable that there should be substitution without the consent of the principal. However, it is clearly vital that this requirement that the agent should first have the express authorisation of his principal before appointing a substitute should be dispensed with in cases where urgency is required to achieve the purpose of the agency and the agent himself is prevented from so acting.

Paragraph 2 of Article 14 provides that the substitute, once appointed, shall become the direct agent of the principal, since a void would otherwise supervene. The relationship between principal and substitute becomes the normal agency relationship as defined in Article 2.

Chapter III

Relations between the principal and the agent

Article 15

It was thought important at the beginning of this Chapter on the relations between the principal and the agent to state, as an essential feature of these relations, the obligation of both parties to act in good faith. This basic principles is applied throughout the whole chapter and, indeed, informs the whole relationship of agent and principal; but a number of its more important corollaries are specifically identified in the four sub-paragraphs of paragraph 2.

The first prohibits the disclosure by the agent of confidential information acquired by him in the course of the agency or its use contrary to the interests of the principal. It is an established equitable principle that, where a person has received information in confidence, he shall not take unfair advantage of it and shall not, moreover, use it to the prejudice of the party from whom he obtained it. The second concerns the situation where the agent desires to act for another principal in situations where the two principals have conflicting interests. The agent is not expressly prohibited from so acting, unless his contract (Article 7 (b)) or a usage binding upon him (Article 9) so provides, but he is bound to notify the principal so that the latter may take appropriate action. The agent's general duty of good faith is also considered to provide an answer, and a negative answer, to the classic question whether an agent may buy or sell on his own account goods which he is to sell or buy on behalf of his principal. Some systems allow him to do so freely (1), others as a matter of inference from contract, usages of trade, custom or the course of dealing between the parties (2), whilst others still would prevent him from doing so without the express consent of his principal (3). The Uniform Law following this last solution in so far as it allows the agent to buy or sell on his own account only with the consent, express or implied, of his principal. Finally, the agent is prohibited from buying on behalf of one principal goods that he is selling on behalf of another, unless both principals agree to such an arrangement. The agent must not, that is to say, put himself in a situation where his interests may conflict with those of either principal

---

(1) German HGB, § 400; Italian Codice Civile, Art. 1735; Swiss Code des Obligations, Art. 436.

(2) Swedish law, Art. 40.

(3) English and French solutions; American Restatement, § 389.

Article 16

This article sets out the duty of skill and care to be exercised by the agent, his duty to follow the instructions of the principal, to keep him informed, and to render accounts.

Reflecting a principle known to a number of legal systems (1), the agent is required to exhibit the skill and care which may reasonably be expected of an agent in that situation. This is an objective standard, but a standard which will vary according to the particular trade and the circumstances of the parties.

Thus, an agent must display that care and skill to be expected of the average person exercising such a profession or trade with the same level of experience. Equally, a gratuitous agent who merely offers his services as a friend without giving any thought to monetary reward cannot be expected to show the same degree of skill and care as a professional agent acting for reward and, thereby, holding himself out as possessing certain professional skills.

In addition, the Draft incorporates an accepted feature of all legal systems in expressly requiring the agent to follow his principal's instructions, irrespectively of what would otherwise be reasonable in the circumstances.

Article 16 also specifies the agent's duty to keep the principal informed of his operations. This duty is a feature of most municipal systems (2), and reflects the principal's direct and continuous interest in the operations of the agent, especially when supervening circumstances modify the factual background contemplated when the contract was concluded.

The Article also imposes upon the agent an obligation to account, a duty familiar both in Civil Law and Common Law systems (3).

---

(1) See Italian Codice Civile, Art. 1710; German HGB, § 384 (390); American Restatement, § 379; BOWSTEAD on Agency, 13th edition, p. 115.

(2) See BOWSTEAD on Agency, 13th edition, p. 118; German HGB, § 384, II; Italian Codice Civile, Art. 1710.

(3) Italian Codice Civile, Art. 1713; Swedish Law, Art. 13; French Code Civil, Art. 1993.

Article 17

This article represents a further elaboration and extension of the agent's fiduciary duties. He is required to exercise care over those items received by him on behalf of the principal (1) and, owing to the fact that he only holds them on behalf of the principal and can himself exercise no personal rights to ownership over them (save in limited circumstances, shown below), the principal may require the agent to make immediate delivery of all that has been acquired in the course of and within the scope and terms of his agency contract.

The word "care" is nowhere qualified; it should, therefore, be interpreted in the spirit of the Draft, as all the care reasonably to be expected in the nature and circumstances of the particular agency and of the particular items held by the agent. The concept underlying this duty of physical preservation of the goods is easily extended to cover the rights and remedies of the principal in the next paragraph.

The last two paragraphs involve an extension of the agent's authority in cases of emergency, where the goods received by the agent for his principal are in danger of perishing or severely deteriorating in quality unless sold or otherwise disposed of forthwith and where there is no time to consult the principal. Such an expedient is permitted by most legal systems (2). In most cases, the proper measure to be taken by the agent will be the immediate sale of the goods. In such an event, he must follow the rules, if any, laid down for sales in such circumstances by the law or usages of the place where the goods are situated. Some legal systems (see the Swedish and German systems) provide for a sale by auction in such a case.

Article 18

This Article sets out the very generally accepted rule that an agent is not personally liable for a third party's failure to fulfil his part of an agency contract, but that the agent may be liable

---

(1) See Swedish law, Art. 10; American Restatement, § 422; German HGB, § 390.

(2) Swiss Code des Obligations, Art. 427; German HGB, § 388.

where he makes himself a guarantor for its fulfilment, that is to say, when he has become a del credere agent (1). In such a situation the agent is jointly and severally liable with the third party seller or purchaser against whom, of course, he would have a right of recourse (2).

Article 19

This Article sets out the basic principle that the agent may not grant special facilities to the third party with regard to the time and manner of payment or delivery, unless the principal has given his express consent thereto or such consent may be implied from the circumstances and his conduct (3). It goes on to specify some of those prohibited facilities, as credit, time, payment by instalments, yet these are clearly not the only facilities envisaged by the Draft, so that it would be equally open to a principal to claim that some other action of his agent represented the granting of facilities to a third party buyer or seller, with regard to the latter's payment or delivery, as the case may be: the risk would, thus, fall on the agent and, unless he could show consent expressly or impliedly given by the principal, he would himself have to answer to the latter for any such default. It is important to bear in mind that the agent is not prevented by this article from granting to the third party any other facilities provided that they do not relate to payment or delivery.

Article 20

This article specifies the agent's right both to remuneration and to the recovery of disbursements. His right to remuneration must flow from the agreement of the parties, as expressly incorporated in the terms of the agency contract or as it is to be impliedly deduced therefrom. However, even in the absence of an express or implied agreement to this effect, the agent is given a right to recover

---

(1) Italian Codice Civile, Art. 1736; German HGB, § 394; BOWSTEAD on Agency, 13th edition, p. 7.

(2) See French Code Civil, Art. 2021; Italian Codice Civile, Art. 1944; German HGB, § 394; Thomas Gabriel and Sons v. Churchill and Sim /1914/ 3 K.B. 1272, per Buckley, L.J.

(3) The formula adopted in the Draft follows, to a large extent, that of § 393 of the German HGB.

disbursements, but only disbursements, provided that these have been reasonably incurred. Such rules are of wide application, both in civil law (1) and in common law (2) countries.

Article 21

This article is designed to balance the duties of the agent as already stated with a similar obligation incumbent on the principal vis-à-vis the agent. Such a duty forms a necessary complement to that laid upon the agent by Article 16, para. 2 (3). It requires the principal to furnish the agent with all the information and general co-operation as is reasonably necessary for the agent to carry out his duties. The test of such information and co-operation is to be viewed objectively, in all the circumstances of the particular agency tasks and the developing situation as it evolves throughout the performance of these tasks.

Article 22

This article confers upon the agent a charge or lien on the goods or other items that he holds on behalf of the principal in the event of the latter not having fulfilled his part of the agency contract, in so far as he has failed to pay the agent his commission and other allowances when due. Most legal systems provide for some kind of privilège or lien as security for the principal's payment of the sums he owes the agent (4).

First, the Draft grants the agent the right to deduct the sums thus owed him from any debts he may owe the principal.

---

(1) See French Code Civil, Arts. 1999 and 2000; Italian Codice Civile, Art. 1720; German HGB, § 396.

(2) See BOWSTEAD on Agency, 13th edition, p. 172.

(3) See a similar provision in Italian Codice Civile, Art. 1719.

(4) See German HGB, §§ 397 and 398; Swedish law, Arts. 31-36; French Code de Commerce, Art. 95; Italian Codice Civile, Arts. 1721 and 2761, II; American Restatement, §§ 463 and 464; Swiss Code des Obligations, Art. 434.

Secondly, the agent is entitled to withhold delivery of those goods or other items that he holds on behalf of the principal "in connection with the contract". If the debt remains unpaid and provided that the agent has given reasonable notice to the principal, the agent is then entitled to sell the goods and retain the proceeds of sale on account of the payments due to him (1). In this case, the agent must follow such rules as may be prescribed for such sales by the law and usages of the place where the goods are situated (see Art. 17, § 4).

Article 23

In the event of the agent having failed to carry out his obligations and in the absence of any good reason for the same, he must answer for any resulting damage to the interests of the principal by paying him such compensation as will place him in the position in which he would have been if the agent had properly carried out his obligations. The Draft thus refrains from imposing special penalties in cases of substantial failure in favour of a more general provision on damages. It is clear, however, that the principle of damages embodied in this article is considerably broader in scope than the normally applied test of "reasonable foreseeability", as known in both civil law and common law systems. Moreover, the agent can escape such liability by producing a good reason for his failure, such as force majeure or Act of God. Such an excuse would have to meet all the requirements of justice in the particular case. The article further specifies that this liability on the agent should not prejudice such taking of any other action as may be proper against the party at fault according to the particular factors present in the individual case. This would clearly include the generally accepted remedy of specific performance.

---

(1) See German HGB, § 398; Swedish law, Art. 36.

Chapter IV

LEGAL EFFECTS OF AN ACT CARRIED OUT BY THE AGENT ON BEHALF OF THE PRINCIPAL

Article 24

Article 24 sets out the fundamental principle that the only conditions needed for a direct contractual link to be established between principal and third party are that the agent should act within the scope of his authority and on behalf of the principal and that his capacity as an agent should be disclosed or apparent. The first condition is self-evident and needs no explanation; with regard to the second condition one should bear in mind the general definition of agency given in Article 2, according to which, for the purposes of the present Draft, an agent, when dealing with a third party on behalf of the principal, may act in his own name or in that of the principal. Consequently, in the establishment of direct links between principal and third party, Article 24 does not specifically require that the agent acts in the principal's name (as the Civil Law systems generally do), but only that he discloses or that it is objectively apparent that he is acting as an agent on behalf of another person, the principal.

The Article is qualified by an important reference to Article 27, which introduces an element of flexibility, allowing the agent to agree with the third party, expressly or by implication, that no contractual relationship shall be established between the principal and the third party.

Article 25

The first paragraph of this article makes a rather obvious statement: an act carried out by an agent without authority or whilst exceeding the limits of his authority cannot bind the principal to the third party; such an act might later be ratified by the principal (see Article 28), but, failing ratification, will not have any legal effect on the principal.

"An agent's authority need not be express, but may derive from an authorisation implied from facts and circumstances under Article 12. The second paragraph of Article 25 makes it clear that a third party cannot found upon such facts and circumstances when he knew or ought to have known that the agent had no authority or was exceeding the limits of his authority".

Articles 26 and 27

These articles deal with the case where an agent acts on behalf of his principal but does not disclose at the time of contracting the principal's name or even the existence of a principal. In this situation, civil law systems generally hold that the contract binds only the agent and the third party; some of them, however, are moving towards the concession in certain circumstances of allowing direct links to be established between principal and third party (1). The common law systems, on the other hand, concede that a direct relationship between principal and third party may arise when it is disclosed or becomes apparent that the agent is, in fact, acting as an intermediary (2). The Uniform Law adopts neither approach in its full rigour, disregarding the differences that the two systems display on points of principle for the similarities that they bear to one another in actual fact. It concedes that a direct right of action between principal and third party may arise when it is disclosed or becomes apparent that the agent is acting on behalf of a principal, but subordinates these rights of action to a number of conditions including:

(a) the condition, unknown to common law systems, that the agent has not fulfilled or is not in a position to fulfil his obligations to the party seeking to exercise those rights (Article 26(2) ad finem); and

(b) the condition that there is no agreement between agent and third party precluding such a right of recourse and that such an agreement is in accordance with the express or implied instructions of the principal (Article 27).

Since the agreement mentioned in (b) above may be inferred from a mere reference to a contract of commission or from the fact that the name of the principal is not to be disclosed, Articles 26 and 27 make a serious attempt to accommodate both the civil law "contrat de commission" and the common law's "undisclosed principal". Paragraph 6 of Article 26 introduces a further qualification to the principle of direct rights of action as between principal and third party, in so far as either the principal or agent must notify the third party of the agreement between themselves before the contract can be regarded as binding upon only the a ent and third party. The remaining paragraphs (3, 4 and 5) of Article 26 merely lay down rules as to notice and the communication of information.

---

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

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

Articles 28 and 29

As is generally the case under all existing legal systems, the present Draft Uniform Law provides that, where a person purports to act on behalf of another but, in fact, acts without authority or exceeds his authority, such acts are to be ineffective rather than entirely invalid. This can be argued from the fact that such an act, on the one hand, obviously binds neither a principal, for want of authority (see Article 25), nor a self-appointed agent, where he purports expressly to act on behalf of another person (see Article 24 and Article 26, para. 1), but may, on the other hand, be ratified by the person on whose behalf the agent purported to carry it out, so that, in such a case, the act has the same effect as if it had been initially carried out with authority (see Article 28, para. 1). This premise should be borne in mind so as to understand correctly the individual provisions of the present articles on ratification and its effects.

There is, however, another general consideration to be made in this context. The whole system of ratification and its effects as provided for in these two articles is based on the distinction of whether or not the third party knew or ought to have known of the agent's lack of authority. This stems from the general principle of good faith. Admittedly, he may in either case fix a reasonable time in which it would be open to the principal to ratify and after the expiry of which, without ratification having taken place, the act carried out by the self-appointed agent would become invalid. But it is only in the case where the third party did not know or ought not to have known of the agent's lack of authority that, instead of fixing such a time-limit, he may unilaterally and immediately free himself from the effects of the agent's act, whereas, in the alternative case, he would first require the agent's consent (see paragraph 2 of Article 28). Furthermore, failing ratification, it is only in the latter and not in the former case that the agent is liable to pay the third party such compensation as will place him in the same situation as he would have been in if the agent had acted with authority or within the limits of his authority.

The other provisions of these articles do not call for any particular explanation, as they are rules known generally to and accepted by all legal systems.

Chapter V

TERMINATION OF AGENCY

Article 30

As is the case in respect of any contract, agency automatically comes to an end either at the expiry of the period of time fixed for its performance (if one has been fixed by the parties) or upon the complete and satisfactory performance of all the obligations undertaken thereunder by the parties. This article, therefore, calls for no special comment.

Article 31

This article deals with the effect of changes in the personal situation of the principal upon the subsistence of a contract of agency and upon the rights of the agent thereunder.

In relation to the principal's death, different systems adopt different approaches. Some, stressing the interests of commerce and the possible interest of the principal's heirs in continuing the business, declare that the agency continues despite the principal's death, his obligations being assumed by his successors (1). Others, stressing the inherently personal nature of agency contracts and the importance of confidence and personal performance, hold that the death of the principal terminates the agency, either immediately (2), or when notice of the fact has reached the agent or third party, as the case may be (3). Following the tendency of modern commerce, the Draft adopts the intermediate position that the contract continues, unless personal performance by the original principal was an essential part of the contract. The same solution is adopted in the case of the principal's total loss of contractual capacity.

---

(1) German Civil Code, § 672 and Commercial Code, § 52; Scandinavian Law, Art. 21; Commercial Codes of Austria, § 52, Spain, Art. 290, and Argentina, Art. 144; compare also re death of the head of a business, the Italian Codice Civile, Art. 1722 and the Swiss Code des Obligations, Art. 465.

(2) See England: Campanari v. Woodburn (1854) 15 C.B. 400; U.S.A., Restatement, § 120; U.S.S.R. Civil Code, Art. 260; Austria, Civil Code, § 1022.

(3) Argentina, Civil Code, Art. 1964; Brazil, Civil Code, Art. 1321; Chile, Civil Code, Art. 2173; Spain, Civil Code, Art. 1738; French Code Civil, Arts 2008 and 2009; Italian Codice Civile, Arts 1396 and 1728; Swiss Code des Obligations, Art. 37; U.S.A., Restatement, §§ 127-129.

Nor does the principal's bankruptcy or the like necessarily put an end to the agency contract; it does so only when by reason of the bankruptcy or like procedure, the principal cannot fulfil his contractual obligations. Even this does not affect the subsistence of the right to claim damages arising out of such termination. It should be remembered that, even after such termination of the agent's authority, it may still be possible for the principal to ratify an act carried out by the agent in such a situation (per Article 28, § 3). In cases where the principal is not a natural person, its dissolution, other than in consequence of bankruptcy or like procedure, does not terminate the contract of agency. This is designed to avoid the unilateral ending of agency contracts in such cases as the voluntary winding up of a company.

In its final paragraph, Article 31 makes it clear that the agent has the right and the duty, even after the termination of an agency contract, so to act as to prevent damage to the principal's interests.

Article 32

This article deals with the termination of the agency contract arising from a change in the agent's situation. The element of personal confidence involved in the choice of an agent automatically terminates the contract of agency upon the agent's death or total loss of capacity. The same applies in cases where the agent cannot carry out his obligations by reason of bankruptcy, winding up or similar procedure, in which event he shall be liable to any claim for damages resulting from such termination of the contract.

Article 33

In accordance with the general principles of Contract Law, this article states that neither principal nor agent may unilaterally revoke the agency contract, unless there is a "just cause or excuse" or the contract was for an unspecified time (subject, however, in the latter case, to the need to give reasonable notice). In the absence of such exceptional circumstances and where one of the parties revokes or repudiates the agency contract, he will become liable to pay damages to the other party for breach of contract or, where the contract is for an unspecified time, for failure to give reasonable notice.

It will be for the applicable municipal law to determine what amounts to "just cause or excuse". The extent of this liability for breach of contract or for failure to give reasonable notice will be decided in accordance with the rule laid down in Article 23.

Articles 34, 35 and 36

Where an agency relationship is terminated by the principal's revocation or the agent's renunciation, this will also affect third parties dealing through the agent; such third parties, therefore, have a right to be informed of such a revocation or renunciation, so that they know that the agent has lost his authority to act on behalf of the principal.

It is for the protection of third parties who are in good faith and do not know of such a revocation or renunciation that the first paragraph of Article 34 imposes the generally accepted rule that such a revocation or renunciation will only have effect upon the third party from the moment he has notice of it.

Article 36, para. 1 lays down a general rule that the agent should "take all reasonable steps" to give timely notice of the revocation or renunciation of his authority to third parties. The particular steps required of the agent are not specified, so that it will depend upon the circumstances of the individual case whether his efforts to inform the third party are to be considered sufficient.

The Draft, however, makes provision for those special cases (in sub-paragraphs (a) and (b) of Article 34) where the particular national legal system requires revocation or renunciation to be published or registered or for a specific procedure to be followed with regard to the invalidation of the agent's authority; such publication, registration or special procedure of invalidation automatically serves as notice to all third parties, regardless of whether they have any actual knowledge thereof, whereas, in the event of these special measures for revocation or renunciation not being followed where they should have been followed, no other effort to inform such third parties will be to any purpose.

Mention should, finally, be made of the rather special case envisaged in Article 35. This deals with the situation where the third party only knows of the agent's authority by virtue of a declaration of the agent himself and where there has been no confirmation by the

principal's conduct: in such a case, revocation by the principal is binding upon any third party as soon as it has been brought to the notice of the agent and without it being necessary for a third party to know of it too.

Where the third party has not been informed of the revocation or renunciation of the agent's authority - either, generally, by the "reasonable steps" envisaged by Article 36, para. 1 or, in particular cases, by the special procedures cited in sub-paragraphs (a) and (b) of Article 34 - the first sentence of Article 34 states that they will not have any effect on him. Nevertheless, if the agent subsequently purports to act on behalf of his erstwhile principal, both he and the principal will be liable to pay the third party such compensation as is provided in Article 29 (see Article 36, para. 2). In fact, in such a case as that just postulated, the agent was acting without any authority, on account of the supervening revocation or renunciation, whereas the third party neither knew nor could have been expected to know of the "agent's" lack of authority, that is, of its revocation or renunciation (because of the failure to carry out the required steps or to give publicity in those cases where it is required).

ANNEX

LIST OF PARTICIPANTS

AUSTRIA

- Mr.Alfred DUCHEK, Counsellor, Federal Ministry of Justice - Vienne (1)(2)(3)

BELGIUM

- Mrs.Anne Marie DELVAUX, Conseiller Juridique au Ministère de la Justice - Bruxelles (1)(2)(3)

BULGARIA

- Mr.Petko ARGUIROV, Conseiller Juridique Ministère du Commerce Extérieure - Sofia (2)
- Mr.Alexandre KOJOUHAROF, Professeur de droit civil de l'Université de Sofia (2)(3)

CANADA

- Mr. Paul OLLIVIER, Sous-Ministre associé - Ministère de la Justice - Ottawa (2)
- Mr. Gérard TRUDEL, Juge - Montréal (2)(3)

CZECKOSLOVAKIA

- Mr. Jiri TROJAN, Directeur adjoint du Départment Juridique au Ministère du Commerce Extérieur - Prague (3)

DENMARK

- Mr. Ole PERCH NIELSEN, Head of Department, Ministry of Justice - Copenhagen (1)(2)(3)

EGYPT

- Mr. Sameh DERAR, Secrétaire à l'Ambassade d'Egypte à Rome (1)

FINLAND

- Mr. Kaarle TELARANTA, Professor of Law, Helsinki (1)(2)(3)

FRANCE

- Mrs. Françoise RAMOFF, Magistrat au Ministère de la Justice - Paris (1)(2)(3)

GERMANY (Federal Republic of)

- Mrs. Helga ECKSTEIN, Conseiller au Ministère Fédéral de la Justice - Bonn (2)(3)
- Mr. Rolf HERBER, Conseiller au Ministère fédéral de la Justice, Bonn (1)

GREECE
- Mr. Alexandre VAYENAS, Premier Secrétaire de l'Ambassade de Grèce à Rome (3)

HUNGARY
- Mr. Gyula LÖRSI, Professeur à l'Université de Budapest (1)(2)(3)

IRAN
- Mr. Ahmad AJDARI, Chargé d'Affaires à l'Ambassade d'Iran à Rome (1)

ITALY
- Mr. Renato MICCIO, Conseiller à la Cour de Cassation - Bureau Législatif, Ministère de la Justice d'Italie - Rome (1)(2)(3)

MEXICO
- His Exc. Antonio GOMEZ ROBLEDO, Ambassador of Mexico, Rome (1)
- Mrs. Ivonne LOYOLA Y ESCOBEDO, First Secretary - Embassy of Mexico, Rome (2)

NETHERLANDS
- Mr. Ernest COHEN-HENRIQUEZ, Conseiller au Ministère de la Justice - La Haye (1)(2)(3)

NORWAY
- Mr. Tore SANDVIK, Professor Norges Handels Høyskole - Bergen (1)(2)(3)

PAKISTAN
- Mr. Azmat HASSAN, Second Secretary, Embassy of Pakistan, Rome (2)
- Mr. A.S. KAUSAR, Counsellor, Embassy of Pakistan, Rome (3)

PORTUGAL
- Mrs. Isabel Maria MAGALHÃES COLLAÇO, Professeur à la faculté de droit de l'Université de Lisbonne (2)(3)

RUMANIA
- Mr. Tudor POPESCU, Professeur à l'Université de Bucarest, Membres du Conseil de Direction d'UNIDROIT (1)(2)(3)

SOUTH AFRICA
- Mr. Etienne du TOIT, First Secretary, Embassy of South Africa, Rome (3)

SPAIN	- Mr. Luis DIEZ-PICAZO, Professeur de droit civil à l'Université de Valencia (1)(2)(3)
SWEDEN	- Mr. Thomas Einar LÖFSTEDT, Head of Division in Court of Appeal - Göteborg (1)(2)(3)
SWITZERLAND	- Mr. Hans MERZ, Professeur à l'Université de Berne (1)(2)
UNITED KINGDOM	- Mr. Maurice ABRAHAMS, Law Commission London (2)(3)
	- Mr. Alexander E. ANTON, Professor in the University of Glasgow (1)(2)(3) Chairman of the 2nd and 3rd sessions of the Committee
	- Mr. Benjamin Atkinson WORTLEY, Professor in the University of Manchester, (1) Member of the Governing Council of UNIDROIT Chairman in the 1st session of the Committee
UNITED STATES OF AMERICA	- Mr. Allan FARNSWORTH, Professor of Law, Columbia University - New York (1)(2)(3)
VATICAN CITY	- Mr. Pio CIPROTTI, Professeur, Président du Tribunal de la Cité du Vatican, Rome (1)(2)(3)
VENEZUELA	- Mr. Benito SANSO', Professeur à l'Université Centrale du Venezuela, Caracas (1)(2)

O B S E R V E R S

EUROPEAN COMMUNITIES COMMISSION

- Mr. Thierry CATHALA, Administrateur Principal, Bruxelles (1)(3)

EUROPEAN FREE TRADE ASSOCIATION

- Mr. Wolfram KARL, Assistant of Legal Department, Genève (1)

INTERNATIONAL CHAMBER OF COMMERCE

- Mr. Frédéric EISEMANN, Directeur Juridique, Paris (3)

INTERNATIONAL LEAGUE OF COMMERCIAL TRAVELLERS AND AGENTS

- Mr. Maurice CAILLAUD, Vice Président Berne (3)
- Mr. Gian Franco VITELLI, Vice Président Turin (3)

INTERNATIONAL UNION OF COMMERCIAL AGENTS AND BROKERS

- Mr. Max GEERLING, Secretary General Amsterdam (2)(3)

THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW

- Mr. Michael SAUNDERS, Secrétaire au Bureau Permanent, La Haye (3)

UNITED NATIONS - UNCITRAL

- Mr. Aharon BARAK, Legal Officer New York (2)(3)

UNIDROIT

His Exc. Mr.	Ernesto EULA,	President (1)
Mr.	Mario MATTEUCCI,	Secretary General (1)(2)(3)
Mr.	Jean Pierre PLANTARD,	Deputy Secretary General (1)(2)(3)
Mr.	Michael Joachim BONELL,	Research Officer (1)(2)
Mr.	Mircea MOSCHUNA-SION,	Research Officer (1)
Mr.	Martin STANFORD,	Assistant (3)

(1) Participant in the first session.
(2) " " " second "
(3) " " " third "