DIPLOMATIC CONFERENCE
FOR THE ADOPTION OF THE DRAFT
UNIDROIT CONVENTIONS ON
INTERNATIONAL FACTORING AND
INTERNATIONAL FINANCIAL LEASING

ACTS AND PROCEEDINGS
VOLUME II

UNIDROIT
Via Panisperna 28 - ROME
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INTRODUCTION

At the invitation of the Government of Canada, a diplomatic Conference for the adoption of the draft Unidroit Conventions on international factoring and international financial leasing was held in Ottawa from 9 to 28 May 1988.

The draft Conventions submitted for adoption at the Conference had been drawn up by twin committees of governmental experts convened by the International Institute for the Unification of Private Law (Unidroit). The other basic working materials of the Conference were twin sets of draft final provisions prepared by the Unidroit Secretariat and comments on the two draft Conventions and sets of draft final provisions submitted by Governments and international Organisations.

59 Governments and ten international Organisations were represented at the Conference which elected Mr T.B. Smith (Canada), member of the Unidroit Governing Council, President. Messrs I. El-Kattan (Egypt), L. Récezi (Hungary), H. Ríos de Marimón (Chile), W. Rolland (Federal Republic of Germany) and Z. Yuan (China) were elected Vice-Presidents of the Conference. The first and second readings of the draft Convention on international financial leasing, including the draft Preamble thereto and Article F of the draft final provisions thereof, and of the draft Convention on international factoring, including the draft Preamble thereto and an Article X as well as Article F of the draft final provisions thereof, were assigned to a Committee of the Whole, the Chairman of which was Mr L. Sevón (Finland). The first and second readings of all but Article F of both sets of draft final provisions as well as the titles of both draft Conventions were assigned to a Final Clauses Committee, the Chairman of which was Mr G. Brennan (Australia). The Conference also set up a Drafting Committee, the Chairman of which was Mr R.M. Goode (United Kingdom), and a Credentials Committee, the Chairman of which was Mr W. Rolland.

The Conference completed its work on 26 May 1988 with the adoption of the Unidroit Convention on International Financial Leasing and the Unidroit Convention on International Factoring, which were opened to signature two days later, following the signature of the Final Act of the Conference, at the closing session of the Conference.

This volume constitutes Volume II of the Acts and Proceedings of the Conference and contains the following Conference papers:

(1) summary records of all sessions of the Plenum and the Committee of the Whole;

(2) a complete list of all the papers issued in connection with the Conference.

Volume I of the Acts and Proceedings of the Conference contains the basic Conference papers, papers submitted to the Committee of the Whole, papers submitted to the Final Clauses Committee, papers and reports submitted to the Plenum as well as the texts and instruments adopted by the Conference.
PART I

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CONF. 7/S.R. 1
10 May 1988

FIRST MEETING

Monday, 9 May 1988 at 10.30 a.m.

Temporary President: Mr Hnatyshyn
(Minister of Justice and Attorney-General of Canada)

President: Mr Smith (Canada)

OPENING OF THE CONFERENCE

The TEMPORARY PRESIDENT gave the following address of welcome:

"Your Excellencies,
Mr President of Unidroit,
Members of the Unidroit Secretariat,
Distinguished Delegates:

On behalf of the Prime Minister and the Government of Canada, I would like to welcome all of you to Ottawa and to this diplomatic Conference convened for the purpose of adopting draft Conventions on international financial leasing and international factoring, which were prepared under the auspices of the International Institute for the Unification of Private Law, known as Unidroit.

The Prime Minister has asked me to read to you the following message:
'It is my distinct pleasure to convey my warmest greetings and sincere best wishes to the Delegates to the Unidroit diplomatic Conference on International Factoring and International Financial Leasing.

This Conference serves as the culmination of numerous meetings of governmental experts on international financial leasing and international factoring as well as a reaffirmation of our collective participation in international law matters.

I have no doubt as to the quality of the work you will produce on the occasion of this Conference and I wish you all many memorable moments.'

The Government of Canada is very pleased that Unidroit accepted our invitation to host this diplomatic Conference. Canada offered to act as host of this Conference as part of our ongoing interest in private international law, and in recognition of our long-standing membership of Unidroit and our representation on its Governing Council. I am very pleased that we have had such a positive response to our invitation to the Conference. There are approximately sixty delegations here, some of them led by their Ambassador to Canada. Permit me to draw particular attention to the presence this morning of the Ambassador of Italy. It was incontrovertibly a pioneering decision of the Italian Government in the context of the development of the unification and harmonisation of law when it took the initiative of setting up Unidroit as long ago as 1926. We all owe a tremendous debt of gratitude to the Italian Government not only for that initial decision but also for the solid support and encouragement it has given Unidroit in the intervening years. The numerous delegations here represent States and organisations from the world over, as well as the various legal systems of the world. This widespread interest in the two draft Conventions demonstrates the relevance of international financial leasing and international factoring in the world today.

International financial leasing now plays a major role as a mechanism for financing the
acquisition of a wide range of equipment used in developed and developing regions of the world. The extent of cross-border leasing activity was estimated recently at upwards of 15 billion U.S. dollars. The efforts of Unidroit in this area have been directed towards developing an international legal regime which recognises the essential economic function of financial equipment leases and which allocates to each party legal rights and obligations in a manner consistent with modern realities.

International factoring is an important element in the growth of economic activity in developing countries. It ensures the availability of adequate credit and collection facilities for suppliers of manufactured goods seeking to enter or remain in export markets. If the banking system in the exporter’s country does not provide adequate credit facilities, factoring companies may provide external sources of such facilities, and they can also offer export accounting and collection services. Unidroit’s factoring project is intended to provide uniformity among nations in their laws dealing with factoring, since current laws in this area are either deficient or non-existent.

The two draft Conventions which you will be considering over the next three weeks have been developed over a number of years through extensive study and widespread consultation conducted by Unidroit. Following development of a text of draft rules, two committees of governmental experts were requested to prepare draft conventions suitable for submission to a diplomatic Conference for adoption. Canada was represented on these committees, as were many of the States and organisations represented here today. I would like to congratulate those who participated in the committees, and particularly their chairmen, Professor Royston Goode from the United Kingdom and Ambassador László Récezi from Hungary, for their work in producing the draft Conventions. Their task was not an easy one; it is difficult to arrive at a consensus when some forty different countries representing various legal systems attempt to harmonise and synthesise different laws and come up with an agreed convention.

Of course, not all of the provisions have been agreed. There is more work to be done. I hope, however, that over the next three weeks you will be able to work with the same spirit of cooperation and compromise that guided the committees of governmental experts during their preparatory meetings.

Once in force, the Conventions will, no doubt, have an immediate impact in many of the countries represented here today. They will also be likely to benefit those countries that are not currently involved to a great extent in international financial leasing and international factoring, since they will serve as guidelines for future lawmakers and business persons throughout the world.

Canada is well-suited to act as host for this Conference. In recent years it has been an active participant in several private international law fora, including the Hague Conference on Private International Law, the United Nations Commission on International Trade Law and, of course, Unidroit. It is becoming more and more evident that Canadians are keenly interested in international commercial law, with our recent adoption of the Commercial Arbitration Act based on UNCITRAL’s Model Law on Commercial Arbitration, the establishment in British Columbia and Quebec of commercial arbitration centres, and our plans to accede to the Vienna Sale Convention. Moreover, we have recently completed the negotiation of a free trade agreement with the United States which will enhance our trading relationship with that country.

International commerce has developed dramatically in the last thirty years, which has challenged the legal profession around the world to develop a new lex mercatoria to correspond to the emerging regime. Efforts to develop uniform laws to be incorporated into the domestic laws of nations are crucial to this exercise. And conferences like this one aimed at adopting conventions with this purpose must be encouraged, particularly if the conventions under consideration are designed to assist both developed and developing countries, like the draft Conventions before you today.

As a bi-juridical State comprising both Common and Civil Law jurisdictions, Canada boasts a particular expertise in the harmonisation and unification of different laws. Moreover, as a bilingual country with experience in developing bilingual legislation, we should be in an ideal position to assist the Conference in its work.

I understand that many of you participated in the preparatory meetings at which the texts of the
draft Conventions were developed. No doubt you have established friendships over the years, and you will likely develop several new friendships here.

I wish you every success in your Conference and I trust that the busy agenda will allow you some free moments to enjoy the National Capital region. This is a particularly nice time of year in this area. I am sure you will enjoy your stay and I hope that you will have an opportunity to visit again.

I hereby declare open the 1988 Unidroit diplomatic Conference on International Financial Leasing and International Factoring.”

Mr MONACO (President of Unidroit) made the following reply to the opening address of the Temporary President:

“Mr Minister,
Excellencies,
Ladies and Gentlemen:

May I first of all, on behalf of the International Institute for the Unification of Private Law, more familiarly known as Unidroit, over which I have the honour to preside, extend my warmest thanks to the Government of Canada for its generosity in hosting this diplomatic Conference for the adoption of the draft Unidroit Conventions on International Factoring and International Financial Leasing and to you Sir for honouring us by your presence today.

The convening of the Conference is only the latest in a long line of acts testifying to the close involvement of Canada in the unification and harmonisation of private law in general, and more specifically in the activity of our Institute since Canada’s accession on 2 March 1968. The active participation of the Canadian Government in committees responsible for the preparation of uniform rules and in particular its accession on 24 January 1977 to the 1973 Washington Convention providing a Uniform Law on the Form of an International Will bear witness to Canada’s commitment to Unidroit and to the ideals which the founding fathers of the Institute sought to foster more than sixty years ago.

Indeed, with its legal traditions firmly rooted in both the Civil Law and the Common Law Canada is equipped to play a very special, indeed an almost unique, role in the development of an international corpus of private law as the growth of more sophisticated means of communication lead to an expansion of world trade and an ever greater interdependence among countries with widely differing economic, social and, not least, legal systems and traditions.

Coming as I do from the birthplace of Roman law, and finding myself in the capital of a young and vigorous nation, I cannot but be struck by the appropriateness of this venue for the holding of a diplomatic Conference for the adoption of Conventions relating to two such modern instruments of financing as factoring and financial leasing. The special characteristics of these transactions are such that they can no longer be confined within traditional contractual schemata; it is indeed precisely the novelty of these methods of financing and their different treatment, often on the basis of legal rules developed in entirely distinct contexts, that have, together with the problems arising out of the triangular relationships which they encompass, constituted one of the obstacles to their cross-border development.

Here, then, lies one of the challenges which confronts this Conference and which has indeed confronted Unidroit over the last decade or more since the first enquiries and studies were conducted by the Secretariat, namely the establishment of flexible and, either principally or exclusively, optional rules (we shall see), which will in no way obstruct the evolution of financial leasing or factoring in any of their forms. We are, in other words, facing a situation not dissimilar to that existing in 1929 when some sceptics feared that the development of international air transport might have been retarded by the introduction of uniform and, let us not forget, mandatory rules. The sceptics were however confounded for, as was stated by a participant in the Unidroit Congress on Uniform Law in Practice, held in Rome in September 1987, the Warsaw Convention and its subsequent amendments have not yet prevented a single aircraft from taking off.

It is therefore, Sir, with the greatest optimism that I look forward to the work of this
Conference which will, if my information is correct, see the largest number of States ever present at a Unidroit diplomatic Conference and, what is even more encouraging, the widest representation yet from the developing countries, many of which are not, or at least not yet, member States of the Institute; and here again perhaps I may be permitted to stress the importance which Unidroit attaches to the contribution to its activities of the countries of Africa, Asia and Latin America, whose presence here today testifies to the importance which these two instruments of financing represent, and will increasingly represent, not only for the economies of those countries, but also for those of the industrialised nations.

I am, Sir, above all convinced of the fact that, whatever may be the differences among the States represented at this Conference, be they geographical, political, economic, social or otherwise, we shall in the next three weeks all be seeking to reach just and equitable solutions to questions which affect international economic transactions whose importance ranges from those conducted by national air or shipping lines to those of small family businesses.

Let us therefore be imaginative, let us be bold, but above all let us be pragmatic! If this spirit prevails, as I am sure it will, there is every reason to believe that the two Unidroit Conventions on International Factoring and on International Financial Leasing which will be adopted by this Ottawa Conference will enjoy wide acceptance in the international community of nations. It is in this expectation that I associate myself with you, Sir, in extending my greetings to all delegates and observers present today and to those who may join us in the coming weeks.

In conclusion, may I convey through you Sir what is, I am convinced, the sentiment of all the participants in this Conference, namely our heartfelt appreciation to the Government of Canada, to the people of Canada and to the people of this beautiful city of Ottawa for so graciously welcoming us and for providing us with this opportunity to contribute, through the medium of private law, to the goals of peace and of economic development based on mutual respect among the nations of the world."

**ELECTION OF THE PRESIDENT OF THE CONFERENCE**

Mr RÉCZEI (Hungary) proposed Mr Smith (Canada) who had served with distinction on the Governing Council of Unidroit for the last five years and who had wide experience in chairing international conferences of this kind.

Mr GOODE (United Kingdom) warmly seconded the proposal.

*Mr Smith was elected President of the Conference by acclamation.*

The TEMPORARY PRESIDENT congratulated the President on his election and asked him to take the chair.

The PRESIDENT of the Conference thanked the Temporary President and expressed his gratitude to the delegates for their support in the following address:

"Mr President of Unidroit,  
Distinguished Ambassadors,  
Distinguished Delegates,  
Ladies and Gentlemen,  

May I express to you my deepest gratitude on my election as President. In particular, I wish sincerely to thank my sponsors, the very distinguished Delegate of Hungary, Ambassador Réczei, and the very distinguished Delegate of the United Kingdom, Professor Goode. I very much appreciate their kind words.

It is a very great honour for me to serve as President of this Conference. I have been involved with Unidroit for a number of years and have had the pleasure of serving on its Governing Council since 1983. This association with Unidroit has afforded me the opportunity to become involved in its various projects and to meet lawyers from all over the world. I see a number of familiar faces
around the table today and I look forward to renewing friendships with them and to meeting and getting to know the many other delegates who have come to participate in the Conference.

I should be remiss were I not to thank Professor Monaco, Malcolm Evans, Martin Stanford, Frédérique Mestre, Paula Howarth and Marina Schneider for the kindness they have shown me over the years during my many visits to Rome. I look forward each year to visiting the magnificent eternal city but it is always an added pleasure to have for object a meeting with the Unidroit staff and my colleagues on the Governing Council.

It is indeed daunting for me to sit before this group of experts and to occupy the position of President of this Conference. Needless to say, as a rank amateur in the subject matter we shall be discussing I shall be looking to you for guidance and assistance as we proceed with the Conference but I am confident that together we shall reach a successful conclusion.

You have been welcomed to this Conference by the Minister. I must simply add that my election as President evidently reflects the fact that this Conference is hosted by Canada. I will do all that is in my power to justify the choice of the city of Ottawa for your gathering.”

AGENDA ITEM 1: ADOPTION OF THE AGENDA (CONF. 7/1)

The provisional agenda was adopted unanimously.

AGENDA ITEM 2: ADOPTION OF THE RULES OF PROCEDURE (CONF. 7/2)

The Rules of Procedure were adopted without comment.

AGENDA ITEM 3: ELECTION OF THE VICE-PRESIDENTS AND OTHER OFFICERS OF THE CONFERENCE (CONF. 7/2)

The PRESIDENT suggested that this item be deferred pending consultations, except with regard to the election of the Chairman of the Committee of the Whole.

It was so agreed.

The PRESIDENT drew the attention of delegates to Rule 46 of the Rules of Procedure (CONF. 7/2). He noted that this rule comprehended two Committees of the Whole; however, he interpreted it to mean that one single chairman could be elected to chair a Committee of the Whole to deal with both the draft Convention on International Factoring and the draft Convention on International Financial Leasing.

It was so agreed.

ELECTION OF THE CHAIRMAN OF THE COMMITTEE OF THE WHOLE

Ms TRAHAN (Canada) proposed Mr Sevón (Finland), who was known to many delegates as an outstanding chairman. She referred more particularly to his chairmanship of the working group of the United Nations Commission on International Trade Law on the New International Economic Order and to that of the Final Clauses Committee at the 1983 Unidroit diplomatic Conference held in Geneva.

Mr ROLLAND (Federal Republic of Germany) warmly seconded the proposal.

Mr Sevón was unanimously elected Chairman of the Committee of the Whole.

AGENDA ITEM 4: APPOINTMENT OF THE CREDENTIALS COMMITTEE (CONF. 7/2)

The PRESIDENT proposed that this item be deferred pending consultations.
It was so decided.

AGENDA ITEM 5: ORGANISATION OF THE WORK OF THE CONFERENCE, INCLUDING THE ESTABLISHMENT OF A FINAL CLAUSES COMMITTEE AND OTHER COMMITTEES, AS NECESSARY (CONF. 7/2)

The PRESIDENT proposed that this item be deferred, except with regard to the establishment of the Committee of the Whole under Rule 46 and the Final Clauses Committee under Rule 48, both of which were open to all States represented at the Conference.

It was so agreed.

The meeting rose at 11.05 a.m.

SECOND MEETING

Wednesday, 11 May 1988 at 2.40 p.m.

President: Mr Smith (Canada)

AGENDA ITEM 3: ELECTION OF THE VICE-PRESIDENTS AND OTHER OFFICERS OF THE CONFERENCE (CONF. 7/2)

ELECTION OF THE VICE-PRESIDENT OF THE CONFERENCE

The PRESIDENT, in accordance with Rule 6 of the Rules of Procedure, invited nominations for the offices of Vice-President.

Mr BERAUDO (France) proposed Mr El-Kattan (Egypt), Mr Réczei (Hungary), Mr Ríos de Marimón (Chile), Mr Rolland (Federal Republic of Germany) and Mr Yuan (China).

Mr KATO (Japan) seconded those nominations.

The delegates in question were elected unanimously.

AGENDA ITEM 4: APPOINTMENT OF THE CREDENTIALS COMMITTEE (CONF. 7/2)

The PRESIDENT said that in conformity with Rule 4 of the Rules of Procedure, and after consultations, representatives of the following States had been proposed to serve on the Credentials Committee: the Federal Republic of Germany, Japan, Nigeria, Switzerland and the Union of Soviet Socialist Republics. In the absence of objections, he would take it that it was the wish of the Conference to appoint them.

It was so agreed.

The PRESIDENT recalled that according to Article 51 of the Rules of Procedure the Credentials Committee would appoint its own chairman.
AGENDA ITEM 5: ORGANISATION OF THE WORK OF THE CONFERENCE, INCLUDING THE ESTABLISHMENT OF A FINAL CLAUSES COMMITTEE AND OTHER COMMITTEES, AS NECESSARY (CONF. 7/2)

APPOINTMENT OF THE DRAFTING COMMITTEE

The PRESIDENT said that in accordance with Rule 47 of the Rules of Procedure, and after consultations, he had been invited to propose the following composition of the Drafting Committee: Belgium, Brazil, China, Egypt, France, Japan, the Union of Soviet Socialist Republics, the United Kingdom and the United States of America.

*It was so decided.*

AGENDA ITEM 3: ELECTION OF THE VICE-PRESIDENTS AND OTHER OFFICERS OF THE CONFERENCE (CONF. 7/2)

ELECTION OF THE CHAIRMAN OF THE DRAFTING COMMITTEE

The PRESIDENT invited nominations for the office of Chairman of the Drafting Committee in accordance with Rule 6 of the Rules of Procedure.

Mr DE PAIVA (Brazil) proposed Mr Goode of the United Kingdom delegation.

Mr YUAN (China) seconded the proposal.

*Mr Goode was unanimously elected.*

AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING (Study LIx – Doc. 48; Study LIx – Doc. 49)

The CHAIRMAN of the Committee of the Whole suggested that since Article F of the draft Leasing Convention was closely related to the substance of Article 2 (1)(b), it might be dealt with by the Committee of the Whole rather than by the Final Clauses Committee.

*It was so agreed.*

*The meeting rose at 2.55 p.m.*

CONF. 7/S.R. 3
26 May 1988

THIRD MEETING

Wednesday, 18 May at 4.45 p.m.

*President:* Mr Smith (Canada)

AGENDA ITEM 8(d): EXAMINATION OF THE REPORT OF THE CREDENTIALS COMMITTEE (CONF. 7/8)

The PRESIDENT drew the attention of the Conference to the Report of the Credentials Committee (CONF. 7/8) and asked if there were any questions delegates might like to put to Mr Rolland (Federal Republic of Germany) who had chaired the Committee. As there were none, the PRESIDENT asked whether there was any proposal for deciding how to proceed, or whether the Conference wished to adopt the Report as it stood.
Mr DAVID-WEST (Nigeria) announced that all the representatives of the Governments of African and Caribbean countries attending the international diplomatic Conference wished to state that owing to the consistent show of deep contempt for the international community by the regular flouting of the United Nations and other international resolutions by the racist regime of South Africa, they did not consider the participation of the representatives of the apartheid regime of South Africa useful, opportune, or legitimate. Therefore, they wished to appeal strongly to all the other delegates and to the President of the Conference to use their good offices to request the representatives of South Africa to withdraw their participation from the diplomatic Conference. They would be most grateful to the President for his full support and cooperation.

Mr BADENHORST (South Africa) stated that over the years the Republic of South Africa had made a valuable contribution to different Unidroit conferences on the matter of the unification of private law. His delegation had demonstrated by its presence and participation at the diplomatic Conference that it desired to make further contributions which it trusted would be of value to the Conference in its deliberations. The ultimate value, of course, of the Unidroit Conventions on International Factoring and International Financial Leasing which the diplomatic Conference was seeking to conclude would depend on the universal acceptance of the final text of the Conventions. Unidroit’s reputation as a truly universal organisation, where the principle of universality in allowing all member States to participate in its proceedings had always been upheld, remained the best guarantee that such Conventions would be universally respected once concluded. The injection of political considerations into the proceedings of a technical conference such as this was not appropriate and created a dangerous precedent from which no member was immune. As set out in Rule 3 of the Rules of Procedure, the criteria which determined the acceptability of delegations’ credentials were firstly, that the credentials were to be submitted to the Secretary-General of the Conference within twenty-four hours after the opening of the Conference (which had been done), secondly that the credentials should be issued by the appropriate constitutional authority of the member State (this too had been done), and in phraseology acceptable to meetings of similar organisations in the past. The proposal by the distinguished representative of Nigeria that the credentials of the South African delegation be rejected, and that the South African delegation be requested to depart from the Conference, were not therefore acceptable.

Opposition to apartheid was not a novel idea. The South African Government was committed to the dismantling of apartheid. His Government had taken important steps to move to a more equitable system of government by broadening democracy and this process was continuing.

Mr RICHARDS (Antigua and Barbuda) stated that as the representative of his Government to the diplomatic Conference he wished to put his name on record as being opposed to the presence of South Africa at, and its participation in, the diplomatic Conference. The Government of Antigua and Barbuda had been vocal and unequivocal in its determination to see an end to the wicked and oppressive system of apartheid which prevailed within South Africa and which system all right-thinking people and Governments in all parts of the world found offensive and repugnant.

South Africa had been suspended from the United Nations General Assembly; it had been expelled in effect from the Commonwealth and from other international fora because of its refusal to dismantle the evil system of apartheid. He joined with the African and those other delegations which were asking for the removal of South Africa from the diplomatic Conference.

Mr MAHEK (Egypt) recalled that the declaration issued by the African representatives at the Conference was constructed in a moderate and objective form. The position of the African States was in conformity with the resolutions previously adopted by the United Nations and other international organisations vis-à-vis the continued practice of the South African regime, which was unanimously abhorred by the nations of the five continents of the world. The present Conference was a diplomatic Conference and not just a meeting of a working group. It was, therefore, difficult for the African States to participate in the deliberations and voting carried through in conjunction with a delegation from the unrecognised South African regime. Despite the fact that the African group was definitely concerned with its participation in this fruitful Conference, it still hoped that the view expressed by the representatives would receive the Conference’s kind consideration in
order that the participation of South Africa in this Conference would not be taken as a precedent to be followed in the future.

Mr ROLLAND (Federal Republic of Germany) stated that he had the honour to speak on behalf of the member States of the European Community participating in the Conference. The Conference had now to take a decision on the Report which had been submitted by the Credentials Committee according to Rule 4 of the Rules of Procedure of the Conference. The decision had to be taken as to whether the credentials of the delegation of the Republic of South Africa conformed with the requirements of Rule 3. The Credentials Committee, after examination of the credentials, had found that they were in conformity with Rule 3 as they were issued by the authorised official and contained the names of delegates present at the Conference. Therefore, the credentials were valid and there was no legal basis under which the credentials could be regarded as insufficient.

Secondly, insofar as proposals sought the exclusion of the representatives of South Africa from participation in the Conference for political reasons, the representatives of the member States of the European Community were of the opinion that there was no basis under international law for such exclusion. The internationally accepted principle of universality accorded to all States the possibility of participation in conferences for the unification of private law. Political reasons did not justify the exclusion of a State from participation in such fora.

Thirdly, this statement did not signify approval of the policy of apartheid of the Republic of South Africa. The position of the member States of the European Community with regard to that policy had been stated publicly on many more appropriate occasions by the respective Governments. In sum, the representatives of the member States of the European Community were of the opinion that the credentials of the representatives of the Republic of South Africa were in due order, and that there was no legitimate reason to exclude the Republic of South Africa from the Conference.

Mr THIAM (Guinea) said that the African group was not denying that the credentials of the delegate from South Africa were in order. However, the Conference had required that every delegate have full credentials from a sovereign State. It was this sovereignty of the South African Government and its legitimacy which the African group was challenging in view of the fact that this Government represented only a minority, and given especially its policies it could not participate in the Conference. He asked what international rule allowed South Africa to participate in international conferences, since it had been said that there were no rules preventing such participation. He was of the view on the contrary that all international rules were against South Africa’s participation and that it was for this reason that economic and political sanctions had been imposed on South Africa.

Mr KOMAROV (Union of Soviet Socialist Republics) stated on behalf of his delegation that he could support the motion of the African States which objected to the credentials of South Africa.

Mr YUAN (China) said that the Chinese delegation would like to support the stand of the representatives of the African States.

Mr PFUND (United States of America) stated that his delegation was of the view that Unidroit in its work, and international conferences convoked to adopt Unidroit prepared conventions in theirs, should not become involved in political causes, however just those causes might be. Political causes were most constructively and effectively raised and pursued in politically oriented international organisations with working methods, agendas and country representatives best suited to deal with political issues and where, unlike in Unidroit and at the Conference, there was little risk to the future, the effectiveness, the work programme and the professional reputation of those organisations.

Consistent with its mandate under the Rules of Procedure adopted for the Conference, the Credentials Committee had found the credentials of the South African delegation to be in order. He did not and could not reasonably deny the importance of the South African issue, which had so effectively been brought to the attention of all delegates at the Conference. While the United States Government completely rejected the system of apartheid, his delegation, which understood the motivations that underlay the raising of the issue, could not support any action at the Conference inconsistent with the principle of universality for Conferences of this kind and the Conference’s
own Rules of Procedure and purpose. It would, moreover, be inconsistent with the hospitality extended by the Government of Canada to all States in conformity with the principle of universality for participation in specialised conferences of this kind if the Conference, as Canada's invited guests, should move to disinvite one of the delegations attending the Conference in response to the gracious invitation of Canada to all States, including, of course, member States of Unidroit.

To the extent therefore, that the declarations made had sought the exclusion of an invited participant at the Conference, his delegation could not support that part of the declaration.

Mr AGYEKUM (Ghana) said that in his opinion there seemed to be a certain misconception of the nature of the Conference. As far as his delegation was concerned, the Conference was no different from other international conferences which had been described as diplomatic. He would like to draw the attention of the distinguished delegates to the fact that, from all the information that was provided to participants, it was clear that this was not a technical conference (as the impression had been created), but rather a diplomatic Conference of sovereign States to draw up a convention that would regulate the relationships between lessors, suppliers and lessees.

Therefore, it was the opinion of the African group that this being so they could not be seen to tread on the same path with a Government which had never accepted universal declarations or resolutions and when, might one ask, had the illegal apartheid regime accepted United Nations resolutions? For these reasons, his delegation strongly reiterated the appeal made by the African and the Caribbean States that the Conference support and cooperate in requesting South Africa to withdraw from the Conference.

Ms ESSOMBA (Cameroon) stated that her delegation did not recognise the legitimacy of the South African delegation which did not represent the people of South Africa. She also pointed out that the South African delegation had been excluded from the United Nations General Assembly on the ground that the regime was recognised neither by the African nor by the non-aligned countries. She said that the fact that South Africa was a member of Unidroit, an international institute which sought the unification of international private law, and that it had participated in the framework of Unidroit in a number of meetings of experts at different levels to study various drafts including those before the Conference, must be distinguished from South Africa's participation as a State in an international diplomatic Conference whose objective was to adopt an international convention and at which a large number of States from the international community were gathered. This was therefore not simply a Conference of technical experts and her delegation must in consequence support the statement of the Nigerian representative in the name of the African group.

Mr THIAM (Guinea) said that he had been surprised to hear a delegate say earlier that despite the fact that this was a just cause, it was possible to ignore it. He wondered what was being done here if not precisely to consider just causes. The Conference was trying to achieve a balance among all the legal systems of the various States. It was therefore seeking just causes in international relations. He would like those causes to be taken into account and asserted.

Mr ADENSAMER (Austria) stated that the position of Austria on the policy of apartheid of South Africa was sufficiently known. Austria rejected that policy and deemed it to be a systematic violation of human rights. Nevertheless, Austria did not support a proposal to exclude a State from participation in a Conference on the unification of private law.

The PRESIDENT said that, as he understood it, the statement by the representative of Nigeria was a request to him to use his good offices to request the representatives of South Africa to withdraw and was not necessarily a motion.

Mr DAVID-West (Nigeria) said that his statement had been a declaration by all the African and Caribbean representatives and it was for the President to decide what to do. He said that if the declaration were to be changed to a motion, he would not mind that, but he requested that the Conference take a decision.

The PRESIDENT said that it was necessary for the Conference to take some decision on the
Report of the Credentials Committee, whether it take note of the Report or adopt a motion along the lines of the statement of the Nigerian delegation or some other proposal since until some such decision were taken the credentials of no participating State could be accepted.

Mr THIAM (Guinea) thought that the Report should be put to a vote and South Africa's lot decided.

The PRESIDENT asked for discussion on the motion by the delegation of Guinea to put the Report of the Credentials Committee to the Conference for a vote.

Mr THIAM (Guinea) wished to make it clear that this would be a vote on South Africa's participation and not on the adoption of the Report as a whole.

The PRESIDENT proposed that the Conference vote on the approval of the Report of the Credentials Committee with the exception of the participation of South Africa.

Mr DAVID-WEST (Nigeria) reminded the President that the matter was one for him to decide and that it was incumbent upon him to make suggestions.

The PRESIDENT said there was a position before the Conference advanced by the representative of Egypt that participation by South Africa ought not to be taken as a precedent. This was a modification of the position put to the Conference by the representative of Nigeria. It was not incumbent upon him to make motions but to rule on them.

Mr MAHEK (Egypt) stated that the delegation of Egypt had not intended to suggest any modification to the Nigerian declaration and, in this sense, he thought it might be useful to put the declaration to the vote.

Mr VIDAL (Dominican Republic) supported the motion presented by the African and Caribbean States, but noted that his delegation had not co-sponsored it as it had not been consulted on that matter.

Mr MATHYS (Canada) noted that the appeal for the "use of good offices" of the delegates and of the President might present an opening for a compromise and he requested the representative of Nigeria to consider this.

Mr DAVID-WEST (Nigeria) reiterated that he was open to any suggestions by the President as to how to deal with the matter.

Mr PÉREZ-AGUILAR (Mexico) supported the declaration of the African States.

Mr SEVÓN (Finland) stated that his delegation would have no difficulty in accepting the declaration made by the African and Caribbean States as part of the Report of the Credentials Committee if that were the wish of the Conference. He observed that, at present, there were no further proposals on which the Conference was requested to act.

Mr BRENAN (Australia) supported the suggestion of the representative of Finland.

Mr MATHYS (Canada) likewise supported that suggestion.

Mr MAHEK (Egypt) believed that the representative of Canada had earlier proposed a compromise but that it had not been specified in clear-cut words.

Mr MATHYS (Canada) stated that he did not have a compromise solution and recommended acceptance of the proposal of the representative of Finland.

The PRESIDENT asked if the representative of Finland wished to put his proposal in the form of a motion.

Mr SEVÓN (Finland) answered in the affirmative and suggested that the Conference take note of the statement made by the representative of Nigeria on behalf of the African and Caribbean
States and that the statement be incorporated in the Report of the Credentials Committee.

Mr MAHEK (Egypt) proposed a motion concerning the adoption of the declaration of the representative of Nigeria as it stood.

The PRESIDENT asked if this meant that the Conference should vote on the proposal of the delegation of Finland.

Mr MAHEK (Egypt) replied that both proposals should be voted upon to ascertain how acceptable they were.

Mr DAVID-WEST (Nigeria) reminded the President that his declaration was still before the Conference but that he was amenable to any compromise solution suggested by the President as a representative of the host Government. Otherwise, his declaration should be voted upon.

Mr THIAM (Guinea) said that he had not properly understood the meaning of the compromise presented by the representative of Finland. He asked whether this compromise meant that South Africa would take part in the debates, in which case the delegation of Guinea could not support it. If however it signified that South Africa would not continue to take part in the debates, his delegation could support it.

Mr SEVÓN (Finland) understood the declaration of the representative of Nigeria to contain a request to delegations and to the President to use their good offices and to approach the South African delegation to suggest to it that it withdraw from the Conference. As he understood it, the declaration did not contain a suggestion for a vote on the participation of South Africa, so the result would then depend on the effect of the use of the good offices. Furthermore, he had made his suggestion with a view to taking into account the interests of all delegations present. He believed that his proposal had accommodated the wishes expressed in the declaration and it went no further.

Mr AGYEKUM (Ghana) drew the Conference’s attention to the specific declaration of the African group that it did not consider the participation of South Africa to be either useful, legitimate or opportune. Merely noting the declaration would imply the continued participation of South Africa and this was not the intention of the African Group when submitting its declaration.

Ms ESSOMBA (Cameroon) gathered that the President had put forward a proposal whereby the Report of the Credentials Committee would be put to the vote with the exception of the problem of South Africa’s presence. She welcomed clarification as to whether the President was requesting a vote on the first part of the Report and then a vote on the second part concerning South Africa’s presence at the Conference, since the Report comprised two parts, one of which put in question South Africa’s participation in the Conference.

Mr ROLLAND (Federal Republic of Germany) suggested a break to allow the Steering Committee to meet and to attempt to formulate a compromise.

The PRESIDENT agreed and adjourned the meeting so as to permit an immediate meeting of the Steering Committee.

The meeting was adjourned at 5.45 p.m. and resumed at 8.25 p.m.

The PRESIDENT indicated that regrettabley no compromise solution had been reached notwithstanding the best efforts of all involved. A number of suggestions had been made during the earlier part of the meeting but as he saw it there was no motion on the floor that could be debated and voted upon and he therefore invited participants to submit motions for debate and to make no more than brief comments on such motions.

Mr DAVID-WEST (Nigeria) recalled that the declaration presented by the African and Caribbean delegations had been made in a conciliatory spirit to seek the withdrawal of the representatives of South Africa. Since the Conference had not resolved the matter, he moved the following motion
on behalf of the African and Caribbean delegations: that the Conference adopt the Report of the Credentials Committee, with the exception of the credentials of the representatives of South Africa.

Mr DE PAIVA (Brazil) stated by way of explanation of vote before it took place that it was the opinion of his delegation that the issue was not to decide on the merits of the credentials of the delegation of South Africa but, above all, to decide on its participation in international organisations and conferences while the hateful practice of apartheid, the illegal occupation of Namibia and the aggression against neighbouring countries persisted. In conformity with the positions taken in the United Nations, including the vote in favour of Resolution 3224-E(XXIX) of 1974, the delegation of Brazil would vote in favour of the motion presented by the delegations of the African countries.

The PRESIDENT invited the delegates to vote on the motion submitted by the Nigerian delegation.

Ms ESSOMBA (Cameroon) stated that her delegation requested a roll-call vote on the motion, pursuant to Rule 36 of the Rules of Procedure.

The PRESIDENT read Rule 37 and rejected the motion presented by the representative of Cameroon. He invited the delegates to vote on the motion submitted by the delegation of Nigeria.

*The motion was carried by twenty-two votes to nineteen, with one abstention.*

Mr SEVÓN (Finland) stated on behalf of the Nordic countries participating in the Conference that those delegations had cast their votes in favour of the principle of universality. It was their belief that all States wishing to do so should be entitled to participate in international conferences and meetings. Their votes in favour of the principle of universality did not alter the views held by their Governments strongly condemning the system of apartheid and continuing to do so.

Mr BADENHORST (South Africa) stated that the decision of the Unidroit diplomatic Conference to expel South Africa was indeed regrettable and would be viewed in a very serious light.

Mr AGYEKUM (Ghana) questioned whether it was proper for the delegation of South Africa to speak when the Conference had voted on a motion which determined that it should not participate in the Conference.

The PRESIDENT ruled that the South African delegate be permitted to finish his statement.

Mr BADENHORST (South Africa) continued that this expulsion would be viewed in an extremely serious light by the South African Government which reserved the right to take whatever action it considered necessary to protect its interests.

Mr THIAM (Guinea) did not think that the President's decision could overrule that of the Conference and he moved an appeal against the President's decision.

The PRESIDENT concluded that his ruling must be voted upon by the Conference.

*The appeal against the President's ruling was upheld by sixteen votes to none, with twenty-one abstentions.*

The PRESIDENT concluded that in accordance with the vote the representative of South Africa should not be allowed to speak further. He closed the meeting and announced that the Committee of the Whole would reconvene after a short break.

*The meeting rose at 8.45 p.m.*
FOURTH MEETING

Thursday, 19 May 1988 at 11.50 a.m.

President: Mr Smith (Canada)


The PRESIDENT invited the Chairman of the Committee of the Whole to introduce the First Report of the Committee of the Whole to the Conference, and stated that there would then be an article by article vote, which required a two-thirds majority for the adoption of each paragraph and article of the draft Unidroit Convention on International Financial Leasing.

The CHAIRMAN of the Committee of the Whole introduced the Committee’s Report (CONF. 7/C.1/Doc. 1). He recalled that the Committee had appointed Mr Beraudo (France) and Mr Agyekum (Ghana) as First and Second Vice-Chairmen respectively. The Committee had considered the text of the draft Unidroit Convention on International Financial Leasing at fourteen meetings and had, at its fourteenth meeting, adopted the text of the substantive articles of the draft, although some minor questions had been left to be resolved by the Drafting Committee which were reflected in the text submitted to the Conference. He suggested that the Chairman of the Drafting Committee might wish to draw the attention of the Conference to the changes proposed by the Drafting Committee.

The PRESIDENT thanked the Committee of the Whole and its Chairman for their work and proposed that the Conference proceed to consideration of the preamble and draft Articles 1 to 14, recalling that the title and the final clauses would be submitted to it later.

It was so agreed.

The PRESIDENT invited the Chairman of the Drafting Committee to introduce the provisions of the draft Convention on International Financial Leasing, indicating in particular the amendments suggested by the Drafting Committee.

Preamble

The CHAIRMAN of the Drafting Committee stated that in the third paragraph of the English text, the word “relationships” had been replaced by “relationship”. No corresponding change had been made by the Drafting Committee to the French text and no other changes had been made to the preamble.

Finding that there were no observations, the PRESIDENT put the preamble as a whole to the vote.

The preamble as a whole was adopted by thirty-nine votes to none.

CHAPTER I – SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1

The CHAIRMAN of the Drafting Committee stated that no changes had been made to any of
the four paragraphs of Article 1.

The PRESIDENT proposed that for the purpose of expediting its business the Conference vote on the text article by article and only on single paragraphs when any serious difficulties arose.

It was so agreed.

The PRESIDENT found that there were no observations on any paragraph of the article and accordingly put Article 1 as a whole to the vote.

*Article 1 was adopted by thirty-nine votes to none.*

*Article 2*

The CHAIRMAN of the Drafting Committee stated that in the English text the words "and is" had been added before the word "otherwise" for the purposes of clarification while in the French text the words "au sens de la présente Convention" had been replaced by "et qui est régie par la présente Convention". No other changes had been made in either language version.

Having found that there were no observations, the PRESIDENT put Article 2 as a whole to the vote.

*Article 2 was adopted by thirty-nine votes to none.*

*Article 3*

The CHAIRMAN of the Drafting Committee stated that although the English text of paragraph 1 remained unchanged, some small verbal amendments had been made to the French version. The word "soit" had been deleted in sub-paragraph (a) and had at the beginning of sub-paragraph (b) been replaced by "que". No changes had been made to the text of paragraph 2 in either language version.

Having found that there were no observations on either paragraph 1 or paragraph 2, the PRESIDENT put Article 3 as a whole to the vote.

*Article 3 was adopted by forty votes to none.*

*Article 4*

The CHAIRMAN of the Drafting Committee stated that paragraph 1 had been amended to express the idea in negative form rather than in the affirmative so that whereas it had previously read: "The provisions of this Convention shall continue to apply if the equipment becomes a fixture to or incorporated in land", the new wording was as follows: "The provisions of this Convention shall not cease to apply merely because the equipment has become a fixture to or incorporated in land". A similar change had been made to the French text which had formerly read: "Les dispositions de la présente Convention continuent de s'appliquer même après l'incorporation ou la fixation du matériel à un immeuble". It now read: "Les dispositions de la présente Convention ne cessent pas de s'appliquer du simple fait de l'incorporation ou de la fixation du matériel à un immeuble".

Paragraph 2 of Article 4 incorporated the language contained in the former Article 8. No changes had been made to the text of the provision either in English or in French.

Having found that there were no observations on either paragraph 1 or paragraph 2 of the article, the PRESIDENT put Article 4 as a whole to the vote.

*Article 4 was adopted by thirty-nine votes to one.*
Article 5

The CHAIRMAN of the Drafting Committee stated that a change had been made in paragraph 1 to reflect a proposal made by the Portuguese delegation. The former text provided that "[t]he lessor, the lessee and the supplier may agree to exclude the application of this Convention". It had, however, been suggested that such language might give rise to the implication that common agreement was necessary and to overcome that difficulty the Drafting Committee had proposed that the text read as follows: "The application of this Convention may be excluded only if each of the parties to the supply agreement and each of the parties to the leasing agreement agree to exclude it". Likewise, the former French text "[l]e crédit-bailleur, le crédit-preneur et le fournisseur peuvent convenir d'exclure l'application de la présente Convention" had been amended so as to read as follows: "L'application de la présente Convention ne peut être écartée que si chacune des parties au contrat de fourniture et chacune des parties au contrat de crédit-bail consent à son exclusion".

Paragraph 2 remained unaltered in both the English and the French versions except for an alteration in relation to the cross-references which took account of the transfer of the content of the former Article 8 to Article 4.

Mr MOONEY (United States of America) enquired whether the words "as stated" in paragraph 2 constituted an addition to the text.

The CHAIRMAN of the Drafting Committee stated that this was the case. In the French text the words "de ce qui est prévu" had been added.

The PRESIDENT having found that there were no other observations on either paragraph 1 or paragraph 2, he put Article 5 as a whole to the vote.

*Article 5 was adopted by forty-two votes to none.*

Article 6

The CHAIRMAN of the Drafting Committee stated that no changes had been made either to paragraph 1 or to paragraph 2 of Article 6.

The PRESIDENT having found that there were no comments on either paragraph of the article, he put Article 6 as a whole to the vote.

*Article 6 was adopted by forty votes to none.*

CHAPTER II – RIGHTS AND DUTIES OF THE PARTIES

Article 7

The CHAIRMAN of the Drafting Committee stated that while no changes had been made to the English text of paragraph 1, the words "définitif ou provisoire" had been added at the end of sub-paragraph (a) of the French version.

As regards paragraph 2, the French text had been changed from "... que dans les conditions fixées par ces règles" to read "... que si les conditions fixées par ces règles ont été respectées" so as to bring it into line with the English text which had not been altered.

The first change to paragraph 3 resulted from the adoption of an Australian proposal to the effect that the contents of the former paragraph 4 referring to the specified time be brought into the *chapeau* of paragraph 3 which in the English text now read: "For the purposes of the previous paragraph the applicable law is the law of the State which, at the time when a person referred to in paragraph 1 becomes entitled to invoke the rules referred to in the previous paragraph, is:...". The corresponding French text read: "Aux fins du paragraphe précédent, la loi applicable est la loi de l'Etat qui, au moment où la personne visée au paragraphe 1 est en droit d'invoquer les règles visées..."
au paragraphe 2, est:”.

In sub-paragraph (a) of the English text, the word “where” had been substituted by “in which” while in the French version the words “ou le bateau” had been inserted so as to make it clear that sub-paragraph (a) applied to both sea-going ships and inland navigation vessels. As regards sub-
paragraph (b) the reference to registration had been brought forward from the words “the State” to qualify the word “aircraft” so that the English text now read: “in the case of an aircraft which is registered pursuant to the Convention on International Civil Aviation done at Chicago on 7 December 1944, the State in which it is so registered;” and the French “en ce qui concerne les aéronefs immatriculés conformément à la Convention relative à l’Aviation civile internationale faite à Chicago le 7 décembre 1944, l’Etat dans lequel l’aéronef est immatriculé;”.

As regards sub-paragraph (c) the word “where” had been replaced by “in which” in the English version and a minor grammatical error corrected in the French text which now read “en ce qui concerne un autre matériel, appartenant à une catégorie de matériel ...”, while finally in sub-
paragraph (d) the words “in which” had been substituted for “where” in the English version. No alteration had been made to the French text.

The PRESIDENT called for comments on the changes to Article 7 proposed by the Drafting Committee.

Mr GAVALDA (France) stated that it did not seem grammatically correct to repeat the word “est” twice in the chapeau of Article 7(3). He suggested that the one before the colon be deleted.

Ms DEBOYSER (Belgium) pointed out that the first “est” referred to the applicable law, whereas the second referred to the State and in consequence she suggested that the text remain unaltered.

Mr BERAUDO (France) felt that it would be preferable to return to the text as it had been submitted to the Committee of the Whole. In his opinion the confusion arose from the attempt that had been made to combine two separate ideas in a single paragraph, one concerning the applicable law and the other the specified time. These two ideas should be dealt with separately in two distinct paragraphs, numbered 3 and 4.

Mr SAMSON (Canada) admitted that the text proposed by the Drafting Committee might present some difficulties but nevertheless he believed that the text should be retained since it was the outcome of a consensus that had been difficult to obtain.

Mr GAVALDA (France) expressed the view that the matter did not relate simply to a stylistic inelegance but to a grammatical error upon which university professors and perhaps even judges might comment.

The CHAIRMAN of the Drafting Committee suggested solving the problem by bringing forward the second “est” so that the text would read, “... la loi de l’Etat qui est, au moment ...”.

Mr MOONEY (United States of America) proposed that a vote be taken on the amendment.

The PRESIDENT suggested that time be given to reflect on the proposal and that in the meantime the Chairman of the Drafting Committee comment on paragraph 4 of Article 7.

The CHAIRMAN of the Drafting Committee stated that since the former paragraph 4 had been incorporated in paragraph 3, the former paragraph 5 had been renumbered paragraph 4. The only changes were the substitution in the English text of the word “treaty” for “Convention” and in the French version of the words “tout autre traité” for “tout autre accord international”.

As regards paragraph 5, there were no changes in the English text but in the French text the words “définitif ou provisoire” had been added in sub-paragraph (a) while in sub-paragraph (b) the reference was now to “... des navires, des bateaux et des aéronefs ...”. No other changes had been made to either the English or the French text.

The PRESIDENT having found that there were no observations on paragraphs 4 and 5 he
proposed to put first to the vote the amended paragraph 3 and then Article 7 as a whole.

Mr SEVÓN (Finland) requested that the proposed text of the French version of the *chapeau* of paragraph 3 be read out.

The CHAIRMAN of the Drafting Committee stated that the French text would read: "Aux fins du paragraphe précédent, la loi applicable est la loi de l'État qui est, au moment où la personne visée au paragraphe 1 est en droit d'invoquer les règles visées au paragraphe 2:." A similar change could be made to the English version which would read: "For the purposes of the previous paragraph the applicable law is the law of the State which is, at the time when a person referred to in paragraph 1 becomes entitled to invoke the rules referred to in the previous paragraph:"

Mr BERAUDO (France) recalled that his delegation's proposal had not been to bring forward the "*est*" at the end of the *chapeau* to follow the word "*qui*" but rather to delete it.

The CHAIRMAN of the Drafting Committee believed that there was a misunderstanding as there were two sentences to be dealt with so that it was necessary to repeat the verb "*is*" in English and "*est*" in French.

Mr MOONEY (United States of America) suggested that the change in the English version proposed by the Chairman of the Drafting Committee would in essence return the text to the form it had been in before the meeting of the Drafting Committee.

Mr DOUKOURE (Guinea) considered that what had been said in French had not been said in the same words in English. He supported the United States proposal that there should be a translation other than that being attempted now since this would affect the meaning of the English text.

Ms DUSSEAX (Commission of the European Communities) shared the opinion of the Belgian representative to the effect that the first "*est*" referred to the applicable law and the second to the State determined in the following sub-paragraphs. The second "*est*" could not therefore be deleted. She found the proposal by the Chairman of the Drafting Committee to be one which would clarify the text even if the language was not particularly elegant.

Mr DUARTE (Portugal) suggested that as a way of solving the difficulty raised by the French representative, the word "*est*" be deleted at the end of the *chapeau* of paragraph 3 and inserted at the beginning of each sub-paragraph.

The PRESIDENT summarised the proposals as being one for deleting the word "*est*" at the end of the *chapeau* of paragraph 3, one by the Chairman of the Drafting Committee to bring it forward and one by the delegation of Portugal to transfer it to the beginning of each sub-paragraph.

Mr BRENAN (Australia) supported the retention of the text contained in CONF. 7/C.1/Doc. 1 in both language versions.

Mr GAVALDA (France) withdrew his delegation's proposal in the belief that the meaning of the provision was clear, albeit it was expressed inelegantly.

The PRESIDENT thanked the French delegation for its willingness to withdraw its proposal. Since the other proposals which had been made had been intended to overcome the difficulty encountered by that delegation he wondered whether they too might not be withdrawn. Having found this to be the case he put Article 7 as a whole to the vote.

Mr RÉCZEI (Hungary) raised a point of order and suggested moving the reference to "la loi applicable" in the French text of the *chapeau* of paragraph 3 so as to read: "La loi applicable aux fins de la présente Convention ...".

The PRESIDENT stated that in his view the point raised by the Hungarian delegation was not a point of order but rather a new proposal which he could not entertain as voting had already begun.
**Article 7 as a whole was adopted by thirty-four votes to none with one abstention.**

The PRESIDENT noted that he had omitted to put to the vote the title of Chapter I and if there was no opposition he proposed that the Conference vote the titles of Chapters I and II together.

*It was so agreed.*

**The titles of Chapters I and II were adopted by thirty-nine votes to none.**

**Article 8**

The CHAIRMAN of the Drafting Committee stated that paragraph 1 of Article 8 (formerly Article 9) remained unchanged in both language versions.

As regards paragraph 2, this had been amended in regard to the onus of proof to reflect the adoption by the Committee of the Whole of a proposal by the Swedish delegation. In consequence the concluding language which formerly read "... where such title, right or claim is derived from an act or omission of any person other than the lessee" now read "... where such title, right or claim is not derived from an act or omission of the lessee". The French text which previously read "... lorsque ce droit ou cette prétention résulte de l'acte ou de l'omission de toute personne autre que le crédit-preneur" had been correspondingly amended to read "... lorsque ce droit ou cette prétention ne résulte pas de l'acte ou de l'omission du crédit-preneur".

In connection with paragraph 3, the language had been brought into line with corresponding language in the United Nations Sale Convention so that in English the beginning now read: "The parties may not derogate from or vary the effect of the provisions of the previous paragraph ..." instead of "[t]he parties may not exclude or vary the provisions of the previous paragraph ...". The French version now read: "Les parties ne peuvent déroger aux dispositions du paragraphe précédent ni en modifier les effets ..." instead of "[l]es parties ne peuvent exclure ou modifier les dispositions du paragraphe précédent ...".

Mr BERAUDO (France) referred to a joint proposal submitted by France, Mexico and the Philippines in CONF. 7/W.P. 1 which would permit a reservation with respect to Article 8(3) and he suggested that this reservation clause (now Article F) be considered in conjunction with Article 8(3) itself.

The PRESIDENT enquired whether this procedural proposal met with the assent of the Conference.

*It was so decided.*

Mr BERAUDO (France) stated that paragraph 3 had the effect of allowing the parties to derogate from the principle contained in paragraph 2, the only limitation being an intentional or grossly negligent act or omission of the lessor. He pointed out that under many legal systems, including the French legal system, it was not possible to contract out of one's own liability for negligence. Paragraph 3, in that it allowed the lessor to contract out of such liability, was thus unacceptable to the delegations co-sponsoring the introduction of a reservation clause. The reservation was therefore intended to allow States, not the parties to the contract, to declare that they would not apply Article 8(3) and for States that adopted the reservation it would be possible to apply ordinary contract law in dealings between the lessor and the lessee.

In certain States the lessor could exclude its liability for gross negligence. Under paragraph 3, however, States that did not permit this would be obliged to recognise the lessor's exclusion of liability for simple negligence, whereas if paragraph 3 were deleted, even if the lessor were to choose a law that would allow such a broad exclusion, the States that had made the reservation would be able to reflect the fact that such a broad exclusion was contrary to their fundamental principles and not to give it effect.
Consequently, although the non-application of Article 8(3) by States that had made the reservation might give the impression of greater freedom, in fact the freedom of the parties would be limited by the fundamental principles of the State in which, through the effect of the reservation, the rules of law and the fundamental principles governing leasing agreements would be reintroduced. For example, if the lessor belonged to a State that allowed contracting out of all liability and the lessee were French, the clause would be declared null and void if the proceedings took place in France, and if the proceedings took place in a State that allowed such contracting out, then when enforcement of the judgment was sought in France the clause would be declared to be of no effect as being contrary to the fundamental principles of French law.

Such a reservation clause had been proposed on a number of occasions. It was fundamental because it would make it possible to maintain a balance between the interests of the lessor and those of the lessee throughout the Convention. Without this reservation, paragraph 3 would mean that the leasing agreement would remain valid even if the equipment had been leased twice and even if the lessor had leased equipment belonging to someone else. In conclusion, paragraph 3 had been adopted by a slim majority and the States that sought its insertion in the text should understand that the situation was too serious for the minority to accept it. The risk was that such States would be unable to accept the Convention.

Mr GOODE (United Kingdom) stated that he understood the concern of any State at what it conceived to be the infringement of a fundamental principle. However, the Conference was faced with an international convention regulating not a domestic consumer transaction but an international commercial transaction where almost as a matter of course warranties of quiet possession were excluded tout court.

The text of paragraph 3 cut down this possibility of exclusion quite substantially, which was an advantage to lessees. A spirit of compromise was clearly necessary but it was obvious that the effect of reservations was to weaken the force of an international convention. In Rome considerable time had been spent in seeking a compromise solution which seemed to have found general favour and he believed that the difficulty was not quite as great as had been suggested because if the matter came before a French court one of two things would happen. Either the court would decide that in the light of the Convention it would take a more relaxed attitude to what had previously been regarded as a question of fundamental policy or alternatively take the view that the principle was so fundamental in French jurisprudence that French public policy would have to override what would otherwise be an obligation under the Convention. Such a solution would be preferable to interfering with the integrity of the Convention.

Mr SÁNCHEZ CORDERO (Mexico) supported the reasoning of the representative of France and called for a roll-call vote on the proposal.

Mr SEVÓN (Finland) stated that, contrary to what had been said by the representative of France, paragraph 3 had not been adopted by a narrow majority in the Committee of the Whole. The paragraph had not been voted on separately but Article 9, as it then was, had been approved as a whole by twenty-four votes in favour, three against and two abstentions.

He stated that he could understand the French proposal from the point of view of legal systems that restricted, more than did Article 8(2) through (4), the possibility for the lessor to relieve itself of liability for intentional acts, gross negligence and similar acts. However, from the deliberations of the Committee of the Whole he had understood that there were some legal systems under which it was possible to contract out of liability for intentional fault and, if the proposed reservation were to be accepted as it was at present drafted, it would in those legal systems be possible for the lessor to relieve itself of any liability in any case for disturbance of the quiet possession of the lessee. This did not appear to his delegation to be a satisfactory result. He could have supported the joint proposal had it been restricted to States under whose legislation the possibility of limiting liability would be more restrictive than what followed from Article 8 as at present drafted but as it did not do so it could be detrimental to the balance of interests between the parties.

Mr SAMSON (Canada) felt that the proposed reservation was not justified as paragraph 3
already contained minimum rules for the protection of the lessee. The provision could cause difficulties for Canadian internal law but the Conference had not been assembled for the purpose of incorporating into an international convention each State’s concepts of national law. It was necessary to seek a minimum consensus on the basis of which uniformity could be achieved and he recalled that for those legal systems which were more generous to lessees than were the provisions of Article 8(3), paragraph 4 of that article provided that the provisions of paragraphs 2 and 3 would not affect any broader warranty of quiet possession by the lessor which was mandatory under the law applicable by virtue of the rules of private international law.

Mr AGYEKUM (Ghana) stated that he supported the introduction of the proposed reservation. The text of Article 8(3) suggested that lessors could opt out of liability at any time and did not therefore give adequate protection to the interests of lessees. The joint proposal was in his opinion of a non-mandatory nature and ought not to cause difficulty.

Mr THIAM (Guinea) supported the inclusion of a reservation to the extent that the text as worded posed a problem of inconsistency between the international transaction described and the domestic public policy of certain States. If such an opposition did indeed exist, then ratification might prove difficult, at least for his own country, since it did not accept a restrictive interpretation of commercial law.

He could therefore support the joint proposal but in an amended version which would reflect the views expressed by the representative of Finland.

Mr RÉCZEI (Hungary) stated that he had changed his attitude to the question under consideration since its discussion by the Committee of the Whole. The lessor was under an obligation to put the lessee in possession of the equipment and to guarantee its quiet possession. He did not accept the proposition that a lessee whose possession was disturbed by a lessor that had contracted out of any eventual liability in that regard should be obliged to pay rentals while deprived of the use of the equipment. Such a result would be contrary to the intent of the Convention and was not desirable.

Mr BERAUDO (France) stated that the delegations of France, Mexico and the Philippines accepted the amendment proposed by the representative of Finland and were therefore submitting a revised proposal for a reservation to Article 8(3) worded as follows:

“A Contracting State may declare at the time of signature, ratification, acceptance, approval or accession that it will substitute its domestic law for Article 8(3) if its domestic law does not permit the lessor to exclude its liability for its default or negligence”.

The PRESIDENT proposed that the Conference briefly adjourn so as to permit all delegations to obtain a written text of the new proposal.

The meeting was adjourned at 1.10 p.m. and resumed at 1.40 p.m.

The PRESIDENT announced that the new text was to be found in CONF. 7/W.P.2.

Mr BERAUDO (France) stated that the effect of the new proposal was different from the original one. Article 8(3) would remain but a State whose domestic law did not allow the lessor to contract out of liability for its fault or negligence would substitute its domestic law for the final phrase of paragraph 3. Thus the general mechanism of paragraphs 2, 3 and 4 was preserved but the term “intentional or grossly negligent act or omission” had been replaced by the words “default or negligence”.

One consequence for a State which availed itself of the reservation would be that it would not be possible validly to include exoneration from liability for fault or negligence in leasing agreements while another would be that the lessor would always have to tender the equipment subject to the leasing agreement.

Mr REBMANN (Federal Republic of Germany) warmly supported the new proposal. The lessor’s undertaking to grant the lessee the right to use the equipment under Article 1 was a
fundamental and characteristic obligation of the financial leasing contract. There were indeed a number of countries which did not permit exoneration from liability in such cases and indeed such a derogation in a domestic contract would, in the Federal Republic of Germany, be void.

Mr MOONEY (United States of America) associated himself with the view of the representative of Canada that Article 8(4) solved all the problems to which the proposed reservation was addressed. The Convention did not create a choice of law rule that would affect what the State of the forum would do when applying its own law. The language of paragraph 3 clearly implied that matters other than intentional or gross negligence could be waived and it was for this reason that paragraph 4 provided that mandatory rules of applicable national law would not be affected by paragraphs 2 and 3.

He counselled delegations to consider the proposed reservation clause not just on its merits but also in the light of the unification process in general. The adoption of reservation clauses was damaging to that process and risked concentrating undue attention on the questions which were the subject of the reservation. Adoption of the proposal would set an unfortunate precedent for work on unification in other areas of commercial law and he strenuously urged its rejection.

Mr KATO (Japan) agreed with the comments of the representative of the United States of America. This was one of the most sensitive articles in the Convention and it had taken much time and effort to secure a compromise in the Committee of the Whole. That compromise was itself now being put in question and if the proposal were to be accepted he feared that the process of unification would be damaged.

The PRESIDENT recalled that in conformity with Rule 34(1) of the Rules of Procedure the proposal would require a two-thirds majority of representatives present and voting for its adoption and he requested the Conference to vote on the proposal of France, Mexico and the Philippines as set out in CONF. 7/W.P. 2.

Mr THIAM (Guinea) raised a point of order. It was his recollection that the representative of Mexico had asked for a roll-call vote but if this were not the case he would himself make such a request.

The PRESIDENT recognised the point of order and, in application of Rule 36 of the Rules of Procedure, requested the representative of Tanzania to begin by casting her vote. The vote proceeded as follows:

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<td>Tanzania:</td>
<td>in favour</td>
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<td>Thailand:</td>
<td>abstention</td>
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<td>Turkey:</td>
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<td>Union of Soviet Socialist Republics:</td>
<td>abstention</td>
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<td>United Kingdom:</td>
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<td>United States of America:</td>
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<td>Venezuela:</td>
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<td>Yugoslavia:</td>
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<td>Zaire:</td>
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<td>Algeria:</td>
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<td>Angola:</td>
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<td>Antigua and Barbuda:</td>
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<td>Brazil:</td>
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<td>Bulgaria:</td>
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<td>Burundi:</td>
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<tr>
<td>Cameroon:</td>
<td>in favour</td>
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<tr>
<td>Canada:</td>
<td>against</td>
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The proposal for a new Article F was adopted by twenty-seven votes to twelve with three abstentions.

The CHAIRMAN of the Drafting Committee stated that the new Article 8(4) was the result of the Canadian proposal which had been adopted by the Committee of the Whole and that its purpose was to preserve the effect of any broader warranty of quiet possession available under applicable domestic law.

The PRESIDENT having found that there were no observations on paragraph 4, he put Article 8 as a whole to the vote.

**Article 8 as a whole was adopted by thirty-four votes to none, with two abstentions.**

*Article 9*

The CHAIRMAN of the Drafting Committee stated that apart from its consequential renumbering the only change to Article 9 was in paragraph 1 which had been amended so as to address the point raised by the delegation of the Philippines concerning the duty of the lessee in those cases where a modification to the equipment had been effected by the agreement of the parties. To this
end, the wording of the English text of paragraph 1 had been amended by the addition of the words “and to any modification of the equipment agreed by the parties” and the French version by the insertion of the words “et de toute modification du matériel convenue par les parties”.

He added that paragraph 2 of Article 9 remained unchanged in both language versions.

The PRESIDENT having found that there were no observations on either paragraph of the article, he put Article 9 as a whole to the vote.

*Article 9 as a whole was adopted by thirty-nine votes to none.*

*Article 10*

The CHAIRMAN of the Drafting Committee stated that there were no changes either to paragraph 1 or to paragraph 2 of the article, apart from its renumbering.

The PRESIDENT having found that there were no observations on either paragraph of the article, he put Article 10 as a whole to the vote.

*Article 10 as a whole was adopted by thirty-eight votes to none.*

*Article 11*

The CHAIRMAN of the Drafting Committee stated that no changes had been made to Article 11, in either the English or the French text, apart from its renumbering.

The PRESIDENT having found that there were no comments on Article 11, he put the article to the vote.

*Article 11 was adopted by forty-one votes to none.*

*Article 12*

The CHAIRMAN of the Drafting Committee recalled that attention had been drawn in the Committee of the Whole to an inconsistency between the language of paragraphs 1 and 3 of the article (formerly Article 13) relating to the curing of non-conforming tenders. A former text of paragraph 1(b) contained language taken over from the United Nations Sale Convention, providing that “the lessor has the right to remedy the failure to perform any of its duties” but this wording had not reflected the alteration made to paragraph 3 which referred to a tender of equipment in conformity with the supply agreement. The Drafting Committee had come to the conclusion that the intention of the Committee of the Whole could best be implemented by bringing paragraph 1(b) into line with paragraph 3 and it had therefore proposed on the one hand that the former language be replaced by the words “the lessor has the right to remedy its failure to tender equipment in conformity with the supply agreement” and on the other that at the end of paragraph 1 the words “as if the lessee had agreed to buy the equipment from the lessor under the supply agreement” be replaced by “as if the lessee had agreed to buy the equipment from the lessor under the same terms as those of the supply agreement”.

Similar amendments had been introduced in the French text, the expressions “le crédit-bailleur a le droit de remédier à l’inexécution de l’une quelconque de ses obligations” and “comme si le crédit-bailleur avait acheté le matériel au crédit-bailleur dans les conditions du contrat de fourniture” having been replaced by “le crédit-bailleur a le droit de remédier à l’inexécution de son obligation de livrer le matériel conformément au contrat de fourniture” and “comme si le crédit-bailleur avait acheté le matériel au crédit-bailleur dans les termes mêmes du contrat de fourniture” respectively.

He added that while there had been no alteration to paragraph 2 in either language version, an
amendment had been made to paragraph 3 to take account of the changed language of paragraph 1. The English text now read "... until the lessor has remedied its failure to tender equipment in conformity with the supply agreement ..." instead of "... until the lessor has tendered equipment in conformity with the supply agreement ..." while in the French version the language "... jusqu’à ce que le créditor-bailleur ait livré un matériel conforme au contrat de fourniture ..." had been replaced by the words "... jusqu’à ce que le créditor-bailleur ait remédie à l’inexécution de son obligation de livrer le matériel conformément au contrat de fourniture ...".

In conclusion he indicated that while no changes had been made to paragraphs 4 and 5 in either English or French, it had been necessary in paragraph 6 to alter the cross-reference which was now to Article 10.

Mr BERAUDO (France) stated that he would prefer the retention of the former language in paragraph 3. The original text was simpler and he feared that the more complicated language of the revised version could give rise to ambiguity and difficulties of interpretation.

Ms DEBOYER (Belgium) agreed that the language of the initial text was clearer but it was nevertheless incorrect. The conformity mentioned in paragraph 3 referred not only to the equipment but also to the obligation to tender the equipment, in all its aspects.

The CHAIRMAN of the Drafting Committee believed that the comments of the representative of Belgium had drawn attention to the main thrust of the amendment. Moreover, there were different ways of curing a non-conforming tender, as had been pointed out by the representative of Canada. One such way was by delivering conforming equipment and another by making some monetary payment or adjustment. In the light of the Canadian observations, the Committee of the Whole had instructed the Drafting Committee to revise the text. It was for this reason that the reference which had been made initially in paragraph 1(b) in rather too broad terms to the lessor’s right to remedy its failure to perform its duties had been altered in the new version which spoke of the lessor’s right to remedy its failure to tender equipment in conformity with the supply agreement. Paragraph 3 had therefore been modified to bring the text into line with paragraph 1.

Mr SEVON (Finland) stated that since his delegation was of the view that the proposal of the French delegation was one of substance rather than of drafting it was not in favour of reverting to the former language of paragraph 3.

Mr BERAUDO (France) stated that in the light of the explanations of the representative of Belgium he would withdraw his delegation’s proposal.

The PRESIDENT put Article 12 as a whole to the vote.

Article 12 as a whole was adopted by thirty-eight votes to none.

Article 13

The CHAIRMAN of the Drafting Committee stated that paragraph 1 of Article 13 (formerly Article 14) remained unchanged in both language versions.

As regards paragraph 2 he indicated that there was no change in the English text but that the French version had been altered to take account of the concern expressed by the delegation of Switzerland as to a possible divergence between the two language versions inasmuch as the English text spoke of “substantial” default on the part of the lessee and the French of “défaillance grave”. The Drafting Committee had reached the conclusion that the adjective “substantielle” would more accurately reflect the word “substantial” in the English version as the word “grave” could be taken as implying a more serious form of breach and that its use would bring about a change of substance in the text.

Mr SANTOS (Philippines) recalled that he had drawn the attention of the Committee of the Whole to the fact that if the lessee’s default were substantial, then under the article the lessor was
entitled not only to recover accrued unpaid rentals together with interest and damages but also to terminate the leasing agreement. He had also pointed out that in the event of termination the lessor could recover possession of the equipment and such damages as would place the lessor in the position it would have been in had the lessee performed the leasing agreement in accordance with its terms. After recovery of the equipment the lessor could also claim the value of unpaid future rentals. He had stated therefore that in the opinion of his delegation this solution was burdensome for lessees. The Chairman of the Drafting Committee had replied that it was implicit in the text that the value of the recovered equipment would be taken into account when assessing the damages payable by the lessee and he wondered whether it might not be possible to amend the present language of Article 13 to enunciate that principle expressly.

Mr DE PAIVA (Brazil) stated that it was his recollection of the previous discussions that it had been agreed that the article might be redrafted so as to take account of the concern expressed by the delegation of the Philippines.

The CHAIRMAN of the Drafting Committee said that this was indeed correct but in view of the lateness of the hour at which the Drafting Committee had met he had requested the representative of the Philippines not to press his proposal and he thought that the latter had agreed not to do so.

Mr SANTOS (Philippines) confirmed that this had been the case but the Conference had time before it now and as one delegation had expressed support for his suggestion he was prepared to submit an oral proposal for amendment of Article 13 if the Conference would entertain it.

Mr MOONEY (United States of America) expressed the opinion that the Conference was in the process of making a law and not explicating all aspects of contractual measures of damages. The point raised by the delegation of the Philippines could not be more explicitly met than was done by paragraph 6 of Article 13 which provided that the lessor would not be entitled to recover damages to the extent that it had failed to take all reasonable steps to mitigate its loss. That language could only be understood as expressly dealing with the concern voiced by the representative of the Philippines and indeed over the years during which the draft Convention had been elaborated the concept of mitigation had always been understood as being one concept which would avoid double recovery by the lessor. It went without saying that if repossessing of the equipment satisfied the claims of the lessor then no damages would be payable. He therefore urged retention of the text as it stood.

Ms MANNING (Tanzania) enquired whether the lessor would, under the present wording of Article 13, be permitted to recover punitive damages.

The PRESIDENT asked whether there were any other observations on the request by the delegation of the Philippines to be permitted to move an oral amendment to Article 13.

After finding that there were none he recalled that the question had already been the subject of a lengthy debate. Unless there was strong support for the proposal of the Philippines, which he did not detect, he proposed that the Rules of Procedure, which required amendments to be submitted in writing at this stage, should be observed.

*It was so agreed.*

The CHAIRMAN of the Drafting Committee indicated that while the French text of paragraph 3 remained unaltered, apart from the deletion of the words “à l’une quelconque” the concluding language of the English version of sub-paragraph (b), which had previously read “the effect of this sub-paragraph” had been amended to read “the effect of the provisions of the present sub-paragraph” so as to bring it into line with the French version.

Paragraph 4 had been amended in both versions by the addition in the English text of the language “[t]he parties may not derogate from or vary the effect of the provisions of the present paragraph” and in the French of the words “[l]es parties ne peuvent déroger aux dispositions du présent paragraphe ni en modifier les effets”.

No changes had been made to paragraphs 5 and 6 in either English or French.
The PRESIDENT having found that there were no further observations on Article 13, he put the article as a whole to the vote.

*Article 13 as a whole was adopted by thirty-two votes to none, with four abstentions.*

*Article 14*

The CHAIRMAN of the Drafting Committee stated that no changes had been made, either in English or in French, to the article, apart from its renumbering.

The PRESIDENT having found that there were no observations on either paragraph 1 or paragraph 2, he put Article 14 as a whole to the vote.

*Article 14 as a whole was adopted by forty-one votes to none.*

The SECRETARY-GENERAL announced that the final clauses of the Convention had been considered on first reading by the Final Clauses Committee and had been submitted to the Drafting Committee. They should be reconsidered by the Final Clauses Committee and by the Drafting Committee and would be presented to the Conference towards the end of its proceedings together with the text of the draft Convention on International Factoring.

*The meeting rose at 2.30 p.m.*

FIFTH MEETING

Thursday, 26 May 1988, at 11.35 a.m.

*President: Mr Smith (Canada)*

The PRESIDENT indicated that the Conference would consider the Addendum to the Report of the Credentials Committee and a technical amendment to the Financial Leasing Convention to bring it in line with the Factoring Convention, after which it would be called upon to adopt the title of the Convention on Financial Leasing, the Final Clauses and then the Convention as a whole.

**AGENDA ITEM 8(d): EXAMINATION OF THE REPORT OF THE CREDENTIALS COMMITTEE (CONF. 7/8 Add.)**

The PRESIDENT called for comments on the Addendum to the Report of the Credentials Committee.

*No comments having been made, the Conference adopted the Addendum to the Report of the Credentials Committee.*


The PRESIDENT requested the representative of Canada to introduce his delegation’s proposed amendment to Article 3.
Mr CUMING (Canada) explained that the Canadian proposal was to change the word "article" to "Convention" in Article 3(2) of the Leasing Convention (CONF. 7/W.P. 3). This change would mean that the interpretive rule set out in Article 3(2) would apply to other provisions of the Convention, and in particular to Articles 18 and 19 which contained references to the place of business of the parties.

The PRESIDENT stated that unless he heard any views to the contrary he would assume that there was a two-thirds majority for consideration of the amendment. There being no objections, he called for comments on the proposed amendment.

Mr SEVÓN (Finland) supported the Canadian proposal. He noted that this detail had been overlooked by the Committee of the Whole and during the previous meeting of Plenum.

Mr DE NOVA (Italy) also supported the Canadian proposal.

There being no other observations on the proposal, the PRESIDENT invited the Conference to vote on the proposed amendment.

The amendment was adopted by thirty votes to none with one abstention.

The PRESIDENT invited the Conference to vote on the adoption of Article 3 as a whole.

Article 3 as a whole was adopted by thirty-two votes to none.

AGENDA ITEM 8(c): EXAMINATION OF THE FIRST REPORT OF THE FINAL CLAUSES COMMITTEE (CONF. 7/C.2/Doc. 1)

The PRESIDENT invited the Chairman of the Final Clauses Committee to present the First Report of that Committee to the Conference.

The CHAIRMAN of the Final Clauses Committee stated that the Committee had, at its third meeting, adopted the proposed title and the text of the final clauses of the draft Leasing Convention.

The PRESIDENT invited the Conference to vote on the adoption of the title "Unidroit Convention on International Financial Leasing" and of the title "CHAPTER III – FINAL PROVISIONS".

The titles of the Convention and of Chapter III were adopted by thirty-six votes to none.

Article 15

The CHAIRMAN of the Drafting Committee stated that Article 15 corresponded to Article A of the draft final clauses prepared by the Unidroit Secretariat which appeared in Study LIX – Doc. 49. The two modifications to the text of paragraph 1 of the article had been the inversion of the words "draft" and "Unidroit" in the title of the Conference in the English text ("projets d'Unidroit de Conventions" being replaced by "projets de Conventions d'Unidroit" in the French version) and the insertion of the date of 31 December 1990 as that until which the Convention would remain open for signature.

No changes had been made in paragraphs 2, 3 and 4 of the article.

No comments being made on any of the paragraphs of Article 15, the PRESIDENT put Article 15 as a whole to the vote.

Article 15 was adopted by thirty-seven votes to none.
Article 16

The CHAIRMAN of the Drafting Committee stated that the text of the two paragraphs of Article 16 corresponded exactly to that of the former Article B in both the English and the French versions.

No comments having been made on either paragraph of the article, the PRESIDENT put Article 16 as a whole to the vote.

*Article 16 was adopted by thirty-two votes to none.*

Article 17

The CHAIRMAN of the Drafting Committee stated that Article 17 constituted a substantially revised version of the former Article C. As far as the English text was concerned, the words “international agreement” had been replaced by “treaty”, the phrase “any liability imposed on any person by existing or future treaties” added and the words “provided that the supplier, the lessor and the lessee have their places of business in States parties to such agreement” deleted.

In the French version, the words “accord international” had been replaced by “traité”, the phrase “à la responsabilité qui pèse sur toute personne en vertu de traités existants ou futurs” added and the proviso “à condition que le fournisseur, le crédit-bailleur et le crédit-preneur aient leur établissement dans des États parties à cet accord” deleted.

No comments being made on the provision, the PRESIDENT put Article 17 to the vote.

*Article 17 was adopted by thirty-four votes to none.*

Article 18

The CHAIRMAN of the Drafting Committee stated that Article 18 corresponded to the former Article D. The one change in paragraph 1, and this affected the English text only, had been the replacement of the word “amend” by “substitute” in the penultimate line.

No changes had been made in paragraphs 2 and 3 while in paragraph 4 the words “of this article” in the English version and “du présent article” in the French had been deleted.

No comments having been made on the article, the PRESIDENT put Article 18 as a whole to the vote.

*Article 18 was adopted by thirty-four votes to none.*

Article 19

The CHAIRMAN of the Drafting Committee stated that Article 19 corresponded to the former Article E. No changes had been made to paragraphs 1 and 2 while in the English version the Drafting Committee had replaced the word “object” by “subject” in the first line of paragraph 3. The French remained unchanged.

The CHAIRMAN of the Final Clauses Committee stated that the amendment had been extensively discussed within that Committee and the choice in favour of the word “object” had been made so as to ensure consistency with the corresponding language of the United Nations Sales Convention.

The CHAIRMAN of the Drafting Committee stated that it had been aware of the rationale for using the word “object”. However it had thought it rather undignified to refer to a State as an “object” and that the use of the word “subject” reflected more normal English usage.
Mr SEVÓN (Finland) recalled that the reference in Article 19(3) was intended to describe the State which was mentioned in the declaration and not the State making the declaration. This distinction would become less clear if the proposal of the Drafting Committee were to be adopted. An explicit decision on this matter had been taken by the Final Clauses Committee and his delegation could not support the proposed amendment.

No further comments having been made on the paragraph, the PRESIDENT invited the Conference to vote on the substitution, in the first line of the English version of Article 19(3), of the word “object” by the word “subject”.

The Conference decided by eleven votes to two, with fourteen abstentions, to retain the word “object”.

The PRESIDENT put Article 19 as a whole to the vote.

Article 19 was adopted by thirty-eight votes to none.

Article 20

The PRESIDENT recalled that Article 20 had already been adopted at the fourth plenary meeting in the form of a new Article F which had been proposed by the delegations of France, Mexico and the Philippines in CONF. 7/W.P. 2.

Article 21

The CHAIRMAN of the Drafting Committee stated that Article 21 corresponded to the former Article G. No changes had been made to the texts of paragraphs 1, 2 and 4 while in both paragraphs 3 and 5 the reference to “Article E” had been replaced by one to Article 19.

In paragraph 5 the words “in relation to the withdrawing State” (“à l’égard de l’Etat qui a fait le retrait”) had been added and the phrases “joint or reciprocal unilateral declaration” in the English text and “déclaration conjointe ou unilatérale et réciproque” in the French inserted as the expression “reciprocal declaration” was not a term of art used elsewhere in the Convention and it had been felt that its use might convey the mistaken impression that it did not cover joint declarations.

No comments being made on the text of Article 21, the PRESIDENT put the article as a whole to the vote.

Article 21 was adopted by thirty-five votes to none.

Article 22

The CHAIRMAN of the Drafting Committee stated that the text of Article 22 was the same as that of the former Article H.

No comments having been made on the article, the PRESIDENT put it to the vote.

Article 22 was adopted by thirty-six votes to none.

Article 23

The CHAIRMAN of the Drafting Committee stated that Article 23 corresponded to the former Article I. Four changes had been made to the provision, the first of which involved the addition of the words “to a financial leasing transaction” (“à une opération de crédit-bail”) in the first line so as to make it clear what was being referred to. Secondly the word “all” (“tous”) had been deleted in line 3. Thirdly the reference to Article 2(1)(a) had been changed to Article 3(1)(a) as a consequence
of renumbering, and lastly the words "or States" ("ou les Etats") had been inserted in the last line since the reference to Article 3(1)(b) might encompass more than one State, for example the Contracting State of the supplier might not be that of the lessor.

No comments having been made on the article, the PRESIDENT put Article 23 to the vote.

Article 23 was adopted by thirty-five votes to none.

Article 24

The CHAIRMAN of the Drafting Committee stated that the only change in Article 24 (former Article J) had been the reduction of the period of twelve months to six months in paragraph 3.

No comments having been made on the article, the PRESIDENT put Article 24 as a whole to the vote.

Article 24 was adopted by thirty-six votes to none.

Article 25

The CHAIRMAN of the Drafting Committee stated that the only changes made with respect to the former Article K had been the substitution in paragraph 2(a)(ii) and (iii) of references to Articles 18, 19, 20 and 21(4) for those to Articles D, E, F and G(4).

No comments having been made on the article, the PRESIDENT put Article 25 as a whole to the vote.

Article 25 was adopted by thirty-seven votes to none.

Mr BERAUDO (France) expressed the wish that the French title of the Conference be corrected on the cover pages of documents CONF. 7/1 and CONF. 7/2 to read "Conférence diplomatique pour l'adoption des projets de Conventions d'Unidroit sur l'affacturage international et sur le crédit-bail international".

Mr SEVÓN (Finland) stated that if he had correctly understood the representative of France, he wished the covers of CONF. 7/1 and CONF. 7/2 to reflect the language used in Article 15(1). He noted, however, that this was not a problem since the Conference did not have to adopt the text of those cover pages.

Mr BERAUDO (France) stated that he simply wished to avoid a reference to "projets d'Unidroit de Conventions" in the Acts and Proceedings of the Conference. He suggested that it would be sufficient to mention this in the summary records.

The PRESIDENT suggested that the proposal of the representative of France be taken into account when the Acts of the Conference were published.

Authentic text and witness clause

The PRESIDENT invited the Conference to vote on the adoption of the last two paragraphs of the Convention, and on the insertion of 28 May as the date of the Convention.

The authentic text and witness clause was adopted by thirty-five votes to none.

ADOPTION OF THE CONVENTION AS A WHOLE

The PRESIDENT invited the Conference to vote on the adoption of the Unidroit Convention
on International Financial Leasing as a whole.

    The text of the Unidroit Convention on International Financial Leasing was adopted by thirty-six votes to none.

    The meeting rose at 12.15 p.m.

SIXTH MEETING

Thursday, 26 May 1988, at 12.25 p.m.

President: Mr Smith (Canada)

AGENDA ITEM 8(b): EXAMINATION OF THE SECOND REPORT OF THE COMMITTEE OF THE WHOLE (CONF. 7/C.1/Doc. 2)

The PRESIDENT invited the Chairman of the Committee of the Whole to introduce the Second Report of the Committee of the Whole concerning the draft Unidroit Convention on International Factoring.

The CHAIRMAN of the Committee of the Whole stated that the draft Convention had been considered by the Committee at seven meetings held between 19 and 25 May 1988. The text of the draft Convention had been adopted at the last meeting of the Committee of the Whole in a spirit of compromise and cooperation and it was that text, contained in CONF. 7/C.1/Doc. 2, which was now before Plenum for adoption.

At the request of the President, the CHAIRMAN of the Drafting Committee outlined the final structure of the draft Convention. He stated that the preambular provisions had been inserted beneath the title, that Article X had become Article 18 and that a new chapter heading “SUBSEQUENT ASSIGNMENTS” had been inserted above Article 11 as suggested by the Italian delegation and agreed to by the Committee of the Whole, as a consequence of which the former Chapter III had been renumbered Chapter IV. Finally, the former Article 11(3) had become a new Article 12 so as to avoid Chapter III containing only one article, while the final provisions had been added under the numbers Article 13 to 23 together with the authentic text and witness clause.

Preamble

The CHAIRMAN of the Drafting Committee stated that the word “Preamble” had been deleted as was customary in international conventions. In accordance with a decision of the Committee of the Whole the word “major” in the second paragraph of the English text had been replaced by “significant” while in the French text “majeure” had been replaced by “importante”.

No comments having been made on the preambular provisions, the PRESIDENT invited the Conference to vote on their adoption.

    The preamble was adopted by thirty-five votes to none.

CHAPTER I – SPHERE OF APPLICATION AND GENERAL PROVISIONS

The PRESIDENT invited the Conference to vote on the adoption of the title of Chapter I.
The title of Chapter I was adopted by thirty-six votes to none.

Article 1

The CHAIRMAN of the Drafting Committee stated that no changes had been made to the English text of Article 1 and that the only amendment to the French text was in paragraph 1 where the words “tels que” had been deleted before the word “décrits”.

No comments being made on any paragraphs of the article, the PRESIDENT put Article 1 as a whole to the vote.

Article 1 was adopted by thirty-eight votes to none.

Article 2

The CHAIRMAN of the Drafting Committee stated that no changes had been made to either paragraphs 1 or 2 of the article.

In the absence of comments, the PRESIDENT put Article 2 as a whole to the vote.

Article 2 was adopted by thirty-eight votes to none.

Article 3

The CHAIRMAN of the Drafting Committee stated that the word “received” had been replaced by “been given” in paragraph 1(b) in the English text while in the French text the words “que le cessionnaire a été informé par écrit” had been replaced by “après que la notification par écrit ... a été faite au cessionnaire”. No changes had been made to paragraph 2.

In the absence of comments, the PRESIDENT put Article 3 as a whole to the vote.

Article 3 was adopted by thirty-three votes to none, with one abstention.

Article 4

The CHAIRMAN of the Drafting Committee stated that no changes had been made to either paragraph of the article.

Mr AGYEKUM (Ghana) noted that paragraph 1 contained a reference to the Preamble but that the title “Preamble” had been deleted from the Convention.

The PRESIDENT considered that this reference created no problem as it was quite clear what were the preambular provisions.

The CHAIRMAN of the Final Clauses Committee agreed with the observation of the President.

Mr CUMING (Canada) suggested that the word “Preamble” in paragraph 1 should be written with a small “p”.

The PRESIDENT believed that it would be appropriate to make that change which was a matter of “toilette” that could be left to the Secretariat as could a similar change in the corresponding provision (Article 6) of the Leasing Convention.

It was so agreed.

No further comments being made on either paragraph of the article, the PRESIDENT put
Article 4 as a whole to the vote.

*Article 4 was adopted by thirty-nine votes to none.*

**CHAPTER II – RIGHTS AND DUTIES OF THE PARTIES**

The PRESIDENT put the title of Chapter II to the vote.

*The title of Chapter II was adopted by thirty-four votes to none.*

**Article 5**

The CHAIRMAN of the Drafting Committee stated that no changes had been made to the provision.

The PRESIDENT put the text of Article 5 as a whole to the vote.

*Article 5 was adopted by thirty-eight votes to none.*

**Article 6**

The CHAIRMAN of the Drafting Committee announced that the only change made had been in paragraph 2 where the reference to “Article X” had been replaced by one to “Article 18”.

Mr SANTOS (Philippines) recalled the strong reservations expressed by his and other delegations regarding Article 6. In a spirit of cooperation they were, however, prepared to accept the text as it stood.

The PRESIDENT thanked the representative of the Philippines for this constructive attitude and in the absence of further comments he put Article 6 as a whole to the vote.

*Article 6 was adopted by thirty-four votes to none, with one abstention.*

**Article 7**

The CHAIRMAN of the Drafting Committee stated that the text of the article was unchanged.

In the absence of comments, the PRESIDENT put Article 7 to the vote.

*Article 7 was adopted by thirty-eight votes to none.*

**Article 8**

The CHAIRMAN of the Drafting Committee stated that the only change to the provisions of the article concerned paragraph 1. In the English version the words “in writing” originally contained in the first line of sub-paragraph (a) had been moved to the *chapeau* where they had placed after the word “notice”, in accordance with the suggestion of the delegation of Cameroon as endorsed by the Committee of the Whole. A similar amendment had been made to the French version, with the further change that the words “dans un écrit” had been replaced by “par écrit”.

No comments being made on either paragraph of the article, the PRESIDENT put Article 8 as a whole to the vote.

*Article 8 was adopted by thirty-six votes to none.*
Article 9

The CHAIRMAN of the Drafting Committee stated that paragraph 1 had remained unchanged in both language versions. As regards paragraph 2, the Drafting Committee had sought consistency with other provisions by replacing the word “received” by “was given” so that the concluding language of the paragraph now read in English: “... available to the debtor at the time a notice in writing of assignment conforming to Article 8(1) was given to the debtor”, and in French “... qu’il peut invoquer à l’époque où la notification par écrit de la cession a été faite conformément aux dispositions du paragraphe 1 de l’article 8”. Finally, in paragraph 2 the comma after the word “arose” should be deleted in the English text on the ground that it was redundant.

Mr GUITARD (Spain) recalled that his delegation had accepted the interpretation of the word “given” in Article 8(1)(a) that it meant “given and received”. In Article 9(2) however a choice had to be made between two moments in time, the critical question being whether the relevant moment was that when the notice was given to, or when it was received by, the debtor. To avoid any ambiguity he proposed therefore that the concluding language of Article 9(2) be amended to read “... and available to the debtor at the time a notice in writing of assignment given in conformity with Article 8(1) is received by the debtor”.

The CHAIRMAN of the Drafting Committee considered the proposal to be a most helpful one as on the one hand it retained the word “given” but on the other made it quite clear that the decisive moment in time was when the debtor actually received notice of the assignment.

Mr SANTOS (Philippines) and Mr AGYEKUM (Ghana) expressed support for the Spanish proposal.

Mr JACOBSSON (Sweden) also supported the Spanish proposal although he requested clarification as to whether the references to the words “in writing” and to “Article 8(1)” did not in a certain sense constitute a double emploi.

The CHAIRMAN of the Drafting Committee recognised the force of what had been said by the representative of Sweden. On balance however he felt that it was preferable to maintain the sentence as it stood since the words “notice in writing” had taken on a particular significance in the context of the Convention and he would regret the deletion of the reference to Article 8(1).

Mr BRENNAN (Australia) expressed some concern at the additional language proposed by the Spanish delegation which, while it might make Article 9 clearer, could have implications for other provisions of the Convention such as Article 3(1)(b) where there was a similar time factor at issue relating to the giving of notice of the exclusion of the Convention to the factor. It had been his impression that in that context the word “given” was understood to mean “given and received” and if the suggested change were to be made in Article 9(2) then it would be desirable for the question to be referred to the Drafting Committee so as to avoid inconsistencies in the text of the Convention.

Mr CUMING (Canada) echoed the reservations of the representative of Australia. The time element was also relevant to Article 8(1)(a) as it dealt with the question of when the duty to pay the factor arose and if it was thought that Article 9(2) was insufficiently clear then a consistent approach should be followed in regard to the language of the different provisions.

The PRESIDENT suggested that the Conference proceed to consideration of Article 10 after which it could revert to Article 9 once delegations had been able to reflect further upon the proposed amendment.

*It was so agreed.*

Article 10

The CHAIRMAN of the Drafting Committee stated that the English text of paragraphs 1 and 2
remained unchanged. In paragraph 1 of the French text however the last line had been amended to read “s’il dispose d'un recours en répétition des sommes payées au fournisseur” so as to match the English text where the word “price” had earlier been replaced by “sum payable” in order to take account of the fact that the factor may lend money against the receivables by way of security rather than by purchasing them. In paragraph 2 the words “dans la mesure où” had been moved to the end of the _chapitre_ rather than being repeated at the beginning of sub-paragraphs (a) and (b) for reasons of drafting style.

In the absence of comments, the PRESIDENT put Article 10 as a whole to the vote.

_Article 10 was adopted by thirty-seven votes to none._

**CHAPTER III – SUBSEQUENT ASSIGNMENTS**

The PRESIDENT put the title of Chapter III to the vote.

_The title of Chapter III was adopted by thirty-two votes to none._

_Article 11_

The CHAIRMAN of the Drafting Committee stated that the only change made had been in paragraph 2 of the French version where the words “le premier cessionnaire” had been replaced by “l'entreprise d'affacturage” which was employed in Article 1(2) to identify the factor.

No comments being made on either paragraph of the article, the PRESIDENT put Article 11 as a whole to the vote.

_Article 11 was adopted by thirty-five votes to none._

_Article 12_

The CHAIRMAN of the Drafting Committee recalled that Article 12 corresponded to the former Article 11(3) and that no changes had been made to the provision in either the English or the French versions.

In the absence of comments, the PRESIDENT put Article 12 as a whole to the vote.

_Article 12 was adopted by thirty-three votes to none, with one abstention._

**AGENDA ITEM 8(e): EXAMINATION OF THE SECOND REPORT OF THE FINAL CLAUSES COMMITTEE (CONF. 7/C.2/Doc. 2)**

At the invitation of the President, the CHAIRMAN of the Final Clauses Committee stated that at its last meeting the Committee had adopted the proposed title and the text of the final provisions of the Convention as they appeared in CONF. 7/C.2/Doc. 2.

The PRESIDENT invited the Conference to vote on the adoption of the title “Unidroit Convention on International Factoring”.

_The title of the Convention was adopted by thirty-six votes to none._

**CHAPTER IV – FINAL PROVISIONS**

The PRESIDENT put to the vote the title of Chapter IV.
The title of Chapter IV was adopted by thirty-four votes to none.

Article 13

The CHAIRMAN of the Drafting Committee stated that Article 13 corresponded to Article A of the draft final clauses prepared by the Unidroit Secretariat which appeared in Study LVIII – Doc. 34. While the language of paragraph 1 had been amended so as to conform to that of Article 15(1) of the Leasing Convention, no changes had been made in paragraphs 2, 3 and 4.

In the absence of any comments, the PRESIDENT put Article 13 as a whole to the vote.

Article 13 was adopted by thirty-six votes to none.

Article 14

The CHAIRMAN of the Drafting Committee stated that no changes had been made to either paragraph of the article which corresponded to the former Article B and to Article 16 of the Leasing Convention.

No comments having been made, the PRESIDENT put Article 14 as a whole to the vote.

Article 14 was adopted by thirty-six votes to none, with one abstention.

Article 15

The CHAIRMAN of the Drafting Committee stated that the language of this article (formerly Article C) was modelled on that of Article 17 of the Leasing Convention, the one difference being that it omitted any reference to the “liability imposed on any person by existing or future treaties” because of the decision taken by the Unidroit committee of governmental experts to delete a provision contained in an earlier version of the article excluding the liability of factors in respect of goods to which they might have acquired title from the supplier on the ground that such a provision was unnecessary.

No comments having been made on the provisions of the article, the PRESIDENT put Article 15 to the vote.

Article 15 was adopted by thirty-six votes to none.

Article 16

The CHAIRMAN of the Drafting Committee stated that the provisions of the article (formerly Article D) corresponded to those of Article 18 of the Leasing Convention.

In the absence of any comments, the PRESIDENT put Article 16 as a whole to the vote.

Article 16 was adopted by thirty-six votes to none.

Article 17

The CHAIRMAN of the Drafting Committee stated that the language of Article 17 (formerly Article E) had been amended to correspond to that employed in Article 19 of the Leasing Convention.

No comments being made on the provisions of the article, the PRESIDENT put Article 17 as a whole to the vote.
Article 17 was adopted by thirty-eight votes to none.

Article 18

The CHAIRMAN of the Drafting Committee stated that this article, the text of which had been adopted by the Committee of the Whole, corresponded to Article X as adopted by the Unidroit committee of governmental experts. No changes had been made by the Drafting Committee in either language version.

In the absence of any comments, the PRESIDENT put Article 18 to the vote.

Article 18 was adopted by thirty-four votes to none.

Article 19

The CHAIRMAN of the Drafting Committee stated that the five paragraphs of Article 19 (formerly Article G) corresponded to those of Article 21 of the Leasing Convention.

In the absence of any comments, the PRESIDENT put Article 19 as a whole to the vote.

Article 19 was adopted by thirty-six votes to none.

Article 20

The CHAIRMAN of the Drafting Committee stated that Article 20 (formerly Article H), which corresponded to Article 22 of the Leasing Convention, had remained unchanged in both the English and French versions.

No comments having been made on the article, the PRESIDENT put Article 20 to the vote.

Article 20 was adopted by thirty-seven votes to one.

Article 21

The CHAIRMAN of the Drafting Committee stated that no changes had been made to Article 21 (formerly Article I) but it was proposed that the word "paragraph" in line 3 be deleted. In all essentials, the language of the article corresponded to that of Article 23 of the Leasing Convention.

In the absence of any comments, the PRESIDENT put Article 21 to the vote, with the minor amendment proposed by the Chairman of the Drafting Committee.

Article 21 was adopted by thirty-four votes to none.

Article 22

The CHAIRMAN of the Drafting Committee stated that Article 22 (formerly Article J) corresponded in all respects to Article 24 of the Leasing Convention.

In the absence of any comments, the PRESIDENT put Article 22 as a whole to the vote.

Article 22 was adopted by thirty-five votes to none.

Article 23

The CHAIRMAN of the Drafting Committee stated that the language of the two paragraphs of
Article 23 corresponded to that of Article 25 of the Leasing Convention. As against the former Article K, the original reference in paragraph 2(a)(ii) to Articles D, E and X had been replaced by references to Articles 16, 17 and 18 while in sub-paragraph (a)(iii) the reference to Article G(4) had been replaced by one to Article 19(4).

No comments being made on the provisions of the article, the PRESIDENT put Article 23 as a whole to the vote.

Article 23 was adopted by thirty-four votes to none.

Authentic text and witness clause

The PRESIDENT invited the Conference to vote on the adoption of the last two paragraphs of the Convention, and on the insertion of 28 May as the date of the Convention.

The authentic text and witness clause was adopted by thirty-six votes to none.

AGENDA ITEM 8(b): EXAMINATION OF THE SECOND REPORT OF THE COMMITTEE OF THE WHOLE (CONF. 7/C.1/Doc. 2)

Article 9 (continued)

The PRESIDENT announced that the representative of Finland had prepared a proposal intended to solve the difficulties relating to Article 9(2) which would entail an amendment to Article 1, upon which Plenum had already voted.

Article 1 (continued)

Mr SEVÓN (Finland) stated that while supporting the comments of the Spanish delegation on Article 9(2), he also recognised the force in the reservations that had been expressed by the Australian and Canadian delegations at the proposed amendment of that provision. He considered that both concerns might be met if Article 1(4) were to be completed by a new sub-paragraph (c) which would read as follows: “a notice in writing has been given when it is received by the addressee”. Such a general formula would, he believed, obviate the need for any amendment of Articles 3, 8 and 9.

The PRESIDENT ascertained that there was a sufficient majority for re-opening consideration of Article 1(4).

Mr GUITARD (Spain), Mr SANTOS (Philippines) and Mr YUAN (China) seconded the proposal of the representative of Finland.

Mr SAMSON (Canada) stated that his delegation also endorsed the proposal of the representative of Finland and he suggested that the French version read as follows: “Aux fins de la présente Convention (...) une notification par écrit est faite lorsqu’elle est reçue par le destinataire”.

Mr BERAUD (France) supported the proposal of the representative of Finland and the translation into French suggested by the representative of Canada.

Mr BRENNAN (Australia) found the Finnish proposal to be attractive but he noted that full consistency had yet to be achieved between the general formulation proposed for Article 1(4)(c) which employed the words “has been given” and the language of provisions such as Article 8(1)(a) where the words “is given” were to be found. He wondered whether the words “is given” should not be used in Article 1(4)(c) and also in Article 3(1)(b).

The CHAIRMAN of the Drafting Committee agreed that the words “is given” would read
better than "has been given" in Article 1(4)(c) but saw no need for absolute consistency throughout and preferred to leave the language of Article 3(1)(b) unchanged.

Mr SAMSON (Canada) noted that whereas the French text of Articles 1 and 9 spoke of notification as being "faite", the word used in Article 8 was "donnée" and he suggested that Articles 1(4) and 9(2) be amended to ensure consistency with Article 8(1)(a).

Mr BERAUDO (France) endorsed the drafting proposals made by the Canadian delegation.

The PRESIDENT invited the Conference to vote on the proposal by the delegation of Finland, as orally amended, to add a new sub-paragraph (c) to Article 1(4) which would read in English: "a notice in writing is given when it is received by the addressee", and in French: "une notification par écrit est donnée lorsqu’elle est reçue par le destinataire". In addition, the full stop after the word "form" at the end of sub-paragraph (b) would, by way of consequential amendment, be replaced by a semi-colon.

The proposal as formulated by the President was adopted by thirty-one votes to none.

 Article 9 (continued)

The PRESIDENT enquired whether there were any further comments on Article 9.

Mr BRENAN (Australia) suggested that the reference in paragraph 2 to the words "was given" be replaced by "is given" for the reasons he had already advanced.

The CHAIRMAN of the Drafting Committee replied that the use of the past tense was necessary in Article 9(2) as what was sought was to establish the cut-off point for claims (which would have arisen prior to, or at the latest at the time of, the giving of notice in writing of assignment) that might be asserted by way of set-off.

The PRESIDENT invited the Conference to vote on the adoption of Article 9 with the excision of the comma in line 2 of paragraph 2 after the word "arose".

 Article 9, as so amended, was adopted by thirty-three votes to none, with one abstention.

ADOPTION OF THE CONVENTION AS A WHOLE

The PRESIDENT invited the Conference to vote on the adoption of the Unidroit Convention on International Factoring as a whole.

The text of the Unidroit Convention on International Factoring was adopted by thirty votes to none.

AGENDA ITEM 9: ADOPTION OF THE FINAL ACT OF THE CONFERENCE AND OF ANY INSTRUMENTS, RECOMMENDATIONS AND RESOLUTIONS RESULTING FROM ITS WORK (CONF. 7/10)

The PRESIDENT called upon the Chairman of the Drafting Committee to speak to the draft Final Act submitted by the Drafting Committee.

The CHAIRMAN of the Drafting Committee stated that the draft Final Act which had been prepared by the Drafting Committee on the basis of a text submitted by the Secretariat followed the normal pattern of such instruments adopted at Conferences convened for the adoption of private law Conventions such as the Financial Leasing and Factoring Conventions.
Mr THIAM (Guinea) addressed to the President the sincere compliments of the delegations of the African States present at the Conference for the brilliance with which he had conducted the work of the Conference, and especially for the considerable results that had emerged from its deliberations. Thanks to a spirit of constructive cooperation the President had been able to ensure that the diversity of legal systems and interests had not stood in the way of the success that had been aspired to.

He also wished to take the opportunity to congratulate Mr Sevón on the excellent manner in which he had chaired the proceedings of the Committee of the Whole. His conciliatory spirit, his tact, the pertinence of his analyses and observations and his sense of humour had resulted in harmonious proceedings which had produced accords acceptable to all parties. His congratulations also extended to the Chairman of the Drafting Committee, Mr Goode, and particularly the Secretariat, all sections and levels together, whose valuable assistance and constant availability had contributed greatly to the success of the Conference’s work through the preparation of documents and translations.

Finally, he respectfully requested the President to convey to the Canadian Government the profound gratitude of the African delegations for the very warm welcome and kindness received during their stay in the beautiful and fascinating country of Canada.

In conclusion, he thanked Unidroit for its arduous, unfailing and stirring efforts to create a solid basis for peaceful and productive cooperation among States and Peoples.

The PRESIDENT stated, on behalf of all those to whom the representative of Guinea had extended his congratulations, that his kind words were highly appreciated and that Canada, which had hosted the Conference, also appreciated the participation of all those States and delegations which had honoured it with their presence during the last three weeks. He offered his warmest thanks to delegates and invited them to attend the final session of the Conference which would be held on Saturday, 28 May at 9.30 a.m.

*The meeting rose at 1.40 p.m.*

CONF. 7/S.R. 7
24 June 1988

SEVENTH MEETING

Saturday, 28 May 1988, at 9.30 a.m.

*President: Mr Smith (Canada)*

**AGENDA ITEM 9: ADOPTION OF THE FINAL ACT OF THE CONFERENCE AND OF ANY INSTRUMENTS, RECOMMENDATIONS AND RESOLUTIONS RESULTING FROM ITS WORK (CONF. 7/11)**

The PRESIDENT enquired whether there were any objections to the Final Act of the Conference prepared by the Drafting Committee and found that there were no objections.

*The Final Act was adopted by acclamation.*

**AGENDA ITEM 10: SIGNATURE OF THE FINAL ACT AND OF ANY INSTRUMENTS ADOPTED BY THE CONFERENCE (CONF. 7/11)**

THE EXECUTIVE SECRETARY invited representatives to sign the Final Act and, where
appropriate, the Unidroit Convention on International Financial Leasing and the Unidroit Convention on International Factoring.

*The Final Act was signed by representatives of the following Governments:*

Algeria, Angola, Antigua and Barbuda, Australia, Austria, Belgium, Brazil, Bulgaria, Cameroon, Canada, Chile, China, Colombia, Czechoslovakia, Egypt, Finland, France, Federal Republic of Germany, Ghana, Greece, Guinea, Hungary, India, Ireland, Italy, Japan, Lebanon, Mexico, Morocco, Netherlands, Nigeria, the Philippine, Portugal, Senegal, Spain, Sudan, Sweden, Switzerland, Thailand, Turkey, Union of Soviet Socialist Republics, United Kingdom, United Republic of Tanzania, United States of America, Venezuela and Zaire.

*Representatives of the following Governments signed both Conventions:*

Ghana, Guinea, Nigeria, the Philippines and the United Republic of Tanzania.

*The President and the Secretary-General of the Conference signed the Final Act.*

**CLOSURE OF THE CONFERENCE**

Mr EVANS (Secretary-General of Unidroit) delivered the following address:

"Mr President,
Mr Deputy Minister,
Your Excellencies,
Ladies and Gentlemen:

The diplomatic Conference is now drawing to a close. I would like to say a few words, not in my capacity as Secretary-General of the Conference, but as Secretary-General of Unidroit.

In his opening remarks, the President of Unidroit, on behalf of whom I am speaking today, and the Honourable Minister of Justice of Canada emphasised that international financial leasing and factoring are important means used increasingly for promoting international commerce in the interests of all countries. This sentiment has been confirmed by the presence at the Conference of delegations from twenty-two States that are not currently members of Unidroit. The active participation of these delegations in the work of the Conference is a source of deep satisfaction and living testimony to the foresight of the Governing Council of Unidroit, when, over ten years ago, it decided to add these two items to the Work Programme. It is true that it will have taken a good number of years for these two Conventions, which will henceforth no doubt be known as the Ottawa Conventions, to be included in the body of international law. For my part, I am convinced that the spirit of compromise and the pragmatism that characterised the three weeks of hard work of this Conference will guarantee the success of the Conventions, and I can assure you that the Unidroit Secretariat will spare no effort to promote their general acceptance within the community of nations.

If this Conference has, and I hope that this sentiment is shared by all those in this room, been an outstanding success, this is most certainly due in large measure to the commitment of all delegations and observers to making it a success, and although it may on occasions such as this seem invidious to single out individuals for special tribute there are some names which it would be ungracious and indeed unbefitting not to mention, all the more so as many of them are old friends of the Institute.

First then, Sir, may I express on behalf of Unidroit our appreciation to the President of the Conference, Mr Brad Smith, the first Canadian to sit on the Governing Council of our Institute and to whom much of the credit must go for the original idea of organising this Conference in Ottawa. Moreover, the manner in which he presided over the Conference, firmly but with his customary courtesy and good humour, have impressed all here. These characteristics were indeed also the
hallmark of the chairmanship of the Committee of the Whole by Mr Leif Sevón, whose authority and diplomatic skills in chairing committees are a byword among the "habitués" of international conferences devoted to the unification and harmonisation of international private law, and who must in particular be congratulated on bringing the two Conventions before the Conference a full half day before we had expected when preparing the schedule in Rome.

This task could not, however, have been accomplished without the energetic role played by the Chairman of the Final Clauses Committee, Mr Gerard Brennan, who although he was called upon to marshal a smaller number of troops, given the fact that final clauses are something of an acquired taste, nevertheless skilfully led the Committee through the labyrinth of articles which hide behind the anonymity of a letter until almost the very last moment of the Conference.

Thanks are also due to Mr Walter Rolland who, with his well-known qualities of tact and wisdom, so ably chaired the meetings of the Credentials Committee and, last but not least, I come to what if I may I would term the ultimate repository of the conscience of the Conference, the Chairman of the Drafting Committee, Professor Roy Goode. He has been involved in the work on the Conventions on financial leasing and factoring since its inception and if we all know that Professor Goode is a master of the intricacies of English legal terminology, I am sure that his experience in the Drafting Committee has been such that he must now feel equally well versed in the corresponding subtleties of the French language.

I understand that Ambassador Réczei will, in the name of the delegations and observers at the Conference, be expressing their gratitude to the Canadian authorities and I do not wish in any way to anticipate what he will have to say. May I, however, on behalf of all my colleagues in the Unidroit Secretariat assure you, Sir, of our sincere and heartfelt thanks for the kindness and hospitality which we have received at both official and personal levels here in Ottawa, as well as for the quite extraordinary organisational infrastructure which permitted what were initially quite distinct secretariat teams, one from Ottawa and the other from Rome, to weld into a single unit, every member of which has played its part in servicing the Conference to the best of her or his ability.

I would therefore like to extend to you, Mr Deputy Minister, and, through you, to the Canadian Government, the sincere thanks of Unidroit for the generosity Canada has shown in hosting this diplomatic Conference here in Ottawa, and I can assure you that the memories my colleagues and I have of this wonderful city will cause us to come back for our greater pleasure, with perhaps a little more time than we had on this occasion, to explore the cultural heritage and natural beauty of your country. Thank you, Mr Deputy Minister.”

Mr Réczei (Hungary) delivered the following address:

"Mr President,
Mr Deputy Minister,
Your Excellencies,
Ladies and Gentlemen:

Permit me in the name of all the delegations who have had the honour and indeed the pleasure of attending this diplomatic Conference to extend my warm thanks and heartfelt congratulations to all those who have contributed to ensuring that it has run so smoothly and been able to come to a successful conclusion at its appointed time.

Permit me too to express the sincere appreciation of all delegations for the outstandingly generous hospitality of the Canadian authorities. We have had ample opportunity to sample and value this hospitality both in the magnificent facilities placed at our disposal here in the Conference Centre and in the delightful extracurricular activities arranged for us. Mr Deputy Minister, I particularly thank you for all you and your department have done to make this Conference not only such a success but also such a delightful occasion.

Special thanks are of course owed to all those who have so selflessly given of themselves in enabling us to arrive at the result which we are gathered here today to witness. The Secretary-General has already detailed the various chairmen who have guided us along the difficult paths that
have finally brought us to our destination. The efforts of all those who have sat on the various organs of the Conference would, however, have been to no avail without the exemplary patience and dedication of the army of staff who have risen so spectacularly to the myriad organisational challenges of a Conference such as this.

We must be grateful too for the unique opportunity this Conference has given us to get to know one another and one another’s point of view better. This is surely the first yardstick by which the success of any international conference must be measured. There have of course been moments when the age-old and deeply rooted differences between our various legal and economic systems have put a strain on the achievement of this objective but happily the search for the consensus solutions that we are proud to put before the international community today has enabled us to make the necessary leaps of imagination to overcome these little local difficulties.

Long live the Ottawa Conventions.”

Mr IACOBUCCI (Deputy Minister of Justice of Canada) delivered the following address:

“Mr Secretary-General,
Mr President,
Members of the Unidroit Secretariat,
Your Excellencies,
Distinguished Delegates:

I am most honoured to be here this morning to participate in this final meeting of the Ottawa diplomatic Conference. It hardly seems three weeks ago that I was here to observe the opening ceremony. I recall the optimism that was expressed then that you would succeed in adopting two Conventions. This optimism was obviously well-placed, as we have just opened for signature the Ottawa Conventions on International Financial Leasing and International Factoring.

There is no doubt, as others have said, that the success of this Conference is due to the diligence and skill of many people, including the members of the Unidroit Secretariat, your President, Mr Brad Smith, Mr Leif Sevón, who served as Chairman of the Committee of the Whole, Mr Roy Goode, Chairman of the Drafting Committee, Mr Gerard Brennan, Chairman of the Final Clauses Committee and Mr Walter Rolland, Chairman of the Credentials Committee.

Of course, many of you here have also played key roles in ensuring the success of this Conference. Some of you have been involved in these projects since their inception, such as Ambassador Réczel. However, the successful conclusion of this Conference is the product of the joint efforts of all participants in this diplomatic Conference, who have been guided by a spirit of compromise and cooperation.

The Ottawa Conventions that have been developed over the last three weeks represent a significant achievement in the on-going process of unification and harmonisation of private law. I congratulate you on your accomplishment. The Conventions will serve the international community by facilitating international commerce, in particular international financial leasing and international factoring. They will hopefully make international financial leasing and international factoring more available to developing countries. Finally, they will act as models for law-makers and business persons throughout the world.

I am grateful to you for having come to Ottawa for this Conference. I confess to a certain pride in our having served as host for the biggest Unidroit diplomatic Conference ever. We have enjoyed being your host and we have done our best to make you feel welcome. We have shown you our Parliament, our Mounties, our lakes, our parks, our spring, our summer, and even a hint of our winter.

I hope that you have enjoyed yourselves and that you will come back again.

I hereby declare the Ottawa diplomatic Conference closed.”
SUMMARY RECORDS OF THE COMMITTEE OF THE WHOLE (COMMITTEE I)

CONF. 7/C.1/S.R. 1
11 May 1988

FIRST MEETING

Monday, 9 May 1988, at 2.35 p.m.

Chairman: Mr Sevón (Finland)

AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING (Study LIX – Doc. 48; CONF. 7/3 and Add. 2; CONF. 7/4 and Add. 3; CONF. 7/C.1/W.P. 2 and W.P. 4)

The CHAIRMAN stated that he was deeply honoured to have been elected to chair the Committee. He expressed the wish that a spirit of cooperation, collaboration and compromise prevail.

As regards the consideration of the draft Unidroit Convention on International Financial Leasing, he suggested that the Committee in principle discuss the articles in numerical order. It might however be useful to consider Article 14 after Article 3 and, if Plenum so agreed, to discuss Article F immediately after Article 2.

He also suggested that the Committee defer the election of its Vice-Chairmen until consultations had taken place and that since the need to elect a Rapporteur might be questioned this matter should likewise be considered at a later stage.

It was so agreed.

The CHAIRMAN furthermore proposed leaving the present title of the draft Convention intact and considering later on whether it was the most appropriate title.

It was so decided.

CHAPTER I – SPHERE OF APPLICATION

Article 1

Paragraph 1

Mr KATO (Japan) referred to his delegation’s comments in CONF. 7/3 and requested clarification as to the ambiguous phrase “on terms approved by, another party (the lessee),” in paragraph 1(a). It seemed that for the Convention to apply all terms of the supply agreement must be approved by the lessee. If this were the case then situations where the lessee was not informed of certain terms of the agreement, for example those relating to the price of the equipment or to payment, would fall outside the scope of the Convention. The matter should be clarified.

Mr MOONEY (United States of America) considered in the first place that as the text of Article 1(1)(a) stood, it was a fair reading that all terms of the supply agreement must be approved by the lessee. In his view however this went too far and it would be sufficient to require such approval only in respect of those terms which might benefit or prejudice the lessee. Secondly, he believed that if the lessee was unaware of the terms of the supply agreement then the transaction would not be caught by the Convention, one of the basic aims of which was to permit the lessee to
look only to the supplier for satisfaction in certain circumstances.

Mr JACOBSSON (Sweden) stated that while he could not offer a solution as to whether the lessee should know all the terms of the supply agreement it should at least be aware of the price of the equipment for the Convention to apply.

Mr GOODE (United Kingdom) considered that it was strongly arguable that the interpretation of the United States delegation was the correct one although he thought that this was not a desirable result in that it would exclude the application of the Convention in cases where certain terms of the agreement of no interest to the lessee had not been approved by it. He believed that it would be difficult to indicate which terms need or need not be approved by the lessee, and he therefore preferred a general formulation excluding approval of terms neither to the benefit nor to the prejudice of the lessee.

Mr REBMANN (Federal Republic of Germany) recalled that there was a connection between Articles 1 and 9 of the draft Convention as the lessee was entitled to a direct claim against the supplier. For this reason it should be quite certain that the lessee be aware of the terms concerning the warranty of the supplier in the event of delay or delivery of defective equipment. He added that in some cases the supply agreement was initially concluded with the supplier by the lessee, after which the lessor replaced the lessee. Such situations should also fall within the scope of the Convention.

Mr ADENSAMER (Austria) stated his preference for the text of the article as it stood.

Mr DE PAIVA (Brazil) suggested that it was implicit from a reading of the other articles of the draft Convention, and in particular Article 4, that all the terms of the supply agreement had to be approved by the lessee.

The CHAIRMAN enquired whether it was the wish of the Committee that the expression "terms approved by the lessee" should cover all terms or only terms other than those which were neither to the benefit nor to the prejudice of the lessee.

Mr JACOBSSON (Sweden) supported the proposal of the United Kingdom, for otherwise it would be too easy for a lessor to escape the application of the Convention by including terms of which the lessee was unaware.

The CHAIRMAN asked whether the delegation of the United States of America intended to submit a written proposal.

Mr MOONEY (United States of America) stated that he would be content if a proposal along the lines he had suggested, and which had been taken up by the United Kingdom delegation, could be submitted to the Drafting Committee.

The CHAIRMAN enquired whether the Committee would be prepared to accept a redraft of the text of Article 1(1)(a) which would specify that the terms to be approved by the lessee would be terms other than those which were neither to the benefit nor to the prejudice of the lessee.

Mr RÉCZEI (Hungary) suggested that the approval of the lessee be restricted to those terms relating to specification and delivery although it should also know the price and the conditions of payment.

Mr REBMANN (Federal Republic of Germany) supported the proposal of the representative of Hungary.

Mr GOODE (United Kingdom) felt that it would be desirable not to state explicitly which terms need or need not be approved by the lessee as those would vary with each specific contract. He would therefore prefer a more general formulation of the kind he had already suggested.

The CHAIRMAN put three questions to the Committee: first whether it was its wish that the
terms to be approved by the lessee should cover all terms other than those which were neither to the benefit nor to the prejudice of the lessee; second whether the approval of the lessee should be required in regard to terms concerning specification and delivery and third whether the approval of the lessee should be required for all terms, which would entail the maintenance of the present text, subject to drafting.

The three variants were put to the vote with the following result:

**In favour of the first variant:** twenty

**In favour of the second variant:** five

**In favour of the third variant:** four.

Mr DE PAIVA (Brazil) objected to the vote which had just taken place and stated that his delegation had not participated in it. His view was that if votes were to be taken for each article of the draft Convention as presented then it was unnecessary to have discussion on them. He suggested that there should be an opportunity for the Drafting Committee to study the matter and, if it deemed it to be appropriate, to propose an alternative text for consideration by the Committee of the Whole.

The CHAIRMAN replied that the function of the Drafting Committee at diplomatic Conferences was to see to it that decisions taken by the Committee of the Whole were properly reflected, rather than to act as a sub-committee. If therefore there were issues in relation to which delegations wished to pursue negotiations then the appropriate procedure would be the setting up of small working groups which would seek to submit an acceptable proposal.

Mr DE PAIVA (Brazil) stated that at this stage of the Conference the reference to working groups of disputed issues prior to the taking of votes seemed to him to be an appropriate manner of proceeding.

The CHAIRMAN replied that he saw difficulties in postponing decisions on an issue simply because there were differing opinions. The task of a diplomatic Conference was to settle the text to be adopted. He therefore proposed that the result of the vote stand and that the Drafting Committee be asked to reflect the decision in a new text. This being said an unusual amount of flexibility might be shown when discussing the text remitted by the Drafting Committee but he feared that if a working group were to be constituted for every matter in respect of which there were differences of opinion then the Committee would be hard pressed to complete its work on time. He asked whether the Committee could accept this procedure.

*It was so agreed.*

Mr KATO (Japan) stated that if the text of Article 1(1)(a) were to be changed in accordance with the majority sentiment expressed in the vote then those cases where the lessee was not aware of the terms of the supply agreement concluded between the supplier and the lessor would be adequately dealt with.

The CHAIRMAN recalled the question raised by the representative of the Federal Republic of Germany, namely whether cases where a supply agreement was originally concluded between a lessee and a supplier and afterwards the lessor entered into the agreement, for example by way of an assignment, would be covered by the future Convention. The Chairman noted that this query coincided with a question raised by Pakistan in CONF. 7/3 Add. 2.

Mr GOODE (United Kingdom) expressed the view that no change in the present text was required to cater for such cases. In the situation contemplated one possibility was that the supply agreement would in the first instance be entered into by the lessee as buyer, the lessee then deciding that it required financing by way of a leasing agreement, the initial sales contract being rescinded and the lessor entering into the supply agreement. In his view such a transaction fell squarely within
Article 1. If, on the other hand, the agreement between the supplier and the intending lessee were to remain unaffected and the supplier to transfer its interest to the lessor, then such a case ought not to fall within the terms of the Convention since it presupposed that the so-called lessee was still a buyer under the purchase agreement.

Mr JACOBSSON (Sweden) mentioned that agreements on the leasing of aircraft were often entered into in the way described by the Chairman. He also alluded to a proposal formulated by the Swedish delegation in CONF. 7/C.1/W.P. 2, which contemplated the deletion of the words "financial leasing" from the chapeau of Article 1(1) to avoid the danger of parties to financial leasing agreements attempting to exclude the application of the Convention, especially if it were to be mandatory, by designating the agreement by some other label such as that of "operating lease". He also drew attention to the situation which would arise if the leasing agreement were to collapse after a short time and the lessee to disappear without any transference of the contract to a new lessee. In that event the lessor would recover the equipment and might well seek to conclude a new leasing agreement but such a situation would not be covered by the present wording of the draft Convention. Sometimes it might be reasonable for such cases to fall under the Convention but it should be pointed out in the explanatory report that this was not a case of financial leasing under the Convention.

The CHAIRMAN stressed that the explanatory report would not be officially adopted by the diplomatic Conference with the consequence that it could not be regarded as having any binding status from the standpoint of the Conference in the interpretation of the Convention.

As to the Swedish proposal to delete the words "financial leasing" from the chapeau of Article 1(1), this could be viewed either as a question of drafting, which could be referred to the Drafting Committee, or as one of substance, in which case it should be debated by the Committee of the Whole.

Mr JACOBSSON (Sweden) considered his proposal to be a matter of drafting.

Mr RÉCZEI (Hungary) stated that he could accept the Swedish proposal if the words "financial leasing" were to be added in brackets at the end of Article 1(1)(b).

Mr JACOBSSON (Sweden) said that this proposal would be acceptable to his delegation.

The CHAIRMAN asked whether the Committee could agree to the Swedish proposal, as amended, being submitted to the Drafting Committee.

It was so decided.

The CHAIRMAN recalled the second question raised by the Swedish delegation which had expressed concern over the situation where, in the case of a leasing agreement having been entered into and the equipment supplied, the lessee subsequently became bankrupt or otherwise collapsed, whereupon the equipment was returned to the lessor who wished to re-lease it. Such a situation, it seemed, would probably fall outside the scope of the Convention as presently worded and he enquired whether the Committee felt it necessary to deal explicitly with that situation.

He noted that this was the case.

The CHAIRMAN requested that further discussion of Article 1(1) be deferred until the written proposal of the Swedish delegation contained in CONF. 7/C.1/W.P. 2 had been circulated.

It was so agreed.

Paragraph 2

Mr VOSS (World Bank) recalled that at the last session of the Unidroit committee of governmental experts he had referred to the concept of leasing arrangements in which the determination of rentals
was related to the returns generated by the lessee’s use of the equipment, that is to say as a form of investment partnership rather than as a traditional debtor-creditor relationship. Although the committee had been unable to take a stand on a proposal explicitly to mention such arrangements in the text of the draft Convention, it had agreed that the matter merited careful consideration by Governments with a view to the preparation of their positions at the diplomatic Conference. The committee had however effectively included those arrangements in the ambit of the draft by substituting the word “calculated” for “fixed” in Article 1(2)(c) and moreover the report had clarified that the revised text contemplated agreements under which the rentals were related to the returns guaranteed by the use of the equipment. It was also his understanding that the language of Article 11(3), according to which the parties to the leasing agreement may decide upon the manner in which compensation is to be computed, emphasised the autonomy of the parties to arrange whatever payment option was appropriate in their specific circumstances. It was true that the introduction of variable prices shifted the concept of leasing agreements on which the balance of interests had been struck in the draft Convention but in his view this caused no problem as Article 14(2) specifically recognised the right of the parties to modify all but three provisions of the Convention.

The importance of the concept he had developed was to be seen in relation to the establishment on 12 April 1988 of the Multilateral Investment Guarantee Agency (“MIGA”) under the auspices of the World Bank, the function of the agency being to insure investments in developing countries against non-commercial risks, including breach of contract by host Governments or their agencies. Draft regulations had already been approved, and would soon be adopted by MIGA’s Board of Direction under which MIGA coverage would be extended to leasing agreements provided that the agreement was for a term of at least three years and that the rentals were substantially dependent on production, revenues or profits deriving from the investment project.

Some airline companies had already indicated that the only way they would be prepared to finance the delivery of capital goods was by way of obtaining guarantee coverage and leasing was being increasingly explored as a means of overcoming the credit-worthiness problem of high debt countries as leasing implied lower risks to creditors than traditional credits. In addition, the concept of leases with performance-related rentals served purposes similar to production and profit-sharing agreements used in the oil industry and build-operate transfer arrangements (BOT) in the construction industry where in essence the price of plant delivered was paid out of revenue from its operation.

In conclusion therefore he proposed that specific mention be made in the text of the Convention of the type of leases to which he had referred. That would encourage such arrangements and facilitate their implementation, thus answering the call in the second paragraph of the preamble to make “international financial leasing more available to developing countries”.

The CHAIRMAN drew attention to the proposal by the World Bank in CONF. 7/4 Add. 3 for the addition of a provision to make it clear that the Convention covered leasing arrangements where rentals were dependent on the returns guaranteed.

Mr MOONEY (United States of America) questioned the need for express treatment of such leases in the Convention and whether all such leases should be covered by it. It had been clear in the committee of governmental experts that the intention was to deal only with long-term leases where a substantial part of the investment could be recovered, whereas many of the leases to which the observer of the World Bank had referred might be short-term leases. In his opinion the language of Article 1(2)(c) as it stood was flexible enough to cover leases under which rentals were related to returns derived from the use of the equipment provided that a substantial part of the investment would be recovered. Moreover, there was a danger that reference to a specific type of leasing could be interpreted as excluding other forms which might develop.

Mr GOODE (United Kingdom) agreed with the views expressed by the representative of the United States of America.

Mr VOSS (World Bank) said that it was not the intention of MIGA that the Convention cover short-term leases, as he had already indicated. He could therefore endorse the statements of the two
previous speakers and suggested that language be included in the commentary on Article 1(2)(c) or on Article 11(3) making it clear that the leases to which he had referred could fall within the scope of the Convention if the other conditions for its applicability were satisfied.

The CHAIRMAN recalled what he had already said regarding the status of an explanatory report. He noted however that a view had so far been expressed to the effect that the arrangements which the World Bank observer had mentioned could to a certain extent fall within the Convention as presently drafted. No delegation had opposed this view and if no objections were made then this fact could be reflected in the summary records. He enquired whether the Committee considered the text to be adequate in the light of the preceding discussions and found this to be the case.

The meeting was adjourned at 4.05 p.m. and resumed at 4.35 p.m.

Mr DE PAIVA (Brazil) asked whether the statement of the observer of the World Bank concerning the preamble would be discussed at this juncture.

The CHAIRMAN replied that the question of whether the preamble should be dealt with by the Committee of the Whole or by the Final Clauses Committee was one to be decided by Plenum, a decision on which would probably be taken within the next day or so.

He noted that no further amendments had been tabled in connection with Article 1(2) and, if this were so, he proposed that the existing text be remitted to the Drafting Committee for consideration and that the Committee proceed to discussion of Article 1(3).

It was so decided.

Paragraph 3

Mr MOONEY (United States of America) proposed the insertion at the end of Article 1(3) of language comparable to that found in Article 2(a) of the United Nations Sale Convention relating to the state of knowledge of the lessor before or at the conclusion of the leasing agreement as to the purpose to which the equipment was to be put by the lessee.

The CHAIRMAN suggested that the proposal submitted by Spain in CONF. 7/3 regarding Article 1(3) be dealt with first, since the United States proposal had yet to be distributed in written form and might need to be reformulated in accordance with the decision to be taken on the Spanish proposal.

Mr ILLESCAS (Spain) indicated that the effect of his delegation's amendment in CONF. 7/3 would be to cast the language of Article 1(3) in an affirmative form, a proposal which was justified on substantive as well as formal grounds. He drew attention to the need for consistency with Article 1(1) in which reference was already made to the use of the equipment. In small and medium-sized businesses it was not always easy to draw distinctions as to the use of the equipment for industrial or for family purposes and he therefore proposed that Article 1(3) be amended to read as follows: "This Convention applies solely to transactions in which the equipment is to be used by the lessee primarily for business or professional purposes".

Mr KATO (Japan) agreed with the delegation of the United States of America that the language of Article 1(3) should conform to that of the United Nations Sale Convention. If affirmative language were to be used, as proposed by the representative of Spain, then possible ambiguity might result as to the application of the article to governmental or non-profit making agencies.

Mr MOONEY (United States of America) expressed sympathy with the Spanish proposal but had to agree with the sentiments expressed by the representative of Japan. He wondered, if the language suggested by the representative of Spain were to be adopted, whether a lease to a hospital owned by a non-profit making corporation or a lease to an embassy would be caught by the Convention. In his opinion such a formulation would cause more difficulties than any which might
be posed by the existing text.

Mr ILLESCAS (Spain) stated that his delegation did not support the idea of transposing the solution of the United Nations Sale Convention into the Financial Leasing Convention. The relationship between the parties to a leasing agreement was of much longer duration than that between parties to a contract of sale and that longer duration made the adoption of a positive form of wording necessary.

Mr GOODE (United Kingdom) also expressed sympathy with the Spanish proposal to cast Article 1(3) in affirmative language. He recalled however that the matter had already been discussed in the Unidroit committee of governmental experts where the view had prevailed that too many problems of definition would arise if a positive formulation of the kind suggested by the representative of Spain were to be adopted. He therefore preferred the maintenance of the existing text.

Mr SANTOS (Philippines) agreed with the need for a positive formulation but suggested that if the Spanish proposal could not be embodied as such in the text it might perhaps provide examples which could be given in Article 1 so as to avoid the enunciation in Article 1(3) of an exception to a general rule which had itself never been stated.

Mr DE PAIVA (Brazil) supported the Spanish proposal for in his view the existing text of paragraph 3 was unclear in that it left room for interpretation of what was "primary use".

The CHAIRMAN enquired whether the delegation of the Philippines wished to make a specific proposal embodying the content of its suggestion.

Mr SANTOS (Philippines) proposed that the language of the Spanish proposal be inserted in Article 1(1) by way of example.

Ms ESSOMBA (Cameroon) indicated that her delegation could support the Spanish proposal, which was clearer and more positive than the existing wording. It needed to be borne in mind moreover that paragraphs 1 and 2 of Article 1 were concerned with the scope of application of the Convention. There would however still be an ambiguity if the word "primarily" were to be retained as this seemed to suggest a contrario the existence of a secondary purpose. As a compromise the word "primarily" might be deleted and the negative formulation of Article 1(3) retained.

The CHAIRMAN suggested that the Committee proceed to a vote on the Spanish proposal contained in CONF. 7/3. If this were not carried then the Philippines proposal to insert the language of the amendment into the chapeau of Article 1(1) could be put to the vote, after which the Committee might entertain the Cameroon proposal to delete the word "primarily" from the present text of Article 1(3). Consideration could then be given to the United States proposal.

Mr DE PAIVA (Brazil) reiterated his reservations as to the taking of votes so early in the proceedings of the Conference.

Mr GOODE (United Kingdom) agreed with the Chairman's proposal regarding voting but enquired whether the representative of the Philippines might be prepared to modify his proposal in the sense that if it were carried then it should be left to the Drafting Committee to decide whether the additional language should be placed in the chapeau or elsewhere in Article 1(1).

Mr SANTOS (Philippines) stated that he could accept the amendment to his proposal suggested by the representative of the United Kingdom.

Mr RÉCZEI (Hungary) pointed out that the proposal of the United States of America raised the question of whether a subjective or an objective test should be applied in relation to the lessor's knowledge of the intended use of the equipment. In these circumstances it might be wise to address that proposal before proceeding to the other three proposals to which the Chairman had referred.

In reply to a request by the Chairman, Mr MOONEY (United States of America) read out the text of his delegation's amendment to Article 1(3) as contained in CONF 7/C.1/W.P. 4, which
involved the addition of the following language at the end of the paragraph: "unless the lessor, at any time before or at the conclusion of the leasing agreement, neither knew nor ought to have known that the equipment was to be used by the lessee primarily for any such purposes".

In his view this amendment was fully compatible in principle with the Spanish proposal although he believed that it would still be necessary, in the event of a positive formulation being adopted, to clarify the position of Governments or governmental entities, to whose role as potential lessees such importance had been attached in connection with the discussion of the MIGA project. Moreover, any language referring to business or professional purposes would need to be expanded to cover leases to Governments or their agencies.

The CHAIRMAN asked whether the Spanish delegation might wish to reformulate its proposal to comprehend the situation mentioned by the representative of the United States of America.

Mr ILLESCAS (Spain) referred to the emphasis laid by the United States proposal on the subjective element constituted by the knowledge of the parties of the use to which the equipment was to be put. In his view this subjective criterion could present problems with regard to the application of the Convention, given in particular the lengthy duration of leasing contracts. On the other hand his delegation agreed that if its own proposal regarding Article 1(3) were to be accepted then it would be necessary to introduce additional language, for example a reference to "public service", which would make it clear that the Convention covered cases where a Government or a governmental agency was acting in the capacity of lessee.

Mr REBMANN (Federal Republic of Germany) saw both advantages and disadvantages in the Spanish proposal. The principal disadvantage was that uncertain cases would not fall within the scope of the Convention whereas they would under the present wording, and this irrespective of whether or not the United States amendment were to be accepted.

Ms TRAHAN (Canada) stated that while her delegation found the Spanish proposal to be an attractive one on account of the positive formulation, she would prefer to see the existing text of Article 1(3) maintained, perhaps with the addition of the language suggested by the United States delegation. The reasons for this were the need to ensure that the Convention covered cases where the lessee was a Government or governmental agency together with Canada's attachment to the harmonisation and unification of international commercial law which suggested the desirability of maintaining parallelism with the United Nations Sale Convention.

The CHAIRMAN recalled the remarks made by the representative of Brazil in connection with the need for sufficient time to consider proposals before voting. He therefore suggested that further discussion of Article 1(3) be deferred until the following day and that the Committee turn its attention to consideration of the Swedish proposal in CONF. 7/C.1/W.P. 2 to insert in Article 1(1)(a) before the last word "and" the words "or replaces the lessee in such an agreement" so as to cover the situation mentioned in the observations of the Government of Pakistan in CONF. 7/3 Add. 2.

It was so decided.

Paragraph 1 (continued)

Mr JACOBSSON (Sweden) recalled that the content of his delegation's proposal had already been discussed and suggested that an appropriate formulation be worked out by the Drafting Committee.

Mr REBMANN (Federal Republic of Germany) backed the Swedish proposal in principle and agreed that the Drafting Committee should seek to improve upon the language if necessary. The proposal represented a useful addition given the narrow construction by commercial circles in his own country of the present language.

Mr ILLESCAS (Spain) argued against the deletion of the words "financial leasing" in the
chapeau of Article 1(1). They already appeared in the title of the draft Convention itself and he suggested that their removal would serve no useful purpose and solve no problems regarding the scope of application of the Convention.

The CHAIRMAN noted that a decision had already been taken on this matter.

Mr KATO (Japan) drew attention to the questions raised in connection with the content of the proposal of the Swedish delegation by the Government of Pakistan in CONF. 7/3 Add. 2 and by the Asian Leasing Association in CONF. 7/4. He believed that the existing text met the concern which had been expressed and that the proposal of the Swedish delegation could result in the exclusion from the application of the Convention of some cases where it was the lessee which had originally entered into the supply contract.

The CHAIRMAN put the Swedish proposal to the vote, subject to drafting.

The proposal was rejected by fifteen votes to eleven.

Mr MOONEY (United States of America) suggested that further clarification by the Committee was perhaps necessary following the close vote which had just taken place. It was his belief that the drafters had believed that the present language of Article 1(1) was broad enough to embrace the cases of assignment or novation which were so common in leasing transactions. He assumed that this was the reason why a number of delegations had voted against the Swedish proposal.

The CHAIRMAN stated that his understanding of the earlier discussion was that the general sentiment had been that a number of the situations to which the Swedish proposal had been addressed were already covered by the draft Convention whereas others fell outside its scope and that the result of the vote left the situation unchanged. Recalling in particular an intervention by the United Kingdom delegation he believed that cases of assignment and novation as referred to by the United States delegation were in principle encompassed by the text of Article 1(1).

The meeting rose at 5.35 p.m.

SECOND MEETING

Tuesday, 10 May 1988, at 9.35 a.m.

Chairman: Mr Sevón (Finland)

AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING (Study LIX – Doc. 48; Study LIX – Doc. 49; CONF. 7/3 and Adds. 2-3; CONF. 7/4 and Add. 2; CONF. 7/C.1/W.P. 1-6 and W.P. 8)

Article 1 (continued)

Paragraph 1 (continued)

The CHAIRMAN noted that a new proposal in relation to paragraph 1 had been submitted in CONF. 7/C.1/W.P. 6 by the Chinese delegation, the aim of which was to clarify the text by adding the words “with a lessee” after the phrase “enter into an agreement (the leasing agreement)” in paragraph 1(b).
Ms ZHANG (China) stated that the amendment was one of drafting and not of substance.

The CHAIRMAN asked whether the Committee was prepared to refer the proposal to the Drafting Committee.

*It was so agreed.*

*Paragraph 2 (continued)*

The CHAIRMAN recalled that at the first meeting of the Committee of the Whole a Swedish proposal to amend paragraph 1(a) by inserting the words “or replaces the lessee in such an agreement” (CONF. 7/C.1/W.P. 2) had not been carried and he wondered therefore whether the representative of Sweden might not in consequence wish to withdraw the consequential amendment to paragraph 2(b) proposed in CONF. 7/C.1/W.P. 2, the effect of which would have been to delete the words “by the lessor” in the first line of that provision.

Mr JACOBSSON (Sweden) withdrew the proposal.

The CHAIRMAN asked whether the Committee was of the opinion that Articles 1(1) and 2) could now be sent to the Drafting Committee for consideration as no further amendments had been tabled.

*It was so decided.*

*Paragraph 3 (continued)*

The CHAIRMAN recalled that at its first meeting the Committee of the Whole had debated a proposal submitted by Spain in CONF. 7/3 the intention of which had been to reformulate Article 1(3) in affirmative language and which provided that: “This Convention applies solely to transactions in which the equipment is to be used by the lessee primarily for business or professional purposes”. Arguments both in favour and against the proposal had been advanced and an amendment tabled adding to it a reference to equipment to be used for public purposes. As an alternative way of solving one of the problems of concern to the Spanish delegation, the representative of the Philippines had proposed that language containing a reference to business, professional or public purposes be inserted in the *chapeau* of Article 1(1) while the representative of Cameroon had suggested that deleting the word “primarily” from paragraph 3 might remove some of that provision’s alleged ambiguities. Moreover, the United States delegation had proposed in CONF. 7/C.1/W.P. 4 that language be added to the paragraph which would import the element of the subjective knowledge of the lessor at the relevant time as regards the proposed use of the equipment subject to the lease.

He called for discussion of the Spanish proposal. If this were adopted then the proposal of the United States of America would be deemed to be rejected. If the Spanish proposal were not accepted, then the Committee could take up the proposals of the Philippines, Cameroon and the United States of America.

Mr MOONEY (United States of America) believed that the amendments presented by his own delegation and by that of Spain were not interrelated and he objected to the suggestion that the United States proposal would be deemed to have been rejected in the event of the Spanish proposal being carried.

Mr KATO (Japan) supported the United States proposal to add at the end of Article 1(3) the words “unless the lessor, at any time before or at the conclusion of the leasing agreement, neither knew nor ought to have known that the equipment was to be used by the lessee primarily for any such purposes”. It was however necessary also to have regard to the state of knowledge of the supplier at the time of the conclusion of the supply contract, given its potential liability to the lessee under Article 9. He therefore proposed completing the United States amendment by a new sentence.
to read as follows: "This provision also applies to the supplier mutatis mutandis."

Mr BRENNAN (Australia) expressed sympathy for the Spanish amendment but the purpose of
the provision was to exclude consumer transactions and in his view the existing text of Article 1(3)
did this clearly and unambiguously whereas the proposal of the Spanish delegation could raise
problems of definition.

Mr GOODE (United Kingdom) reiterated his sympathy for the Spanish proposal in that it
called for a positive formulation. As worded however it would give rise to ambiguity and exclude
borderline cases from the scope of application of the draft Convention which were already encom-
passed by it. The aim of the provision was simply to exclude use by the lessee for personal, family
or household purposes and by way of compromise he proposed that Article 1(3) be amended as
follows: "This Convention applies to financial leasing transactions in relation to all equipment,
save that which is to be used primarily for the lessee’s personal, family or household purposes."

Mr ILLESCAS (Spain) agreed that the United Kingdom proposal went in the same direction as
his own since it was formulated in a positive manner and sought to provide a wide scope of
application for the Convention. In these circumstances and in a spirit of compromise he could
accept it.

Mr BERAUDO (France) noted that the United States proposal sought to introduce a subjective
element into the definition of the scope of application of the Convention, with the danger that
problems of interpretation could arise and inhibit uniform application of its provisions. He further
considered that the Spanish proposal was useful in that its effect would be that, subject to the
exceptions already mentioned relating to consumer contracts, the Convention would apply to
leasing transactions in general. The text emerging from the proposals made by the Spanish and
United Kingdom delegations represented a compromise which could with advantage replace the
existing wording of Article 1(3).

Mr ROLLAND (Federal Republic of Germany) stated that his delegation could accept the
United Kingdom proposal which combined the merits of the original text and those of the Spanish
proposal. The basic problem was not primarily one of adopting a positive or a negative formulation
but rather of ensuring that if it were not to be proved that the leasing transaction was essentially one
which could be viewed as a consumer transaction, then the Convention should apply.

Mr BRENNAN (Australia) recalled that his delegation’s preference lay with the original text
but by way of compromise it could accept the proposal of the representative of the United Kingdom.

The CHAIRMAN asked whether any delegation wished to register strong opposition to the
text formulated by the United Kingdom delegation. If this were not the case then it might be
possible to settle the issue unanimously without the need for any vote on the Spanish proposal.

Mr KATO (Japan) enquired as to the extent to which the United Kingdom proposal was linked
with the amendment tabled by the delegation of the United States of America.

The CHAIRMAN replied that the United States amendment called for consideration as a
separate question, as also did the proposal of the delegation of the Philippines, although in his
opinion the proposal by the representative of Cameroon could be subsumed under the United
Kingdom proposal. In these circumstances he asked whether the Committee was prepared to accept
the text read out by the United Kingdom representative, subject to drafting.

It was so decided.

The CHAIRMAN then enquired as to whether, in view of that decision, it was still advisable to
insert in paragraph 1 some language relating to business, professional or public use as had been
suggested by the delegation of the Philippines. Given the new positive formulation of Article 1(3) to
the effect that the Convention would apply to all equipment subject to the exception stated therein,
he wondered whether there was still a need to add the proposed language.

He noted that this was not the wish of the Committee.

Turning to the proposal of the United States of America he recalled that an amendment adding further language relating to the state of knowledge of the supplier had been tabled by the Japanese delegation and he asked whether this amendment was acceptable to the United States delegation.

Mr MOONEY (United States of America) stated that without expressing any opinion on the drafting of the Japanese proposal he would embrace any attempt to include in the formulation of Article 1(3) a degree of protection for the supplier. He noted however, that some delegations had expressed criticism of the subjective nature of his own delegation's proposal but in his view the text of the paragraph as it stood could only be applied sensibly if regard were had to a subjective appreciation of the intentions of the lessee. What was in his view important was that in cases where the lessor reasonably and in good faith believed that the lessee intended to use the equipment for business purposes, whereas in fact it was intended for consumer use, the Convention should not apply. Likewise, if the lessor had good reason to believe that the lessee's claim that the equipment was to be used for professional purposes was spurious, the application of the Convention ought to be excluded.

Finally he expressed surprise at the fact that his delegation's proposal had been the subject of controversy, given the fact that the language was drawn from the United Nations Sale Convention which had already been accepted by fourteen countries, with more likely to do so in the near future.

Mr JACOBSSON (Sweden) requested clarification as to the combined effect of the Japanese and United States proposals. His understanding was that both the supplier and the lessor would have to know that the transaction was a consumer transaction. Did that mean that if the lessor knew this to be the case but the supplier did not then the application of the Convention would be totally excluded?

Mr KATO (Japan) stated that it was the wish of his delegation that the supplier should not be subject to the liability which might attach to it under Article 9 if it neither knew nor ought to have known that the equipment was to be used for the lessee's personal use. The supplier's lack of knowledge should not however be of relevance to the relations between the lessor and the lessee.

Mr RÉCZEI (Hungary) considered that what was under discussion was the issue of burden of proof and that this should rest on the party seeking to affirm that the Convention should be applied in cases where the equipment was used for purposes other than business. In this connection it was therefore unnecessary for the Convention to regulate the subjective question of the knowledge of the parties.

Mr BRENNAN (Australia) associated himself with the sentiments of the representative of Hungary and, given the new formulation of Article 1(3) proposed by the United Kingdom delegation, he doubted whether any additional language was necessary.

Mr ROLLAND (Federal Republic of Germany) shared the view expressed by the Hungarian and Australian delegations. The problem had been solved by the adoption of the United Kingdom proposal which laid down a general rule subject to exceptions. Anyone wishing to invoke the exception must adduce proof to that effect and if he failed to do so then the Convention should apply.

The CHAIRMAN put to the vote the United States proposal as completed by the Japanese delegation.

Mr JACOBSSON (Sweden) asked for clarification regarding the vote.

The CHAIRMAN stated that the vote could only be interrupted if a question was raised concerning the voting procedure.

*The proposal was rejected by twenty-two votes to six.*
The CHAIRMAN suggested in relation to a proposal which had been made regarding the location within the Convention of the content of Article 1(3) that it be considered at a later stage when Article 3 came up for discussion.

*It was so agreed.*

Mr PHILIP (Comité Maritime International) recalled that in its written observations, submitted in CONF. 7/C.1/W.P. 5, the CMI had argued in favour of the total exclusion of the leasing of ships from the future Convention. The varying objectives of that instrument were such that the inclusion of ships could jeopardise the existing harmony in the shipping area and endeavours to achieve uniform legislation in that field. There would be no great practical loss to the Convention if ships were to be excluded and indeed its adoption might thereby be facilitated.

Financial leasing of ships was encompassed by bareboat chartering, a contract frequently entered into in respect both of new and of old ships. Such contracts were extremely detailed, usually containing both standard and specific clauses, and experience had shown to the shipping community that there was no need to distinguish between financial and other leases of ships. He feared therefore that problems would be created for the preparation by UNCTAD and the CMI of rules on bareboat chartering if the area of financial leasing of ships were to be left out because of their inclusion in the Unidroit Convention, while similar difficulties could be created in connection with the IMO/UNCTAD initiative on ship financing.

Whereas one of the aims of the Unidroit Convention appeared to be the international recognition of financial leases, no such problem of recognition arose in relation to the work on bareboat charters, the aim of which was to bring about uniform legislation covering the whole field of bareboat chartering which would ensure a reasonable balance of interests of the parties. It should also be borne in mind that the United Nations Sale Convention had specifically excluded ships from its scope of application and that a similar intention had been manifest in Unidroit’s original draft on financial leasing. No explanation had been offered regarding the subsequent change in attitude.

If the CMI recommendation to exclude ships altogether from the future Leasing Convention were not to be accepted, he would at least hope that some recognition might be given in certain articles to their special position, that parties to bareboat charters be allowed to contract out of the Convention and that States be permitted to enter a reservation excluding its application to ships.

Ms FAGHFOURI (UNCTAD) noted that the development of uniform rules for financial leasing would be a positive step in assisting developing countries but she understood the reservations of the shipping community regarding the inclusion of ships within the draft Leasing Convention. A modern international legal regime for ship financing was required and the matter was under study by a joint IMO/UNCTAD intergovernmental group of experts which was currently reviewing the existing Conventions dealing with the more traditional methods of ship financing, namely mortgages, hypothèques and other similar charges. The principal objective of the group was to develop an international legal agreement that would encourage financing for the building and purchase of ships and in this connection she noted that financial leasing was an alternative method of ship financing and sometimes the only one available to developing countries.

Any rules governing the financial leasing of ships would have to take account of its relationship with certain fundamental issues such as ship registration and bareboat charterparties while the special treatment of ships in Article 5 of the draft Convention raised a number of questions which needed to be addressed in a more satisfactory manner. In particular, the reference to “public notice” in paragraph 2 was not clear as it was uncertain whether such notice was to be given in the flag State, the charterer’s State or elsewhere. Similarly, the words “security interest” in paragraph 4 were unclear in that it was not apparent whether such an interest included a ship mortgage.

In her view, the draft Convention would place a greater liability on ship lessors than was presently the case in practice, in which connection she cited Articles 7 and 10, which scarcely seemed to be compatible with the objective stated in the preamble to the draft Convention of making international financial leasing more available to developing countries. It could therefore be questioned whether a general convention on financial leasing was the appropriate place to deal with
the financial leasing of ships as such a solution would, inter alia, prevent attempts to regulate it in a more specific way. She therefore believed that it would be desirable to exclude ships from the scope of application of the future Convention or alternatively to permit Contracting States to achieve that result by way of a reservation.

The CHAIRMAN noted that two observers had recommended the exclusion of ships and sought the views of governmental delegations.

Mr KATO (Japan) addressed two questions to the observers: first, the extent to which financial leasing was used in shipping and second how far bareboat chartering coincided with financial leasing in the sense that the draft Convention contemplated the full amortisation of the investment. Would this be the case with a single bareboat charter?

Mr PHILIP (Comité Maritime International) responded to the first question by stating that although such statistics were not available, there was increasing recourse to financial leasing as defined in the draft Convention in connection with the sale of ships. As to the second question, he noted that ships were chartered not only on a short-term, but also on a medium or long-term basis.

Ms FAGHFOURI (UNCTAD) stated that it was her belief that financial leasing was used increasingly by countries with debt burdens. As to the second question, she affirmed that bareboat charters were also concluded on a long-term basis between financial institutions and charterers.

Mr ROLLAND (Federal Republic of Germany) saw no reason why ships should be excluded totally from the scope of application of the future Convention on the basis of the arguments so far advanced. It was true that it might not deal adequately with all aspects of the financial leasing of ships but appropriate provision could be made in the final clauses for the primacy of any specific convention which might be adopted in the future while the parties to individual contracts would be free under Article 14 to exclude the application of the Convention to their transactions.

Mr EL-KATTAN (Egypt) believed that if ships were to be excluded from the scope of the Convention, the next move might be to press for the exclusion of aircraft and other vehicles and he wondered what equipment would then be left.

The CHAIRMAN recalled that the only issue which had so far been raised was the exclusion of ships.

Mr GOODE (United Kingdom) was of the opinion that careful consideration should be given to the matter before the Committee took any decision to exclude ships from the Convention which conferred many positive benefits on lessors and lessees of ships. He could not understand why they should be deprived of those benefits simply because no international convention specifically regulating the financial leasing of ships had as yet been prepared and adopted. In the absence of such a convention, and if ships were to be excluded from the application of that under consideration by the Conference, shipowners and ship lessees would be deprived of the possibility of availing themselves of the advantages offered by the future Convention whereas if ships were included they could either benefit from its provisions or, if they so preferred, exclude its application under Article 14. Such a solution would preserve an element of choice. As the representative of the Federal Republic of Germany had also pointed out, if the UNCTAD/IMO work were to result in future conventions, such conventions could be adequately safeguarded in the final clauses of the Leasing Convention.

Mr BERAUDO (France) was unable to support the proposal of the Comité Maritime International.

The CHAIRMAN noted that as no governmental delegation had supported the proposal made by the two observers to exclude the application of the Convention to the leasing of ships he took it to be the wish of the Committee to include ships within its scope, without prejudice to the outcome of the discussions on Articles 5 and 14 and the final clauses.

*It was so agreed.*
The meeting was adjourned at 11 a.m. and resumed at 11.30 a.m.

Proposed new paragraph 4

The CHAIRMAN referred the Committee to the proposal of the United States delegation contained in CONF. 7/C.1/W.P. 4.

Mr MOONEY (United States of America) stated that his delegation’s proposal to introduce a new paragraph 4 in Article 1 was designed to remove an ambiguity in the text which arose from the fact that while Article 6 contemplated that equipment which had become a fixture or incorporated in land might be covered by the Convention, this was nowhere expressly stated and the amendment was therefore intended to make it clear that if equipment otherwise subject to the Convention became affixed to or incorporated in land the Convention would not cease to operate. The proposal did not broaden the scope of the Convention, nor did it interfere with the substantive rule contained in Article 6.

Mr GOODE (United Kingdom) expressed his support for the amendment for the reasons already stated.

Mr REBMANN (Federal Republic of Germany) believed that since Article 6 stated the same thing as the proposed Article 1(4), there was no need for further clarification, the only effect of which would be to burden still more the provisions on scope.

The CHAIRMAN noted that it could be argued that Article 6 only answered the question of whether or not equipment was to be deemed to have become a fixture but not that of what would happen in that event.

Mr MOONEY (United States of America) suggested that if the Committee’s understanding was that his delegation’s proposal was one simply of a drafting nature, then it might be referred to the Drafting Committee.

Mr RÉCZEI (Hungary) had no objections to the proposal although he was of the opinion that the more appropriate location would be a new paragraph 2 of Article 6.

Mr BRENNAN (Australia) agreed with this view and suggested that the proposed amendment be referred to the Drafting Committee which might determine whether it was indeed necessary and, if so, its location.

Mr KATO (Japan) also lent his support to the opinion expressed by the representative of Hungary.

Mr BERAUDO (France) preferred the retention of the text of Article 6 as it stood as the solution of the issue raised by the United States delegation was already implicitly covered by the existing language. He feared that the addition of a new paragraph 4 to Article 1 would in effect result in the establishment of an incomplete list which could give rise to discussion and difficulties of interpretation. The amendment had been tabled before the adoption of the compromise formula put forward by Spain and the United Kingdom in respect of Article 1(3), the effect of which was that the Convention would, subject to limited exceptions, cover all equipment.

Mr ILLESCAS (Spain) found the existing text of Article 6 to be adequate for the reasons advanced by the representative of France.

Mr CUMING (Canada) endorsed the proposal of the delegation of the United States of America. It was not obvious that any new category of property was being added to any list. The issue was whether equipment ceased to be personal property and became real property when affixed to land or incorporated in it and not whether it became a new type of equipment. This was a sufficiently important matter to merit the introduction of language making it clear that the Convention would continue to apply in such cases.
Mr SANTOS (Philippines) expressed support for the United States proposal which recognised that Article 6 dealt only with the question of the applicable law to determine whether equipment became a fixture and therefore sought to make it clear that the Convention would continue to apply to such equipment if it did become a fixture.

The CHAIRMAN put to the vote the United States amendment on the understanding that if carried it would be for the Drafting Committee to determine its location.

*The proposal was adopted by fourteen votes to seven, with five abstentions.*

The CHAIRMAN enquired whether Article 1 as a whole together with the amendments so far adopted could now be referred to the Drafting Committee for consideration.

*It was so decided.*

**Paragraph 1**

The CHAIRMAN noted that the proposals by the delegation of Spain in CONF. 7/3 and by the Swedish delegation in CONF. 7/C.1/W. P. 2 seemed to be addressed to the same issue, namely the relation between the *chapeau* of Article 2(1) and sub-paragraphs (a) and (b).

Mr ILLESCAS (Spain) enquired whether it had been the intention of the authors of the provisions, when read together, that for the Convention to apply the general condition stated in the *chapeau* must always be satisfied together with sub-paragraph (a) or (b).

The CHAIRMAN stated that this was his understanding of the text and he therefore considered the matter to be one of drafting. He believed this also to be the case with the Swedish proposal to delete the word “when” at the end of the *chapeau*, the intention being to clarify the relationship between the *chapeau* and the two sub-paragraphs.

Mr JACOBSSON (Sweden) confirmed that this was his delegation’s intention.

The CHAIRMAN, after noting that no other delegations wished to take the floor on paragraph 1, suggested that the paragraph as a whole, together with the Spanish and Swedish proposals, be referred to the Drafting Committee for consideration.

*It was so decided.*

**Paragraph 2**

The CHAIRMAN called for comments on the proposal submitted by the Government of Pakistan in CONF. 7/3 Add. 2, the thrust of which seemed to be to specify the places of business intended to be relevant under the provisions.

Mr BRENNAN (Australia) stated that while not wishing to take up the proposal as such, his delegation had a related question to put. The expression “place of business” was defined in paragraph 2 in such a way that if a party to the supply agreement or to the leasing agreement had more than one place of business then the place of business was that which had the closest relationship with the agreement concerned and its performance. This seemed to be an unambiguous statement in the case of the supplier and of the lessee, each of which was party to only one agreement but the lessor’s position was unclear since it was a party to both agreements and he would welcome clarification in that connection.

The CHAIRMAN asked whether in relation to the lessor different places of business could be
relevant to the two contracts. In other words, could the scope of application of the Convention be affected by the fact that the relevant place of business of the lessor might be different in respect of the two agreements.

Mr MOONEY (United States of America) read the text as providing that regard be had to each agreement to which the lessor was a party separately and that it was therefore possible for its place of business to be in different States in relation to the leasing agreement and to the supply agreement. The Committee should decide whether this was an appropriate rule and, if not, what the rule should be. His inclination was to leave the text as it stood. Such situations would probably be rare and any attempt to deal with every possible permutation would be unwise. If however the provision was thought to be ambiguous then it might need to be clarified.

The CHAIRMAN enquired whether the representative of Australia found this answer to be satisfactory and, if so, whether the present text was acceptable.

Mr BRENNAN (Australia) stated that his understanding of the text coincided with that of the representative of the United States of America although the question remained of its effect on particular transactions so that the matter might profitably be considered by the Drafting Committee.

Mr JACOBSSON (Sweden) did not see the importance of the lessor’s place of business in relation to the supplier as the *chapeau* spoke only of the lessor and the lessee and sub-paragraph (a) of the place of business of the supplier.

The CHAIRMAN believed that the relevant place of business of the lessor might have some impact on Article 2 (1)(b) in determining whether the supply agreement was governed by the law of a Contracting State since, although it was usually the case, it was not invariably so that the seller’s law would apply to the supply agreement.

Mr GOODE (United Kingdom) was of the opinion that the interpretation suggested by the Chairman did not conform to the intention of the drafters of paragraph 2 which had been that it should be read only for the purposes of paragraph 1(a) and that it did not extend to paragraph 1(b). If that interpretation was generally accepted then the language should be reviewed by the Drafting Committee.

The CHAIRMAN stated that in these circumstances the issue before the Committee would seem to be one of substance and he therefore asked whether there was any opposition to the view that Article 2(2) referred only to the *chapeau* and to paragraph 1(a) of that article. There being no objections to that reading he asked whether the Committee would be prepared to refer paragraph 2 to the Drafting Committee on that understanding.

*It was so agreed.*

*Proposed new paragraph 3*

The CHAIRMAN invited the delegation of the United States of America to introduce its proposal in CONF. 7/C.1/W.P. 8.

Mr MOONEY (United States of America) recalled that Article 2(2) made it clear that where there was more than one place of business regard should be had to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the agreement in order to determine that place of business. The language had been taken over almost verbatim from Article 10(a) of the United Nations Sale Convention. The proposed new paragraph 3, which was intended simply to complete the picture as the closing phrase of paragraph 2 addressed only part of the problem, namely where there was more than one place of business, was drawn from Article 1(2) of the United Nations Sale Convention. It would establish the general rule with respect to determination of place of business that the fact that places of business were in different States was to be disregarded when
this fact did not appear either from the leasing agreement or from the dealings between the lessor and the lessee, thus regulating principally the situation of an agent acting for an undisclosed principal which might appear to the other party to be a domestic or local agent when in fact the principal had its place of business in another State. In other words the leasing agreement would in fact be an international one and it was questionable whether, for example, the supplier should in such cases be directly liable to the lessee under the Convention. An alternative way of dealing with the problem would be by incorporating similar language at the end of paragraph 2.

Mr RÉCZEI (Hungary) agreed that similar language was to be found in the United Nations Sale Convention. It had however to be borne in mind that whereas the contract of sale had been regulated in every country so that parties to a contract of sale should from the very outset be aware which law would be applicable, leasing agreements were regulated by the law of only a few States. In consequence, the knowledge of each party of the place of business of the other was not so significant as it would scarcely be to the detriment of a party to the leasing agreement not to know that the international Convention would apply in view of the absence of applicable local rules. The aim of the Convention was to unify the law relating to international financial leasing and its scope of application should not therefore be unreasonably restricted.

Mr GOODE (United Kingdom) expressed support for the United States proposal as the situation contemplated was not uncommon in practice. He enquired however whether as a corollary of the proposal a similar provision ought not to be introduced to the effect that the fact that the lessor and the lessee had their places of business in the same State should be disregarded whenever this did not appear from the leasing agreement since the situation could arise where one party was led to believe that the Convention did not apply because the parties were contracting in the same State when in fact the other party had its place of business in another State.

Mr MOONEY (United States of America) saw the point as one meriting consideration and stated that he would be prepared to amend his proposal to take account of it.

Mr BERAUDO (France) did not believe the United Nations Sale Convention to be a useful precedent in this connection, given the difference between the tripartite financial leasing transaction and the contract of sale. The United States proposal would create a further exception to the application of the Convention, could encourage fraudulent behaviour and would introduce an element of subjectivity creating a potential for litigation and difficulties for practitioners.

Mr REBMANN (Federal Republic of Germany) recalled that it was always possible for the parties to exclude in advance the application of the Convention under Article 14. In cases where one party insisted on the application of the Convention and the other opposed it in reliance on the "surprise" factor he would hesitate to accept the solution that only the latter party should be protected. There was therefore no need for the suggested clarification which would only serve to complicate still further the general rules on scope of application.

Mr DE PAIVA (Brazil) expressed serious doubts regarding the proposal of the delegation of the United States of America.

The CHAIRMAN recalled that the delegation of the United States of America had agreed to modify its proposal in the light of the amendment suggested by the representative of the United Kingdom. He therefore put to the vote the substance of the proposal as amended, subject to drafting.

*The proposal was rejected by twenty-three votes to five, with four abstentions.*

The CHAIRMAN suggested that in these circumstances Article 2 be referred to the Drafting Committee.

*It was so decided.*
Article F

The CHAIRMAN recalled that he had already referred to the possibility of this article being discussed by the Committee of the Whole immediately after Article 2 in that it constituted a reservation to paragraph 1(b) of that article. A technical difficulty lay in the fact that Article F formally fell within the competence of the Final Clauses Committee and that it would strictly speaking require a decision of Plenum for its consideration by the Committee of the Whole. In view however of the close connection between the two provisions it seemed to him to be desirable for Article F to be taken at this juncture and he doubted whether a different view would be taken by Plenum. He enquired therefore whether the Committee of the Whole found such a procedure to be acceptable.

It was so agreed.

The CHAIRMAN stated that two proposals had been tabled regarding Article F, the first by the Hague Conference on Private International Law in CONF. 7/4 Add. 2 and the second by Finland in CONF. 7/C.1/W.P. 3, both of which called for the deletion of Article F.

Mr PELICHET (Hague Conference on Private International Law) recalled that Article F permitted a State to declare that it would not be bound by Article 2(1)(b). Article F had never been discussed by the Unidroit committee of governmental experts, having been submitted to the Conference by the Secretariat in a document dealing with the final clauses. In his view the article presented significant problems in connection with financial leasing transactions.

The justification of the inclusion of Article F was stated to be that an identical reservation clause was to be found in Article 95 of the United Nations Sale Convention and in Article 28 of the Geneva Agency Convention. Not only was the situation here quite different but the Article 95 reservation was already presenting problems in the doctrine. Moreover, adoption of Article F would strike a serious blow at the autonomy of the future Convention and the system underlying it.

To take an example, the lessor had its place of business in State A and the lessee in State B, both Contracting States, whereas the supplier’s place of business was in non-Contracting State C. In such a situation, the Convention would not be applicable under Article 2(1)(a) since not all of the three parties had their places of business in Contracting States. Suppose next that the leasing agreement was subject to the law of State A, either because the parties had so agreed or because the conflict rules of State A led to the application of the law of that State. Suppose finally, that State A had adopted the Article F reservation. Would it then be reasonable for the judges of State A to be permitted not to apply the Convention, when the principal contract of the tripartite relationship, the leasing agreement, had been concluded between parties whose places of business were in Contracting States, and when the parties to the supply agreement had expressly chosen to apply the law of State A to their agreement so as to comply with the requirements of Article 2(1)(b), in other words so that the Convention would apply.

The effect of Article F would be to allow one State to paralyse application of the Convention throughout the tripartite relationship, even when the principal contract had been concluded between two parties having their places of business in States which had not made the reservation. Moreover, the Permanent Bureau of the Hague Conference considered acceptance of Article F as all the more unfortunate in that the territorial scope of application of the Convention was already extremely limited, requiring as it did either that all three parties had their places of business in Contracting States or that both the leasing agreement and the supply agreement be governed by the law of a Contracting State. Further restricting this already limited scope of application by means of a unilateral declaration of a single State would undermine the attempt at unification in which the Conference was engaged. In these circumstances he proposed that Article F be deleted.

Ms ASTOLA (Finland) also proposed the deletion of Article F, first because in conventions relating to commercial agreements it was extremely difficult for parties to know whether Contracting States had entered reservations to the convention in question whereas in fact it should be as
easy as possible for them to know whether or not the convention was applicable. The problem was even more acute in tripartite transactions such as financial leasing. Secondly, the example offered by the observer of the Permanent Bureau of the Hague Conference on Private International Law eloquently showed the possible consequences of the acceptance of Article F.

Mr GOODE (United Kingdom), Mr RÉCZEI (Hungary), Mr BRENNAN (Australia), Ms REINSMA (Netherlands), Mr ROLLAND (Federal Republic of Germany) and Mr BERAUDO (France) all supported the proposal to delete Article F.

Mr KATO (Japan) stated that he would prefer to reserve his delegation's position at this stage, pending discussion of Article 14.

The CHAIRMAN noted that there was strong support for the deletion of Article F, and that no delegation had pleaded for its retention, while the representative of Japan wished to reserve judgment until such time as Article 14 had been considered by the Committee of the Whole.

Mr RÉCZEI (Hungary) requested that the record indicate the almost unanimous support for the deletion of Article F.

The CHAIRMAN noted that this statement would be included in the record and he proposed that the Committee revert to Article F, without the need for any further lengthy discussion, at a later stage in deference to the wishes of the representative of Japan.

*It was so agreed.*

*Article 3*

The CHAIRMAN announced that three proposals had been made regarding the location of this provision in the Convention, one by Spain in CONF. 7/3 that it immediately precede Article 2 and the others by Sweden in CONF. 7/C.1/W.P. 2 and by the United Kingdom in CONF. 7/C.1/W.P. 1, both of which suggested that it be relocated as Article 1(3).

In addition, there was a South African amendment in CONF. 7/3 Add. 3 to replace the word "option" by the word "right" and to add a new paragraph 2 stating that: "For the purposes of this article a right to purchase does not include an obligation to purchase".

Mr BADENHORST (South Africa) recalled that at the last session of the Unidroit committee of governmental experts the word "right" had been replaced by "option", ostensibly to offer clarification that the provision did not purport to cover the situation where the lessee's right derived from an obligation to purchase the leased asset as such an agreement would constitute a sale. The amendment however gave rise to another problem since under South African and German law the term "option" did not necessarily comprehend all situations falling short of an obligation to purchase equipment, such as a right of first refusal. The word "option" narrowed the possibilities and the use of the word "right" as in the earlier draft was preferred by his delegation, all the more so as acceptance of its proposal was in line with the language of Article 8(2) which spoke of the lessee's "right" to buy the equipment.

Mr DAVID-WEST (Nigeria) said that in conformity with United Nations Resolutions his delegation must emphatically state that it saw the presence of a representative of the racist, minority regime of South Africa at the Conference as being neither useful nor legitimate. To this extent Nigeria's participation in the Conference and the possibility of its acceding to any instruments adopted by it would be dictated by its policy in this regard, without prejudice to its conviction that the objectives of the Conference were worthwhile.

The CHAIRMAN considered that the Nigerian delegation had raised a point of order. He recalled that Rule 5 of the Rules of Procedure provided that pending a decision of the Conference upon their credentials representatives were entitled provisionally to participate in the Conference. He asked whether the representative of Nigeria would be prepared to postpone discussion of the
question until the Credentials Committee had submitted its report to Plenum for discussion.

Mr DAVID-WEST (Nigeria) stated that he could accept the Chairman’s proposal.

The CHAIRMAN enquired whether there was support for, or opposition to, the South African proposal.

Mr MOONEY (United States of America) believed that the word “option” signified an ability to exercise a right to purchase but did not include an obligation to do so. In his view it covered a right of first refusal.

Mr REBMANN (Federal Republic of Germany) called for clarification of the interpretation of Article 3. Was it correct, as he believed, that a lessor’s option to sell the equipment or to extend the lease would not exclude a transaction from the scope of application of the Convention? If this was the common understanding then he would have no objections to the present text of Article 3.

The CHAIRMAN noted that the representative of Australia had requested the floor and in view of the hour it would be necessary to resume discussion of the question in the course of the afternoon session.

The meeting rose at 1.05 p.m.

CONF. 7/C.1/S.R. 3
12 May 1988

THIRD MEETING

Tuesday, 10 May 1988, at 2.35 p.m.

Chairman: Mr Sevón (Finland)

AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING (Study LIX – Doc. 48; Study LIX – Doc. 49; CONF. 7/3 and Adds. 1-2; CONF. 7/4 and Add. 2; CONF. 7/5; CONF. 7/C.1/W.P. 1-2; W.P. 5 and W.P. 9)

Article 3 (continued)

The CHAIRMAN recalled that at the previous meeting the representative of the Federal Republic of Germany had raised a question relating to the proper understanding of Article 3. Following a request for the floor by the representative of Australia further discussion on the matter had been postponed. It now transpired however that there was no difference of opinion between the two delegations and in these circumstances he enquired whether there was any dissent from the interpretation suggested by the representative of the Federal Republic of Germany.

Finding this not to be the case he proposed that that interpretation be reflected in the summary records with an indication that no statement indicating a contrary view had been made within the Committee.

It was so agreed.

The CHAIRMAN further recalled that he had at the previous meeting drawn attention to proposals by the delegations of Spain (CONF. 7/3), the United Kingdom (CONF. 7/C.1/W.P. 1) and Sweden (CONF. 7/C.1/W.P. 2) regarding the location of Article 3, the first to the effect that it be placed before Article 2, and the two latter that it be brought forward as a new paragraph 3 of Article 1, the existing paragraph 3 becoming paragraph 4. He asked whether the representative of
Spain found the proposals of the United Kingdom and of Sweden to be acceptable.

Mr ILLESCAS (Spain) agreed that the intention of those proposals was substantially the same as that behind his delegation’s amendment set forth in CONF. 7/3. What he was seeking was to bring together more directly in the text the elements of the general description of the transaction in Article 1 and the specific characteristics of the contract mentioned in Article 3, whether this be in Article 1 or in Article 2.

The CHAIRMAN considered that the question of the placing of Article 3, and in particular whether it should be relocated as a new paragraph 3 of Article 1, was one of drafting. If this were the view of the Committee, and if no further proposals were made concerning Article 3, then he would propose that the article be referred to the Drafting Committee which would also be called upon to consider its location.

It was so decided.

CHAPTER III – GENERAL PROVISIONS

Article 14

The CHAIRMAN reminded the Committee of his suggestion at the outset of its work that Article 14 be considered after Article 3. This seeming to be acceptable, he noted that a number of proposals had been submitted on paragraphs 1 and 2 of the article, including one of a general character by the observer from the Comité Maritime International in CONF. 7/C.1/W.P. 5 which suggested that a choice would have to be made between paragraphs 1 and 2 of Article 14 as the two provisions could not be combined. With reference to a proposal by Sweden contained in CONF. 7/C.1/W.P. 9 he asked whether it was intended that the proposed new text should replace both paragraphs of Article 14 or whether it simply constituted an amendment to paragraph 2.

Mr JACOBSSON (Sweden) stated that his delegation’s proposal sought to replace the whole of Article 14. Written observations, and in particular those of the Permanent Bureau of the Hague Conference on Private International Law, showed very clearly that it was illogical on the one hand to allow the parties to exclude the Convention entirely, and on the other to establish the mandatory character of certain of its provisions. If the general understanding was that some provisions should indeed be mandatory then the parties ought not to be allowed to exclude the application of the Convention entirely.

Mr KATO (Japan) insisted on the commercial character of the transactions with which the Convention was concerned and on the weight traditionally attached to party autonomy in commercial matters. Consumer transactions had moreover been excluded from the Convention’s scope of application. There was therefore no room for mandatory provisions and the parties should be allowed to exclude the Convention totally.

Mr MOONEY (United States of America) thought that the Swedish proposal raised two issues, the first being the question of whether or not it should be possible for the Convention to be excluded entirely while the second related to drafting technique and a purported logical inconsistency. Addressing the second issue first, he understood the concern of some delegations to be that if the parties were to be free to exclude the application of the Convention entirely, then it would not make sense to subject parties who did embrace the Convention to mandatory non-derogable terms. He did not however see this as a problem for if parties were to seek the benefits of the Convention in the balance which it was being sought to achieve then it was perfectly logical to assert that the price to be paid should be the acceptance of certain mandatory rules.

On the other hand, if the parties did not wish to enjoy the benefits of the Convention and therefore excluded its application entirely, then they would simply be left to their own agreement and to the applicable law. If, moreover, they were to exclude the Convention and then incorporate some of its provisions in their contract to the exclusion of the mandatory terms of the Convention,
then here again he could see no logical difficulty as they would not be applying the Convention but simply relying on it in part to flesh out their contract.

As to the suggestion that the parties should not be permitted to exclude the Convention as a whole, this was totally unacceptable to his delegation. The draft preamble, as well as the legislative history of the draft Convention, clearly indicated that one of its main functions was to facilitate international financial leasing by making it more readily available in countries which might not at present be friendly to the structure of such transactions. The intention had never been to force parties to apply the Convention in circumstances where they would prefer their relations to be governed by the applicable domestic law.

The CHAIRMAN suggested that the Committee concentrate in the first instance on the question of whether or not the Convention should be of a mandatory character, considering at a latter stage which provisions, if any, ought to be mandatory.

Mr GOODE (United Kingdom) agreed with the observations of the representative of the United States of America. He felt that it was however important first to clear up what might perhaps be a misunderstanding caused by the present wording of paragraphs 1 and 2 of Article 14. The intention of the authors had been that the provisions were not alternative but cumulative in the sense that the parties could exercise an option between excluding the application of the Convention as a whole and derogating from or varying certain of its provisions.

Mr BERAUDO (France) admitted that, in an abstract conception of law, it was possible to view the two paragraphs of Article 14 as cumulative, the first permitting the parties to exclude the Convention in its entirety and the second providing that if the parties wished their relations to be governed by the Convention then they must in their mutual relations accept certain mandatory rules perceived as being fundamental to the transaction under consideration. This concept had not however met with a large measure of success if it were borne in mind that paragraph 1 had been included by the committee of governmental experts in square brackets in view of the feeling of a number of delegations that it might be deleted. It was therefore in his opinion possible to consider the two paragraphs of Article 14 as alternatives.

In this perspective it was necessary to decide whether the parties to the supply agreement and to the leasing agreement should be permitted to exclude totally the application of the Convention. For its part, the French delegation could not accept the idea that parties could nullify the fruits of six years work and negotiations at intergovernmental level. The principle of party autonomy made it possible for parties to exclude certain provisions of a law but not the law itself. As the Chairman had already stated, it was however premature at this stage for the Committee to consider which articles of the Convention should be mandatory. Pending discussion of that matter, he proposed that paragraph 1 of Article 14 be deleted and that paragraph 2 be retained on the understanding that the possibility for parties to exclude the application of certain provisions of the Convention be limited to the mutual relations of the parties concerned and to those provisions which did not involve fundamental points of principle.

Mr NISHIKAWA (World Leasing Council) supported the views expressed by the representatives of Japan and the United States of America and stated his total disagreement with those of the representative of France. The adoption of paragraph 2 of Article 14 would fail to reflect business realities and could possibly inhibit international financial leasing transactions in the future. The World Leasing Council agreed that it was desirable to unify business practice but it had to be remembered that cross-border leasing was a new phenomenon calling for flexible solutions. Failure to recognise this fact could cast doubt on the attractiveness of the future Convention to lessors and lessees alike.

Mr BRENNAN (Australia) spoke in favour of the retention of Article 14(1), so as to permit the parties to exclude the Convention as a whole. As to paragraph 2, it should be formulated in such a way as to enable the parties to derogate from or vary any of the provisions of the Convention without any restrictions.
Mr ROLLAND (Federal Republic of Germany) expressed agreement with the statement of the representative of Australia. The transaction under consideration was a commercial one and given the exclusion of consumer leasing full scope should be accorded to the principle of party autonomy. Paragraph 2 of Article 14 should therefore be deleted and paragraph 1 amended so as to permit the parties not only to exclude the application of the Convention as a whole but also in certain respects.

Mr RICHARDS (Antigua and Barbuda) did not see paragraphs 1 and 2 as being mutually exclusive. It was important to bear in mind the fact that the parties might not find the Convention as a whole, or some of its provisions, to be suited to their needs and it was therefore necessary to preserve the principle of party autonomy and to retain both paragraphs 1 and 2 of Article 14.

Mr WUJEK (Poland) regarded Article 14 as being crucial to the Convention as a whole. Referring to the draft preamble, he recalled that one paragraph drew attention to the need to adapt the traditional rules of hire to the specific tripartite relationship constituted by financial leasing transactions while another insisted on the desirability of formulating certain uniform rules. Such uniformity could not be achieved if the parties were to be free to exclude the Convention entirely and he therefore favoured the concept of an instrument which would in principle be binding but from which the parties could derogate except in relation to a certain number of mandatory rules. A solution of this kind, which had been advocated by the French delegation, would preserve party autonomy within the framework of the Convention. It was of course necessary, when determining which rules should be mandatory, to have regard to current leasing practice and to the need for flexibility. The aim of the Conference ought therefore to be that of adopting a body of rules that was practicable and which sought to preserve the interests of all three parties involved.

Mr GOODE (United Kingdom) recalled that the purpose of the Convention was to facilitate cross-border financial leasing from the viewpoint both of lessors and of lessees, including those situated in developing countries which would welcome a sound framework for the expansion of such cross-border leasing. He could not however conceive how such expansion would be encouraged by interfering with the autonomy currently enjoyed by the parties under most legal systems when negotiating transactions which were both international and commercial. His delegation’s position was therefore that with the possible exceptions of paragraphs 3 and 4 of Article 11 the whole Convention should be permissive. The United Nations Sale Convention had allowed derogation therefrom in whole or in part and he could see no logic in departing from such a principle merely because what was under consideration was a financial leasing transaction rather than a contract of sale.

Mr PHILIP (Comité Maritime International) stated that he had perhaps misunderstood the relationship between paragraphs 1 and 2 of Article 14. He could however accept the explanation of the article as a whole given by the representatives of the United States of America and of the United Kingdom to the effect that while paragraph 1 permitted the parties to exclude the Convention entirely, paragraph 2 provided for derogation apart from certain mandatory rules. If this were the case then he did not believe that paragraph 2 would endanger the interests of the shipping industry.

He had however to insist on the need for there to be complete freedom for the parties to exclude totally the application of the Convention. As far at least as shipping circles were concerned, the transactions were of a commercial character, party autonomy was customary and negotiations were conducted between parties on a comparable economic level with equal access to know-how and expertise. There was therefore in this field no need to accord special protection to one party or the other, all the more so as the content of the three mandatory rules contemplated by Article 14(2) differed little from that of the law of most countries. It was however necessary for shipping circles to be certain as to which law would govern their relations. If paragraph 1 of Article 14 were to be accepted there would be no problem as the standard documents, especially those relating to bareboat chartering, could exclude the operation of the Convention entirely but if only paragraph 2 were to be retained then a considerable degree of uncertainty would exist as the parties would in each case have to ascertain whether Article 1 or Article 2 would bring their transaction within the scope of application of the Convention; this would not be easy given the difficulty not uncommon in.
shipping contracts of ascertaining the place of business of a party. In these circumstances he pleaded in favour of the retention of Article 14(1), but if the provision were to be deleted then paragraph 2 of the article should contain an exception in respect of the leasing of ships.

Mr RONCORONI (Switzerland) stated that his delegation broadly supported the stand taken by the representatives of France and Poland. He was however not insensitive to the considerations raised by the United Kingdom delegation and he therefore believed that a satisfactory solution could be found in the amendment submitted by his own Government in CONF. 7/3 Add. 1, the thrust of which was that the application of the Convention could be excluded totally only if the three parties to the financial leasing transaction so agreed. Such a compromise would maintain the balance achieved over the years in connection with the rights and obligations of the parties involved in financial leasing transactions and would at the same time respect the tripartite nature of such transactions. It would also have the advantage of preventing a party behaving in an inconsistent manner by seeking to include the application of the Convention in one agreement but not in the other.

Mr DE PAIVA (Brazil) saw the question as being a different one. Generally speaking his delegation supported those which had emphasised the private law character of the Convention and the need to preserve the autonomy of the parties in commercial transactions. He had however sympathy for the view of those who had warned against the danger of the Convention becoming just another piece of paper if the parties were to be allowed to exclude its application in all cases with the consequent risk of its being of little interest to Governments. It seemed to him that none of the provisions of Article 14 as it stood were altogether acceptable and it was therefore incumbent on the Committee to contemplate compromise proposals which might obtain general acceptance. One suggestion had already been advanced by the delegation of Switzerland while an alternative might lie in a form of wording along the lines that: "Parties shall not enter into agreements that are contrary to the spirit or general principles of the Convention". He conceded that such a provision might not be as precise as was customary in international instruments and offered it simply as a basis for consideration with a view to assisting the Committee in finding a general formula which would prevent the parties entering into agreements contrary to the spirit of the Convention.

Mr BERAUDO (France) stated that international commercial relations had evolved considerably over the last twenty years. Attention had been drawn to the paragraph of the draft preamble which spoke of the need to make international financial leasing more available to developing countries and while it was true that the concept of the New International Economic Order had been developed within the framework of the United Nations, Article 14 could not be considered in isolation from the philosophy and legal implications of the voluntary redistribution of the cards between developing and industrialised nations. The developing countries represented at the Conference were no doubt fully aware of the mechanism of international financial leasing but from a legal standpoint he had to recall that only three mandatory rules were at present contemplated by paragraph 2, one of which went to the very essence of a lease (Article 7(2)) while the others in Article 11(3) and (4) were simple rules of equity in favour of the lessee. If the concept of rendering financial leasing more readily available to developing countries were to have any sense then those three provisions of the Convention must assume a mandatory character under Article 14(2) and paragraph 1 of that article be deleted.

Mr NISHIKAWA (World Leasing Council) agreed that one of the principal purposes of the Convention was to make international financial leasing more available to developing countries. He noted, however, that if the Convention were not to provide incentives to the leasing industry, then this aim would be frustrated. If the realities of international financial leasing were not reflected in the Convention there was a risk that the leasing industry would be deterred from expanding its activity, which would be in the interest neither of lessors nor of lessees, nor in that of the developing countries.

Mr MOONEY (United States of America) stated that he could in part agree with the statements by the representatives of Poland and Brazil. The decision of the Conference on Article 14
would indeed determine whether or not the work of fourteen years would turn out to be yet another piece of paper. He failed however to see how restricting the parties' freedom of contract could encourage international financial leasing and he recalled that his own professional experience had not shown prospective lessees to be unsophisticated. They had a clear interest in pricing and if that were to be perceived as attractive then they would welcome the basic format of financial leasing. The problem was that although the basic standards and format of financial leasing had already been struck in the early nineteen-seventies, with little substantial variation thereafter, thus permitting a fairly standardised way of doing business, doubts had arisen in lessee jurisdictions where the equipment was to be kept as to the enforceability of the transaction in those jurisdictions, since misunderstandings might persist as to its nature, judges might view it as one-sided in favour of the lessor and informed legal advice was difficult to obtain. This was not to say that other areas of concern might not impede the transaction. He therefore suggested that if the intention of the Committee were now to change the underlying purpose of the Convention from one of facilitation to a regulatory law designed to protect the parties then there was a serious risk that it might on the contrary do much to hinder the development of international financial leasing.

Mr REBMANN (Federal Republic of Germany) stated that if mandatory rules as contemplated in Article 14(2) were to be included in the Convention they would not be very strong as there would be fears that they might unduly prejudice the position of lessors. His delegation would therefore prefer to see the adoption of genuine substantive provisions which could always be tempered by the rules of domestic law preventing the misuse of party autonomy, for example those relating to public policy, which would be more effective then watered-down mandatory rules under the Convention designed to protect one or more of the parties.

Mr FERRARINI (Italy) shared the views of, among others, the representatives of the United States of America and of the United Kingdom in the sense that the parties should be free to derogate from the provisions of the Convention. It was important to bear in mind the consideration that many States, including his own, had not introduced specific domestic laws dealing with financial leasing, a fact which seemed to mitigate against the imposition by the Committee of a strictly mandatory system by way of the Convention.

Mr RÉCZEI (Hungary) saw the debate on Article 14 as going to the very roots of the process of unification of law which was, he recalled, a modern development responding to the needs created by increasing inter-dependence among States and the rapid growth of national economies in recent years. For the most part international economic relations were still governed by domestic law and the legal "nationalism" or "chauvinism" of each State clearly constituted an impediment to the process of unification. Nevertheless the draft Convention under discussion did provide an opportunity to establish internationally accepted rules, always provided that due weight was given to the sovereignty of States. An international instrument could of course be framed in such a way as to be of mandatory application but no State could be obliged to ratify such a convention. Much therefore as he would have liked to accept the French proposal the reality of the situation was such that paragraph 1 of Article 14 would have to be retained, subject to paragraph 2 listing those provisions designed to protect the weaker party.

Mr KATO (Japan) indicated that Article 14 was the provision of the draft Convention which had been found most shocking in his country. The Conference must be aware of the need to draw up a convention acceptable to a majority of countries if it were to be widely ratified. He stated that it might be difficult for Japan to ratify the Convention if it contained the present text.

Mr SANTOS (Philippines) recognised that there was a conflict between the principle of party autonomy and the establishment of some principles of international law governing the relations of the parties. He agreed however with the representative of Hungary on the need to protect the weaker party, in which connection he recalled the preambular provision which referred to the need to maintain a fair balance of interests among the parties. In these circumstances he would favour the deletion of Article 14(1) and the adoption of paragraph 2 or a compromise formula which would ensure that the interests of lessors or lessor countries would also be safeguarded.
Mr NISHIKAWA (World Leasing Council) stated that it was not always the case in cross-border leasing that the lessor was the stronger party and the lessee the weaker. Very often, lessors were small companies and the lessee a Government or quasi-governmental entity such as an airline. In many cases of so-called "big ticket" cross-border leases it was the lessor who was the weaker party.

Mr BERAUDO (France) expressed support for the compromise proposal advanced by the delegation of Switzerland to the effect that the Convention could be totally excluded under Article 14(1) only if all three parties so agreed. Paragraph 2 would then set out the provisions of mandatory application if the parties decided not to exclude the Convention.

Ms ASTOLA (Finland) endorsed the statements of the representatives of Switzerland and France and stated that her delegation could support the compromise Swiss proposal. She noted however that although reference had been made to Article 7(2) and Article 11(3) and (4) as mandatory provisions, no mention had been made of Article 9 which was one of the core articles of the Convention and one to which consideration should be given if the compromise were accepted.

Mr MOONEY (United States of America) stated that he could in principle support the idea that Article 14(1) would operate to exclude entirely the application of the Convention only if all three parties to the tripartite transaction so agreed, the effect of which would be that the Convention would be disappiled intentionally and not inadvertently. For his part he would prefer to see no list of mandatorily applicable provisions of the Convention in Article 14(2) and he strongly urged that apart from the general issue of mandatory rules the question of which provisions should be so classified be considered later.

The CHAIRMAN emphasised that the exchange of views which had so far taken place had been of an essentially preliminary character since it was clearly difficult to take a stand on which provisions, if any, should be mandatory before the content of those provisions was known. In these circumstances it seemed premature to discuss in detail the content of Article 14 itself.

What had however become apparent was that there were two main lines of argument. The first was that the Convention should be totally permissive, with a variant to the effect that if the parties did not contract out of it in its entirety then they might be subject to some mandatory provisions. The second view was that in principle the parties should enjoy freedom to contract out of all provisions except for those to be mentioned in Article 14, one variant being that, in order to contract out of the Convention as a whole or possibly from any of its provisions, all three parties would have to be in agreement.

In these circumstances he suggested that the Committee proceed to an indicative vote which would show its preference between the two main approaches. On the basis of that vote, a small informal working group might meet and seek to hammer out a broadly acceptable solution which the Committee could bear in mind as it worked its way through the various articles of the draft Convention.

Mr KATO (Japan) drew attention to the fact that there seemed to be an assumption that the making mandatory of certain provisions would have the effect of protecting the weaker party. He questioned this assumption for if a heavier burden were to be shouldered by lessors then either they would abstain from concluding leasing agreements or offset that burden by raising rental costs.

Secondly, and on a more technical point, he recalled that in Japan assignment-purchase agreements were very popular. The mechanism was that the supply contract was initially concluded between the supplier and the lessee, after which the lessee's contractual status was transferred to the lessor. His question was therefore how the supplier could in such cases ensure that the Convention would not be applicable if, as had been proposed by the representative of Switzerland, it was necessary for all three parties to agree to the exclusion of the Convention in toto.

Mr REBMANN (Federal Republic of Germany) stated that he too had some problems with the Swiss proposal; in particular it did not seem to him to make sense to require the supplier's consent to the exclusion of the Convention. After all, the supplier's main concern was to sell the equipment
and whether or not the equipment was being supplied under a financial leasing arrangement was of no direct concern to it, the only difference between that situation and one of a straightforward sale contract being that there were two creditors rather than one. It should therefore be sufficient for the lessor and the lessee to agree to exclude the application of the Convention.

Further, he agreed with the statement by the representative of the World Leasing Council that it was impossible to make broad generalisations as to which of the parties to a leasing agreement was the stronger or the weaker. This was a matter which could best be judged by the court in each individual case, in which connection it should also be recalled that the court would, in the absence of any special provisions of the Convention, have at its disposal adequate means to counter any misuse of party autonomy such as the rules of public policy and the legal doctrines of invalidity of contracts, immoral terms and so forth.

Mr RÉCZEI (Hungary) also doubted whether there was any need to require that the supplier consent to the exclusion of the application of the Convention and he therefore proposed that the words “either by the terms of the supply agreement or” be deleted from Article 14(1). It was in his view quite sufficient for the exclusion of the Convention that the lessor and the lessee so agree.

Mr PELICHER (Hague Conference on Private International Law) stated that the amendment proposed in Article 14 by the Permanent Bureau of his organisation was also in the nature of a compromise proposal. That amendment, set out in CONF. 7/4 Add. 2, was worded as follows: “In their relations with each other [alone], the lessor and the lessee, on the one hand, and the lessor and the supplier, on the other, may exclude the application of this Convention or derogate from or vary the effect of any of its provisions”. The thrust of the proposal was that since the parties to the leasing and supply agreements were professionals, there was no need to protect them in their mutual relations. They should therefore be allowed to exclude the application of the Convention in those relations but in so doing they should in no way be permitted to affect the position of the third party to the tripartite leasing transaction or of the persons contemplated by Article 7 of the draft Convention.

The CHAIRMAN closed the discussion on Article 14 and proposed that the Committee follow the procedure which he had suggested, namely that it proceed to an indicative vote regarding the principal options which had been outlined so that some guidance could be offered to the informal working group which would permit it to come up with a solution acceptable to a majority of delegations. He stressed that the article under consideration was of crucial importance for the future of the Convention so that as broad a consensus as possible should be reached.

He therefore proposed that delegations indicate their preference as to the following solutions:

(i) that the parties be entitled to contract out of the Convention and any of its provisions;

(ii) that the Convention contain certain mandatory provisions from which the parties could not derogate.

The different variants of the main solution could, he suggested, be considered by the working group together with any compromise proposals.

Mr CUMING (Canada) requested that a third solution be put to the vote, namely that the parties be permitted to exclude the Convention in its entirety but that if they failed to do so then they might be subject to certain mandatory provisions.

The CHAIRMAN noted that this proposal largely coincided with the broad lines of the existing text. He then proceeded to a vote as to the first preference from among the various solutions which yielded the following result:

*In favour of a totally non-mandatory Convention: twelve

*In favour of a solution which would permit the parties to opt out of the Convention but, in the event of their failing to do so, then their being subject to certain mandatory provisions: fourteen*
In favour of a solution whereby certain mandatory provisions would apply whenever the Convention was applicable: two.

The CHAIRMAN suggested that the informal working group on Article 14 be composed of the following delegations: Antigua and Barbuda, Australia, Brazil, China, France, Federal Republic of Germany, Poland, Switzerland and the United States of America. He requested the representative of Brazil to assume responsibility for convening the group.

Following a request by the representative of Guinea, the CHAIRMAN proposed that Egypt be added to the group.

The Committee agreed to the composition of the working group as so amended.

The meeting was adjourned at 4.25 p.m. and resumed at 4.55 p.m.

CHAPTER II – RIGHTS AND DUTIES OF THE PARTIES

Article 4

The CHAIRMAN suggested that the Committee turn its attention to Article 4, in respect of which proposals had been submitted by the Governments of Pakistan in CONF. 7/3 Add. 2 and of Japan in CONF. 7/3. To the extent that the Pakistani proposal required the consent of the lessee to matters affecting its rights and interests he believed that the concern had been met by the decision taken by the Committee on Article 1. As to the Japanese proposal, this had been tabled in connection with its comments on Article 1(1).

Mr KATO (Japan) stated that in the light of the new text of Article 1(1)(a) his delegation wished to table an amendment to Article 4 along the following lines: "... The terms of the supply agreement approved by the lessee may not be varied without the consent of the lessee." He viewed the amendment as corresponding substantially to the Pakistani proposal.

The CHAIRMAN noted that in view of the decision taken in relation to Article 1 that some terms of the supply agreement might not require the consent of the lessee the Japanese proposal could be seen as a consequential amendment.

Mr BRENNAN (Australia) supported in principle the Japanese proposal which he too saw as a consequential amendment. He suggested however that to ensure consistency of language with other provisions of Chapter II, the word "may" be changed to "shall". In addition, he believed that the words in Article 4 "without the consent of the lessor" related to a question of evidence and enquired whether such consent should be evidenced in writing.

The CHAIRMAN asked whether the Committee agreed that the first Australian proposal was a matter of drafting.

Mr GOODE (United Kingdom) thought that the substitution of the word "shall" for "may" was a matter of drafting and that although the amendment was not essential, it would constitute an improvement.

Mr REBMANN (Federal Republic of Germany) stated that he could not accept that the consent of the lessee under Article 4 must be given in writing.

The CHAIRMAN announced that in the absence of any objection to the Japanese proposal as amended by the Australian delegation he would propose that it be referred to the Drafting Committee. As to the second limb of the intervention of the representative of Australia it was his understanding that Article 4 prescribed no form for the expression of the lessee’s consent. It was therefore up to the parties to take the necessary steps to ensure that the best proof would be available. If this were the common understanding of the Committee he would propose that Article 4 as a whole be referred to the Drafting Committee for consideration.
It was so decided.

Article 5

The CHAIRMAN drew the attention of the Committee to the fact that in addition to the basic text of Article 5 reproduced in Study LIX – Doc. 48, a revised version was to be found in Appendix III to CONF. 7/5. That document contained the report of a Working Group of Technical Experts on international financial leasing which had met after the last session of the Unidroit committee of governmental experts responsible for the preparation of the draft Convention with a view to considering some rather complex matters in respect of which the committee of governmental experts had believed that it might be appropriate to seek specialist advice.

He invited the representative of the United Kingdom, who had acted as Chairman of the Working Group of Technical Experts, to introduce the changes which the group had proposed to Article 5 as adopted by the committee of governmental experts.

Mr GOODE (United Kingdom) stated that the main purpose of the meeting of technical experts had been to explore a number of problems which were perceived as arising from the attempt made in Article 5 to deal with certain aspects of registration, and especially that of ships and aircraft, in connection with the requirement of public notice, and to determine whether or not the system contemplated by paragraph 3 of the article would work in practice. At the same time the group had dealt with some other suggested weaknesses in paragraphs 1 and 4.

Turning to the redrafted text of paragraph 1, he stated that the reference to the lessee’s trustee in bankruptcy, against whom it was intended that the lessor’s real rights should be valid, had been deemed to be too narrow and it had therefore been proposed to extend the concept by defining “trustee in bankruptcy” as including “a liquidator, administrator or other person appointed to administer the lessee’s estate for the benefit of the general body of creditors”. The language of paragraph 2 had remained substantially unaltered, the only innovation being the substitution at the end of the provision of the words “only where they are valid according to such rules” by “only if there has been compliance with such rules” so as to make it clear that what the provision was concerned with was whether there had been compliance with the relevant rules of public notice rather than with the question of the validity of the lessor’s real rights in accordance with those rules.

The revised text of paragraph 3(a) addressed the problem of ships which sprang from the fact that with the growing tendency to register bareboat charter interests there was a danger of double registration of different interests in the same ship, namely those of the shipowner, and those of the bareboat charterer, even though technically the first registration might be considered to have been suspended for the duration of the second. It was for this reason that the Working Group of Technical Experts had proposed replacing the connecting factor of registration by that of the flag State of which there would only be one. In so doing the group had recognised that although in respect of mobile equipment such as ships there was possibly no single State which would necessarily have a direct connection with the leasing agreement or with the parties, it was nevertheless imperative to identify one State whose public notice requirements, if any, would have to be complied with. As regards paragraph 3(b), this constituted a clarification of the earlier text in that it indicated the kind of registration contemplated, namely registration for the purposes of identification and for this reason it made reference to registration of the equipment by “serial number, name or other identifying mark”.

The redrafted sub-paragraphs (c) and (d) of paragraph 3 were slightly amended versions of the former sub-paragraphs (b) and (c) while the new paragraph 4 was intended to ensure the subordination of the provisions of Article 5 to those of other Conventions recognising the lessor’s ownership or other real rights in equipment such as the 1944 Chicago Convention on International Civil Aviation. Finally, he stated that the former paragraph 4, new paragraph 5, had been amended so as to allay concern that the reference to liens or security interests in the equipment might not be broad enough to cover for example some admiralty liens, rights of arrest, detention of aircraft etc. The intention of the proposed new text was to attempt to fill any such gap.
The CHAIRMAN suggested that, in the discussion of Article 5, the text contained in Study LIx – Doc. 48 should be regarded as the basic text although delegations which wished to support all or part of the revised Article 5 as reproduced in CONF. 7/5 need not introduce proposals in writing to that effect. He then noted a proposal by the Government of Pakistan in CONF. 7/3 Add. 2 and by the Asian Leasing Association in CONF. 7/4 to replace the words “real rights” by the term “ownership”. This seemed to be a matter of substance as the amendment would restrict the scope of the provisions in question. However he invited the Drafting Committee to consider the matter of whether it might not be possible to find a formula conveying the sense of the words “real rights” but in language more usually encountered in legal texts.

No comments having been raised in respect of the proposal made by Pakistan and the Asian Leasing Association, the Chairman’s suggestion for forwarding the matter to the Drafting Committee for consideration was adopted.

The CHAIRMAN invited the observer of the Comité Maritime International to introduce his organisation’s proposal in CONF. 7/C.1/W.P. 5 to exclude ships altogether from the application of Article 5.

Mr PHILLIP (Comité Maritime International) laid stress on the special character of ships which in his view justified their exclusion from the application of Article 5. Until recently the provisions of Article 5(3)(a) would not have caused him any serious concern as there had been a substantial identity between the State of registration of a ship and its nationality. These public law matters directly affected private law questions such as the registration of mortgages and other real rights in ships which were entered on the register of the country of the nationality of the owner of the ship or of the company owning it.

The picture was however rapidly changing, with increasing recourse to bareboat charters which were now being entered in the register of the country of the bareboat charterer. This development had primarily been for public law purposes and the consequence had been a desire in some quarters for dual registration, which had then been followed by a proliferation of national legislation permitting the bareboat charterer not only to register its interest in its own country but also to fly its flag. This did not mean that a ship had the right simultaneously to fly two flags as the right to fly the original flag would be suspended. It did however demonstrate that the choice of the law of the flag State as a connecting factor in Article 5(3)(a) was no more free of ambiguity than that of the law of the State of registration, in which connection he recalled that it was now not uncommon for the rights of ownership and other real rights in the ship to be entered in the register of the State of the owner of the ship and for interests relating to the bareboat charter to be entered in the register of the bareboat charterer’s country.

In these circumstances, and in the absence at present of a more suitable connecting factor, he could only propose in the first instance that Article 5 should not apply at all to ships, which would simplify the article as a whole. If however that suggestion were not taken up, then it would be preferable to include no connecting factor for ships but simply to refer to the applicable law, a solution which would admittedly not be very helpful. He remained convinced therefore that the most satisfactory approach would be to disapply Article 5 entirely to ships, one which would be workable given the fact that the area was already the subject of a certain number of Conventions and that important practical difficulties had not arisen for shipping circles from the problems associated with insolvent shipowners, the enforcement of rights in ships and so forth.

Lastly, further assistance could be offered in this context by Article C of the draft final clauses although he would suggest, in the interest of avoiding possible conflicts with other Conventions, that the reference to the supplier, the lessor and the lessee be changed to one to “the supplier, the lessor or the lessee”.

The CHAIRMAN noted that in view of the hour it would be necessary to bring the discussion to a close and to resume consideration of Article 5 at the Committee’s next meeting.

The meeting rose at 5.40 p.m.
FOURTH MEETING

Wednesday, 11 May 1988 at 9.35 a.m.

Chairman: Mr Sevön (Finland)

AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING (Study LIX – Doc. 48; CONF. 7/3; CONF. 7/5; CONF. 7/C.1/W.P. 5; W.P. 7-8 and W.P. 16)

Article 5 (continued)

Paragraph 1

The CHAIRMAN proposed first discussing paragraphs 1 and 2 and then dealing with the question of the applicability of Article 5 as a whole to ships when the Committee came to paragraph 3(a).

This proposal was accepted by the Committee.

Moving on to paragraph 1, the CHAIRMAN first noted the proposal for paragraph 1 made by the Working Group of Technical Experts (CONF. 7/5). The question of the definition of a "trustee in bankruptcy" contained therein, even though it corresponded to the intentions of the earlier draftsmen, amounted in his opinion to a question of substance in so far as it went beyond what the present text meant. There was also a proposal from the United States of America (CONF. 7/C.1/W.P. 8) which went slightly beyond that of the Working Group of Technical Experts. He suggested starting with the proposal of the working group and called upon the representative of the United Kingdom, who had chaired the group, to explain the intended effect of the proposal.

Mr GOODE (United Kingdom) pointed out that attention had been drawn by some consultees to the fact that the original text referring solely to "trustee in bankruptcy" was too limited because there were other officials whose task it was to administer an estate for the benefit of the general body of creditors as opposed to taking possession of assets for a particular creditor, such as a secured creditor. The purpose of paragraph 1 as it was envisaged was to preserve the lessor's real rights against the general body of creditors, as opposed to secured creditors. The definition was therefore intended to cover all those categories of persons, such as trustees in bankruptcy, who typically represented the general body of creditors. While this proposal represented in some sense a change of substance it was intended to reflect more fully and accurately what the working group had conceived to be the intention of the governmental experts.

After having been called upon by the Chairman to present his proposal for paragraph 1, Mr MOONEY (United States of America), explaining that this proposal was substantially similar to one his delegation had made at the last session of the committee of governmental experts and that it had been prepared before his delegation had seen the report of the working group, stated that, subject to minor details best left to the Drafting Committee, the proposal by the working group fairly met the concerns that lay behind his delegation's proposal. In these circumstances and subject to consideration by the Drafting Committee, he withdrew his delegation's proposal in this regard.

The CHAIRMAN noted that the only proposal remaining was therefore that made by the Working Group of Technical Experts. He assumed that as this proposal was submitted by a group
made up of representatives of several States there was support for the proposal and he therefore called for comments on it.

Mr BRENAN (Australia) supported the proposal for paragraph 1 put forward by the Working Group of Technical Experts. At the same time he suggested a minor drafting change designed to assist the text whereby the words “for the purposes of this Article” would be placed ahead of the words “trustee in bankruptcy” in the second clause of paragraph 1.

The CHAIRMAN, after ascertaining the Committee’s agreement that the proposal made by the representative of Australia was purely one of drafting, proposed that the text of paragraph 1 as drafted by the Working Group of Technical Experts should, subject to the drafting amendment proposed by Australia, be adopted by the Committee and sent to the Drafting Committee for review.

*It was so agreed.*

**Paragraph 2**

Having been called upon by the Chairman to illustrate the proposal made by the Working Group of Technical Experts for this paragraph, Mr GOODE (United Kingdom) pointed out that the only change the working group had proposed here was in the last line of the text adopted by the committee of governmental experts. The effect of this proposal would be to substitute the words “only if there has been compliance with such rules” for the words “only where they are valid according to such rules”. This was not intended as a change of substance, being designed only to make the formulation more accurate, by emphasising that the rules had to be complied with.

The CHAIRMAN noted that there was a United States proposal for paragraph 2 contained in CONF. 7/C.1/W.P. 8. Since in the explanatory notes to this proposal it was stated that the amendment proposed was consequential in nature to that proposed for paragraph 1, he assumed that, subject to drafting improvements, he could take it that the proposal was now withdrawn. This was so.

Neither any further proposals for this paragraph nor any objections to the proposal of the Working Group of Technical Experts being forthcoming, the CHAIRMAN proposed that the proposal of the working group be adopted.

*It was so agreed.*

**Paragraph 3**

Regarding paragraph 3 the CHAIRMAN noted that there were a number of questions to be dealt with. He suggested dealing first with the paragraph in relation to ships only. There were a number of proposals before the Committee in this connection. The Committee had the day before heard the suggestion made by the observer from the Comité Maritime International that it would be wiser not to apply Article 5 at all to ships (CONF. 7/C.1/W.P. 5). There was also a proposal by Spain in CONF. 7/3 offering alternatives, the first of which was that the law of the State where the lessee had its principal place of business should be applied to ships and the second that the law of the State where the lessee had its principal place of business should be applied to ships. A further proposal came from Finland in CONF. 7/C.1/W.P. 7, suggesting the deletion of sub-paragraph (a) with the result that sub-paragraph (b) would be applicable to ships also. Lastly there was the proposal of the Working Group of Technical Experts suggesting that for ships one should apply the law of the flag State rather than the law of the State of registration. He asked whether there were any further proposals relating to ships.

Mr GOODE (United Kingdom) announced that his delegation together with the delegations of Canada and the United States of America were in the process of putting the finishing touches to a joint proposal which would address both the question of ships and other questions raised by Article 5. The effect of this proposal in respect of ships would be that, instead of a reference to the
flag State, there would be a reference to the applicable law as determined by the rules of private international law.

The CHAIRMAN suggested opening discussion on the paragraph with the proposal tabled by the Working Group of Technical Experts and to this end he called upon the representative of the United Kingdom to explain the purport of the proposal.

Mr GOODE (United Kingdom), recalling that the original sub-paragraph (a) referred to the law of the State of registration, explained that the information before the Working Group of Technical Experts was very much to the same effect as the statement made the day before by the observer from the Comité Maritime International, namely that bareboat charter registration had become increasingly common so that at any one time one might have ownership registration and bareboat charter registration even though the ownership registration would normally be in suspense for the duration of the bareboat charter registration. The effect of this relatively recent development was to make a reference to the law of the State of registration no longer unambiguous. For that reason the view was taken that the law of the flag State should be substituted for the law of the State of registration, on the basis that there would be only one flag State at any one time. In making this choice the working group had recognised that the law of the flag State would not necessarily have any connection with the leasing transaction as such or the location of the parties but had felt that this problem of establishing a connection with the transaction would probably arise in the case of mobile goods whichever connecting factor was selected and had conceived its objective as being to find one State which, regardless of whether or not it was related to the transaction or the parties, was at least a unique State, so that it would be possible to know for certain which State’s public notice rules would be applicable.

The CHAIRMAN called upon the representative of Spain to explain his proposal.

Mr ILLESCAS (Spain) explained that his delegation’s proposal had its origin in its perception of what it saw as the difficulties inherent in any attempt to put into practice the rule proposed by the committee of governmental experts, a perception that had received confirmation from the statement made by the observer from the Comité Maritime International the day before. In effect, the connecting factor proposed under this rule was neither sufficiently certain nor workable. The other solution proposed, namely the law of the flag State, was, for the reasons that had already been given the day before, equally lacking in certainty and workability.

In so far as the situation addressed by this article was effectively the bankruptcy of the lessee its purpose was to safeguard the lessor’s rights in the leased assets vis-à-vis the lessee’s other creditors. The surest way of realising this purpose in the opinion of his delegation was to submit this question to the law of the State where the lessor had its principal place of business. While such a solution might at first sight appear unduly to favour the lessor’s interests, this was only the appearance as in reality it was in the interests of all parties to both an individual leasing transaction and all future leasing transactions to enable the lessor to remove its property from the reach of the general body of the lessee’s creditors.

Should this first proposal of his delegation fail to commend itself to other delegations as introducing an element of imbalance, his delegation proposed, as a second-best solution, taking the law of the State where the lessee had its principal place of business.

Whichever proposal should be chosen, compliance would be required with the formal procedures regarding public notice laid down by the applicable law, requirements with which it would not always be easy to comply, especially when the equipment was located in a different country. Both proposals were designed principally to ensure the preservation of the separatio ex iure domini and were conceived not so much in the interests of the individual parties but rather in those of the future development of the leasing transaction itself.

The CHAIRMAN called upon the representative of Finland to explain her proposal.

Ms ASTOLA (Finland) stated that in proposing the deletion of sub-paragraph (a), her delegation was mindful of the purpose behind public notice requirements rather than of the traditional
view taken with regard to ships and other vehicles subject to registration. The purpose of public notice in financial leasing transactions was the protection of third parties and this protection would be most called for where the lessee had either gone bankrupt or was in danger of going bankrupt. The question that then arose was which country had the closest connection with such a situation. In the opinion of her delegation this would be the country in which the lessee had its principal place of business. As to the proposal for taking the lessor's principal place of business as the suitable connecting factor, it was her opinion that it would be difficult for third parties to know what that country would be. For these reasons her delegation favoured the deletion of sub-paragraph (a) with the result that the rule set out in sub-paragraph (b) would also apply to ships.

The CHAIRMAN called upon the representative of the United Kingdom to enlarge on his explanation of the joint proposal formulated by the delegations of Canada, the United Kingdom and the United States of America that the question should be left to the rules of private international law of the forum.

Mr GOODE (United Kingdom) replied that his delegation and those of Canada and the United States of America had considered this matter in the light of the paper presented (CONF. 7/C.1/W.P. 5) and the oral explanations of the observer from the Comité Maritime International that with modern developments even a reference to the law of the flag State was no longer unambiguous in that it was possible in some cases to use the law of the flag of the bareboat charterer as an alternative to the law of the flag of the owner and those might change quite rapidly. Given that the flag State did not therefore seem any longer to offer an adequate solution and the inadequacies of the State of registration had already been proven, his delegation and those of Canada and the United States of America had reached the conclusion that, in the light of the special characterisation of ships and the work going on at the time on the subject of maritime liens and mortgages on ships, coupled in particular in the case of ships with the difficulty of establishing in advance of the dispute which law would prove most satisfactory to govern the question of public notice requirements, it was better to leave the matter to be dealt with by the court of the forum in the light of the facts that would then be available to that court, so that it would be for that court to apply its own rules of private international law to determine which State's perfection requirements should be applicable. This seemed to be the most sensible solution. In one sense it was a non-rule, leaving the question to be dealt with by general conflict of laws rules. However, it was considered right for it to be specifically included as a rule so as to avoid any inference that ships were being left out of Article 5 altogether.

The CHAIRMAN suggested as a means of approaching this problem diminishing the number of choices left on the table. He first asked whether there was support for the proposal made by the observer from the CMI to exclude ships altogether from the scope of Article 5.

Mr REBMANN (Federal Republic of Germany) specified that there was no support for excluding ships from the entirety of Article 5 but there was rather support for excluding them from Article 5(2) and, consequently, Article 5(3). His delegation was not satisfied with any of the proposals on the table. The joint proposal of Canada, the United Kingdom and the United States of America amounted to a non-rule, as had been explained by the representative of the United Kingdom. The other proposals created the danger of dual registration of ships. He felt it could be assumed, first, that ships were usually registered and, secondly, that ship registers were intended to give public notice of ownership and, if that were so, he did not feel there was any need for another rule like the one set out in Article 5(2). His delegation favoured providing that Article 5(2) and, consequently, Article 5(3) did not apply to registered ships. Non-registered ships would therefore fall under the category "mobile equipment" and should be dealt with as proposed in the Finnish proposal.

The CHAIRMAN noted that there was no indication of any support for the idea of excluding ships from the purview of Article 5 as a whole.

He then noted that there were however a great number of proposals involving criticism of the
basic text of the provision. He accordingly enquired whether there was any support for retaining the basic text which proposed taking the place of registration as the appropriate connecting factor for ships. Having ascertained that there was no such support, he accordingly asked for comments on the proposal by the Working Group of Technical Experts for adopting the law of the flag State.

Mr BERAUDO (France) supported the proposal made by the Working Group of Technical Experts. By way of explanation of his support for this proposal, he pointed to the reasons why in his opinion none of the other solutions advocated appeared satisfactory to him.

The proposal to submit the public notice requirements governing the lessor’s real rights to the law of the State where the latter had its principal place of business was understandable in so far as it corresponded to the conflict of laws rule generally admitted in respect of financial leasing, whereby such transactions were governed by the law of the party that effected the performance characteristic of the transaction, that is the lessor. This proposal however failed to take sufficient account of the precise purpose of Article 5, which was not to give general public notice of the financial leasing transaction but simply to give public notice in respect of certain types of equipment and as regards ships to ensure the public notice of the lessor’s real rights over the ship. The lessor’s principal place of business was not, in his opinion, a relevant connecting factor where the ship was considered as an object. The same reasoning applied in reverse to the proposal that public notice of the lessor’s real rights over the ship should be given in the State where the lessee had its principal place of business. He did not consider this to be a relevant connecting factor in the case of ships.

Under the joint proposal of Canada, the United Kingdom and the United States of America the conflict of laws rules of the forum would determine the law applicable to the public notice requirements to be complied with in respect of ships. As the representative of the United Kingdom had himself admitted and the representative of the Federal Republic of Germany had confirmed, this amounted to a non-rule because there was no way either of knowing the conflict of laws rule that would be applied by the forum seized of the case nor indeed which would be the forum. The idea of such a solution could not in his opinion be entertained two years after the opening to signature of the United Nations Convention on Conditions for Registration of Ships, concluded under the auspices of UNCTAD and done at Geneva on 7 February 1986. This Convention contained rules on the registration of ships and on the flag. It also contained several articles dealing with bareboat charters.

He feared lest the introduction of the bareboat charter into the Committee’s debates was causing unnecessary confusion. Financial leasing could be used in respect of ships that already had a captain and crew and were ready to sail. He was of the opinion that financial leasing was in most cases used in respect of that type of vessel. Admittedly there was no way of excluding the possibility that financial leasing might be used in respect of ships that did not have either captain or crew and were not members of a liner conference, that is ships chartered on a bareboat charter as defined by Article 2 of the aforementioned United Nations Convention. Whilst he believed that in practice this situation would only arise exceptionally, it was a situation that would require a rule that would at the same time ensure that public notice was given both of the financial leasing transaction and of the bareboat charter. A single connecting factor would be required for this purpose so that public notice could be given in only one place. This was the reason why the Working Group of Technical Experts, acting on the advice of Dr Mensah, the Head of Legal Services and Assistant Secretary-General of the International Maritime Organization, had opted for the flag as the most suitable connecting factor. In reaching this decision the working group had in mind Article 4(3) of the aforementioned United Nations Convention which provided that: “Ships shall sail under the flag of one State only”. Article 11(5) enjoined States to assure themselves that ships bareboat chartered-in could fly the flag of only one State. The effect of this clause as regards ships that were leased under a financial lease and subsequently bareboat chartered-in was that such ships would on sailing from one State to another fly the flag of only one State, the former flag being suspended. For these reasons it was the opinion of his delegation that the connecting factor proposed by the working group, that is the flag, was the right solution. Reference to the lessor or the lessee’s principal place of business would only make sense if this rule were concerned with the totality of the lessee’s assets. Such was not the case: this rule was concerned with one item of
equipment only and equipment of a special nature at that, that is a ship subject to special rules relating to the status of ships and in particular the aforementioned United Nations Convention. By the same token the Committee could not simply give up and refer the whole matter to the conflict of laws rules of the forum. Neither was it for the Committee to draw up special rules relating to the registration of ships and the public notice formalities to be complied with in respect of the financial leasing of ships. The 1986 Convention already contained rules on this subject proper to charters in general and to bareboat charters in particular. The best solution in his opinion was to take the public notice rules of the flag State as the appropriate rules for ships.

The CHAIRMAN, noting that the application of the law of the flag State to a leased ship would normally if not necessarily lead to the application of the law of the lessee’s principal place of business, pointed out that where a leased ship was sub-leased the law of the flag State would be applied both to the main leasing contract and to the sub-leasing contract.

Mr MOONEY (United States of America) was persuaded by the representative of France that it was possible and perhaps even likely that in terms of certainty the flag State might provide the most clear-cut answer in most cases but two problems remained. The first related to a proposal that his delegation would be making later regarding the ease of change of the flag State. Whatever the reasons for supporting the flag as the appropriate connecting factor, that is its certainty, there were perhaps more compelling reasons why such a choice would cause problems. Flags were frequently flags of convenience and could be changed very quickly and easily, perhaps much more quickly and easily than goods normally used in one State could be transported to another State and certainly more quickly and easily than a lessee would be likely to change its principal place of business. One substantial drawback of taking the flag State was that if the flag State were changed, especially in a sub-leasing context where the lessor might not be involved, it could upset the lessor’s rights almost instantly if it were changed to a State where there were public notice requirements from a State where there were none. The lessor’s real rights would in such a case be instantly subjected to those claimants who might benefit from non-compliance with the laws of the new flag State. This risk, whilst it existed with the other connecting factors being proposed, was perhaps much greater with the flag than with some of the other formulations.

A second problem that his delegation had with the flag State was that it appeared from the information before the Committee that neither of the interested parties, lessor or lessee, desired such a rule. Whilst in agreement with the representative of France that the Committee had a responsibility to improve the law and could not be driven by the reactions and interests of every interested organisation, he noted, however, that there seemed to be unanimity among the interested parties representing shipping interests that they did not desire such a rule and he therefore hesitated to exercise his responsibility in such a way as to impose this rule on them.

Thirdly, he imagined that there was probably very little difference in ultimate effect between those preferring the exclusion of ships from Article 5(2) and (3) and those supporting the proposal that the question should be left to the otherwise applicable choice of law rules. Whichever solution were chosen, the result would be that nothing was being done in the Convention to disrupt or interfere with the status quo ante in this regard. He admitted that there were sound reasons for arguing either side of the point but he imagined that those who could support one proposal could also support the other even if feeling that one was preferable, because they reached the same result in substance.

Mr FERRARINI (Italy) supported the text of Article 5 as it was proposed by the Working Group of Technical Experts but was ready to support a compromise solution provided that it was proven to be workable.

In order to see whether the joint proposal of Canada, the United Kingdom and the United States of America would be workable, he took the example of a ship leasing contract between an Italian company as lessee and a United States company as lessor where the leased ship was arrested in Italy. He felt sure that in these circumstances an Italian judge would apply the law of the flag State, that is United States law, with regard to Article 5(2). Turning the situation round, so that the
lessee were American and the lessor Italian, he wondered which law would be applied by an American court in the event of the leased ship being arrested in the United States of America.

Were the American court to apply American law, he would not be particularly happy as this would mean that the Italian leasing company would have to register the leasing agreement in all the States to which the ship was likely to sail.

If this were the case, then the proposal of the Federal Republic of Germany as a compromise solution was probably to be preferred. There was an important difference between the proposal of the Federal Republic of Germany and the joint proposal of Canada, the United Kingdom and the United States of America: under the German proposal Article 5(1) would always apply.

Mr GOODE (United Kingdom), referring to the last point raised by the representative of Italy which he considered an important point that should not be overlooked, recalled that the effect of excluding paragraphs 2 and 3 would be to leave paragraph 1. The Convention, in other words, would state that the lessor’s real rights were overriding regardless of any public notice requirements of any legal system whatsoever. He reminded the Committee that this solution, of giving the lessor an absolutely overriding title in all circumstances, had already been looked at but had been considered unacceptable to those States that had public notice requirements.

Mr REBMANN (Federal Republic of Germany) specified that his delegation’s proposal only suggested excluding registered ships from paragraphs 2 and 3.

Mr PHILIP (Comité Maritime International) expressed his agreement with the representative of the United Kingdom that it would be unfortunate to exclude paragraphs 2 and 3 only in relation to ships. He took the view that the choice lay rather between excluding the whole of Article 5 and retaining the whole of Article 5 and then seeking a solution to the problem before the Committee. Otherwise, as had been indicated by the representative of the United Kingdom, a situation would arise where the lessor’s rights were much stronger than any other rights known in a ship, whereas usually even a mortgage was not valid as against creditors if not registered. The effect would be to put the leasing agreement on the same footing as maritime liens.

Referring to the Spanish proposal to refer to the lessor’s principal place of business, he agreed with the French delegate that this would be in line with the normal conflict of laws rule applied regarding contracts and would, he imagined, work reasonably well in many cases but nevertheless suffered from two defects. First, it had the same problem as the law of registration in that the law of the lessor’s principal place of business would normally also be the law of registration but would differ from the law of registration in the case of bareboat charter registrations. The second problem related to the point raised by the Chairman, namely that under Article 13 financial sub-leasing agreements were also covered by the Convention and there might be a number of sub-leases, with the attendant problem that different laws could not apply to different leases of the same ship.

He agreed with the representative of France that no ship would fly two flags at the same time but the flag solution raised the same problem as arose in connection with sub-leases, namely the fact that the ship might change flags at various moments with the result that there might be competing laws of flags in respect of the same lease. If ships were to be included within the purview of Article 5, he believed that the joint proposal of Canada, the United Kingdom and the United States of America was the one that came closest to a reasonable solution. It would under this solution be for the forum to analyse the circumstances of each case in order to decide which law should apply.

One possible solution that he saw would, given that the ownership rights in a ship would always be registered in one place and, even if this registration might be suspended in the case of a bareboat charter, it would remain as a basic registration until such time as a sale of the ship took place and the ship was transferred to another register, be to provide that the applicable law would be the law of the State where the ownership of the vessel was registered, even in cases where such ownership registration was suspended because there was a bareboat registration in another State. He wondered whether this solution might not be looked at by a small working group with a view to being presented to the Committee. Failing this, he would advise that the joint proposal be accepted.

Finally, referring to the remarks made by the representative of France, he stated that there was
no doubt that 99% of all leasing of ships took the form of bareboat charters. The situation where a financial institution provided the crew and the management of the ship was very unlikely.

Mr ZYKIN (Union of Soviet Socialist Republics) noted that the Working Group of Technical Experts had done much good work in seeking to clarify this important issue. Its report however revealed what a difficult problem the connecting factor for ships was. Indeed the working group recognised that the flag State might not necessarily have any direct connection with the financial leasing agreement. These limitations of the flag State as a solution underlay the reasoning of the Finnish delegation in the proposal it had made on this point. Secondly, while the flag State might appear to guarantee certainty, the debates of the Committee, in particular the statements made by the observer from the Comité Maritime International, had shown that this connecting factor would not guarantee certainty in respect of international leasing transactions. His delegation accordingly favoured a reference to the applicable law as suggested in the joint proposal of Canada, the United Kingdom and the United States of America. This solution had certain merits in the opinion of his delegation in that it did not exclude ships from the scope of Article 5 without however laying down a specific connecting factor. His delegation feared lest to introduce a specific connecting factor for ships would introduce an undesirable element of rigidity.

Mr BERAUZO (France) agreed that a ship could certainly change its flag but, unlike what had been said by the delegate of the United States of America, not from one moment to another. The 1986 United Nations Convention on Conditions for Registration of Ships laid down a procedure for the change of flag involving the giving of public notice in the original flag State and the taking of certain precautions for the granting of the new flag. These precautions included the agreement of the owner, which in the context of international financial leasing meant the agreement of the finance lessor. Accordingly, where a change of flag led a finance lessor to fear lest its rights might not be respected in the new flag State, such a finance lessor was entitled to withhold its consent to such a change of flag and take the necessary steps so that the leased ship did not fly the new flag as long as account had not been taken of its rights and public notice thereof had not been given on the register of the new flag State.

The purpose of the provision before the Committee was after all to ensure that public notice be given of the lessor’s real rights in the event the lessee going bankrupt or the ship being arrested. To take the example of a leased ship where the lessor was American and the ship was flying the Liberian flag, it might happen that the ship had failed to discharge its debts in a port in the Philippines. The Filipino creditor would be confronted with a ship and a flag. He found it inconceivable that such a creditor should have to inquire into who was the creditor at the origin of the leasing agreement or the circumstances in which the Liberian flag was granted. At the time of arrest it should rather be for such a creditor to check on the ship register kept by the flag State to see whether there were any rights superior to its own, such as a maritime lien, a mortgage or the lessor’s ownership rights.

In his opinion the only practical, viable solution was to take the flag as the appropriate connecting factor for ships. This was the only viable solution in that it had been enshrined in the 1986 United Nations Convention, approved by most of the States represented at this Conference. This Convention organised by reference to the law of the flag State the protection both of the finance lessor’s interests and those of third party creditors in bankruptcy or arrest proceedings. If the Committee rejected this clear solution in favour of referring the matter to be settled by the conflict of laws rules of the forum, he foresaw the creation of much confusion. He was sure that certain States would apply the law governing the leasing agreement, others would instead choose the law applicable to the bankruptcy, while still others would opt for the law governing the debt underlying the arrest. He considered that it would amount to a legal defeat to introduce in the Convention an abstract rule simply referring the question to the conflict of laws rules of the forum without specifying what this involved. He called upon the Committee to give effect to the solution to the question of public notice regarding bareboat charters provided in the United Nations Convention by selecting the simple connecting factor of the flag.
Ms REINSMA (Netherlands) supported the joint proposal of Canada, the United Kingdom and the United States of America. Her delegation did not think the flag would be the right connecting factor for a number of reasons. First, as had already been mentioned by other representatives, the flag did not offer sufficient certainty as a connecting factor in that in many countries it was quite easy for a ship to change flag and such changes of flag occurred quite frequently. A second objection of her delegation to the flag as a connecting factor was that in her country only sea-going vessels and not inland navigation vessels flew a flag, so that use of the flag as the appropriate connecting factor would mean that the provision would not cover the leasing of inland navigation vessels, whereas those vessels were in fact often leased. The final objection of her delegation to the flag as the appropriate connecting factor was that the applicable law as defined in paragraph 3 should bear some relation to paragraph 2 dealing with public notice requirements for the lessor’s real rights. In the opinion of her delegation the law of the flag State might not have a sufficient connection with the lessor’s ownership and could well result in the lessor finding some obscure law applicable to its ownership rights. Such a solution was not acceptable in the view of her delegation which accordingly supported the joint proposal as the best, even if not the ideal, solution available in the circumstances.

The CHAIRMAN summed up the Committee’s debate on the question of the connecting factor for ships. First, he noted that no support had been expressed for taking the law of the State of registration, as proposed in the basic text approved by the governmental experts, as the applicable law. However, a new proposal had been made during the course of the debate for taking the law of the State of registration of ownership of the vessel as the applicable law. While this proposal had not thus far been commented upon, it was one that the Committee might wish to consider.

Secondly, there was the proposal by the Working Group of Technical Experts that the applicable law should be that of the flag State. In support of this connecting factor it had been argued that it provided a clear rule in the sense that under the 1986 United Nations Convention a ship could only fly one flag at a time. Also in support of this solution it had been argued that it guaranteed certainty in the sense that it was easy for parties to discover. It had also been pointed out that a lessor would be entitled to oppose a change of registration if its rights were not sufficiently secured under the law of the new flag State. Among the number of objections raised to this proposal was the ease with which it was possible to change the flag. Although there was a difference of opinion within the Committee as to how easy that was, he assumed that most international financial leasing contracts entered into in respect of a ship would imply a change of flag. Other objections raised to the flag solution were the lack of connection between the leasing transaction and the flag State, the fact that none of the interests involved in the leasing transaction supported the solution and the failure of such a solution to cover the case of inland navigation vessels, which did not fly a flag.

Under the third proposal before the Committee the law to be applied would be that of the State of the lessor’s principal place of business. In support of that proposal it had been argued that it would be in line with the conflict of laws rule generally applied to financial leasing, that it would provide the maximum of security for the lessor and that it was important to provide the lessor with adequate protection in the case of the lessee’s bankruptcy. Objections had, however, also been raised in respect of the proposal. First, it had been argued that it might be difficult for the parties involved to find out which law would be applicable under the rule. Secondly, it had been argued that the lessor’s principal place of business would raise the same difficulties as the connecting factor proposed in the basic text. Thirdly, the fear had been voiced that the proposal would not be workable in the case of ships that were sub-leased.

A fourth proposal suggested taking the lessee’s principal place of business as the appropriate connecting factor. That proposal had encountered the objection, first, that it would be out of line with the conflict of laws rule generally applied to financial leasing and, secondly, that it would be subject to many of the same difficulties noted in connection with the proposal to take the lessor’s principal place of business.

Under another proposal, the matter of the applicable law should be left to be determined in accordance with the rules of private international law of the forum. Whilst it had been acknowl-
edged that this in effect amounted to a non-rule, it had been argued that it was the least inadequate of all the rules proposed. One objection levelled at such a rule was the argument that it did not make much sense to state that the applicable law was the applicable law. Attention was also drawn to the uncertainty resulting from the fact that the forum might apply different rules of private international law in respect of the same ship so that it would be impossible to have any advance idea what the applicable law rules would be and indeed by forum shopping quite different results might be achieved depending on where the question was raised.

There was also a proposal for excluding registered ships from the application of Article 5(2) and (3). This proposal had encountered the objection that it would give the lessor rights which were stronger than those of other creditors.

He found it difficult to determine where the sympathies of the Committee lay and, failing the submission of a new proposal designed to resolve the issue which met with broad acceptance, he accordingly intended to seek to ascertain this after the adjournment.

The meeting was adjourned at 11.10 a.m. and resumed at 11.30 a.m.

The CHAIRMAN drew the Committee's attention to the text of the joint proposal of the delegations of Canada, the United Kingdom and the United States of America which had been distributed as CONF. 7/C.1/W.P. 16. This joint proposal embodied the proposal, thus far raised orally, for the applicable law in relation to ships to be the law that would be applicable under the rules of private international law of the forum. Having ascertained that there were no new proposals, he proposed taking an indicative vote to determine the degree of support enjoyed by the different proposals that were on the table. The Committee could then proceed to a formal vote if this vote indicated that there was no need for further discussion. He first asked how many delegations would support as their first preference the proposal of the Working Group of Technical Experts that the applicable law should be the law of the flag State.

Ten delegations indicated that they would support this proposal.

He then asked how many delegations would support the proposal of Spain that the applicable law should be the law of the State in which the lessor had its principal place of business.

One delegation indicated that it would support this proposal.

He then asked how many delegations would support the alternative proposal of Spain that the applicable law should be the law of the State in which the lessee had its principal place of business.

Two delegations indicated that they would support this proposal.

He then asked how many delegations would support the joint proposal that the applicable law should be the law indicated by the relevant rules of private international law.

Fourteen delegations indicated that they would support this proposal.

He finally asked how many delegations would support excluding registered ships from the application of Article 5(2) and (3).

One delegation indicated that it would support this proposal.

Mr BRENnan (Australia) sought clarification as to whether the proposal made orally by the observer from the Comité Maritime International was before the Committee as a possible solution.

The CHAIRMAN, recalling that he had asked whether there were any new proposals immedi-
ately after the adjournment and that the proposal thus far raised only by the observer from the Comité Maritime International had not yet been taken up by any delegation, nevertheless agreed that the informal indicative voting procedure provided a suitable opportunity to determine whether this proposal enjoyed any support prior to proceeding to a formal vote. He accordingly asked how many delegations would support as their first choice the law of the State where the ownership of the vessel was registered.

Five delegations indicated that they would support this proposal.

The CHAIRMAN stated that two options were open to the Committee. Either it could proceed to a formal vote on the various proposals on the table or it could set up a working group entrusted with the finding of a solution. He noted that there was some support for the setting up of such a working group but that this support was limited. He accordingly proposed proceeding to a formal vote.

Mr BRENAN (Australia), referring to the Chairman’s proposal to proceed to a formal vote, enquired whether the proposal made by the observer from the Comité Maritime International would be before the Committee. He indicated that, if it was not, then his delegation would be prepared to sponsor it.

The CHAIRMAN replied that the representative of Australia’s indication of his support for the proposal made by the observer from the Comité Maritime International meant that it was definitely before the Committee.

Mr BERAUDO (France) cautioned against proceeding too hastily to a formal vote since the Committee had not had sufficient time to consider the new proposal made by the observer from the Comité Maritime International and the indicative vote taken by the chair had not produced a clear result. The CMI proposal seemed to have all the hallmarks of a possible compromise solution. It could accommodate those delegations favouring a reference to the conflict of laws rules of the forum in so far as it had the advantage of laying down such a conflict rule itself, indicating that public notice should be given in the State where the shipowner had registered its rights. It could also be reconciled with the concerns of those delegations favouring the flag State, as could be seen by reading Article 11 of the 1986 United Nations Convention whence it emerged that the shipowner gave public notice of its rights in the register of the flag State.

Mr REBMANN (Federal Republic of Germany) withdrew his delegation’s proposal that registered ships should be excluded from the application of Article 5(2) and (3).

Mr FERRARINI (Italy) supported the point of view expressed by the representative of France. He too considered that the proposal made by the observer from the Comité Maritime International could provide a good compromise solution, as the main reason why the Committee was debating this issue was because registration had also become possible under a bareboat charter and the State where ownership of the ship was registered would have the merit as a solution of being similar to that adopted in respect of aircraft.

The CHAIRMAN felt that, in view of these last interventions, an additional effort should be made to find a more acceptable solution before proceeding to a formal vote. He accordingly proposed setting up an informal working group to attempt to find a more acceptable solution.

It was so decided.

The CHAIRMAN nominated the following delegations as members of the group: Canada, Guinea, Italy, Philippines and the Union of Soviet Socialist Republics. He also invited the observer from the Comité Maritime International to participate in the work of the group. It would be for the working group to elect its own chairman. He noted that the constitution of the group meant that the Committee could for the time being leave the question of the appropriate connecting factor for ships
and turn its attention to the rest of sub-paragraph (a) of Article 5(3) as proposed in the basic text. He drew attention to the proposal in this regard made by the Working Group of Technical Experts (CONF. 7/5), to the proposal made by Spain (CONF. 7/3) regarding the use of the expression "mobile" and to the joint proposal made by Canada, the United Kingdom and the United States of America (CONF. 7/C.1/W.P. 16) for splitting up the content of paragraph 3(a) in such a way that there would be a separate rule for aircraft and a separate rule for all other equipment of a kind normally moved from one State to another. He first invited the representative of the United Kingdom to explain the proposal of the Working Group of Technical Experts.

Mr GOODE (United Kingdom) explained that the basic text referred to the law of the State of registration in the case of aircraft, vehicles or other equipment subject to registration without identifying the type of registration that was envisaged, pointing out that there were all sorts of registration systems, for instance registration of ownership, nationality registration and security interest registration. The purpose of the revised text of paragraph 3(a) as proposed by the working group, in whose redrafting it had become paragraph 3(b), was to make it clear that the type of registration envisaged was the nationality type of registration by serial number, name or other identifying mark, as opposed, for example, to a registration against the owner or a registration against the grantor of a security interest.

The CHAIRMAN then called upon the representative of Canada to explain the joint proposal of Canada, the United Kingdom and the United States of America in this regard.

Mr CUMING (Canada) first pointed out that this proposal had incorporated the proposals of the Working Group of Technical Experts. The joint proposal, first, suggested creating a separate category for leases of aircraft. The idea behind this proposal was that there was an international Convention, the Chicago Convention on International Civil Aviation, to which almost all countries in the world were Parties, which provided for registration as to nationality of aircraft, thus providing a single suitable choice of law factor. This was already recognised in paragraph 3(a) of the basic text, the new paragraph 3(b) as proposed in the joint proposal being intended to clarify what registration meant in this context, that is registration as provided by the Chicago Convention.

What, however, principally distinguished the joint proposal from the basic text and the revised text proposed by the Working Group of Technical Experts was the singling out of aircraft as the only type of equipment subject to the registration choice of law factor. The effect of this was that the choice of law rule for all other equipment was, as stated in paragraph 3(c) of the joint proposal, the lessee's principal place of business. The reason for this proposed rejection of the working group's proposal to treat certain types of mobile equipment subject to serial number, name or marking registration as subject to the same rule applicable to aircraft was that, in the opinion of the proponents of the joint proposal, it would be unworkable. The difficulty that such a proposal would create in a Canadian context arose out of the fact that registration of equipment other than aircraft was a very confusing, imprecise term. In Canada all sorts of equipment were registered in one way or another, for instance by serial number, for different purposes: there was registration in some, very limited cases of ownership, but primarily registration of mobile equipment and, in particular, vehicles in Canada was for taxation or licensing purposes and at any rate purposes quite different from those contemplated in this provision, namely choice of law purposes.

The other problem that arose in a Canadian context related to the proposed use of serial number registration as a connecting factor. As an example he cited a fleet of lorries leased to a lessee carrying on business in Ontario. Under the law of Ontario and indeed that of most other Canadian jurisdictions, the first question was to determine the applicable law and the connecting factor for this purpose was the lessee's principal place of business. Once the applicable law was identified, this law would determine the method of registration. In some provinces this would be serial number registration, in others it would not. The type of registration was a matter that depended on the way in which local law chose to record security interests. In the opinion of his delegation registration as a connecting factor, in whatever form, would not work in connection with mobile equipment other than aircraft. It was only in connection with aircraft where there was an
international Convention governing registration that was honoured throughout the world that register-
ination could be used as the appropriate connecting factor. This left as the one workable connecting
factor for mobile goods other than aircraft the one normally applicable to mobile goods, that is the
lessee’s principal place of business.

Under the redraft of Article 5 set out in the joint proposal the connecting factor recommended
for aircraft would not apply to aircraft engines. Aircraft engines would under this proposal be
subject to the same connecting factor as mobile equipment other than aircraft, that is the lessee’s
principal place of business. The reason for this distinction was that in aircraft financing expert
advice had indicated that aircraft mainframes and aircraft engines were treated quite separately and
that it was not inconceivable for an aircraft to land in a city and in the space of a couple of hours
have one or other of its engines removed and replaced by another from a pool. The aircraft engine
was also sometimes the subject of a different financing arrangement from the aircraft mainframe.
The value of the aircraft engine might well be as much as one-third of the value of the aircraft
mainframe. Registration pursuant to the Chicago Convention was not therefore, in the opinion of his
delegation, an adequate connecting factor for aircraft engines, as they did not always stay with the
aircraft and were not separately registered under that system. The most appropriate connecting
factor for aircraft engines, in the opinion of his delegation, as reflected in the joint proposal, was
that employed for mobile equipment other than aircraft, that is the lessee’s principal place of
business.

The CHAIRMAN pointed out that the proposal of Spain (CONF. 7/3), which the Committee
had already considered in the context of ships, indicating as a first preference the application of the
law of the State of the lessor’s principal place of business and, as a second choice, the application of
the law of the State of the lessee’s principal place of business was a proposal of a general nature in
relation to Article 5(3)(a) of the basic text and did not refer just to ships. He accordingly asked the
representative of Spain whether, in view of the joint proposal, he wished to maintain his proposal.

Mr ILLESCAS (Spain) replied that, while his delegation basically supported the proposals
made by the Working Group of Technical Experts in this regard, it had nothing against discussing
the proposals for redrafting sub-paragraphs (b) and (c) contained in the joint proposal.

The CHAIRMAN sought confirmation from the representative of Spain that he did not wish to
pursue his delegation’s proposal for taking the lessor’s or, alternatively, the lessee’s principal place
of business as the appropriate connecting factor for mobile equipment other than ships and aircraft
and instead would wish to throw his support behind the proposal in this regard made by the Working
Group of Technical Experts.

Mr ILLESCAS (Spain) confirmed that this was the case.

The CHAIRMAN, recalling the proposal of Finland that Article 5(3)(a) of the basic text
should be deleted, sought clarification from the representative of Finland whether this proposal was
still on the floor or whether she would wish to throw her support behind the proposal of the Working
Group of Technical Experts or the joint proposal.

Ms ASTOLA (Finland) replied that she would not be prepared to withdraw her proposal. She
could see that the joint proposal offered a major improvement on the basic text but as the representa-
tive of Canada had pointed out in his explanation of the joint proposal, there would still be the
problem of two different connecting factors for aircraft, one for the mainframe and another for the
engine, and it seemed to her that this could be solved by taking the lessee’s principal place of
business as the appropriate connecting factor.

The CHAIRMAN accordingly proposed that the Committee first discuss the problem of
aircraft and then see whether it wished to choose a rule for aircraft which would fall within a more
general framework or whether it would prefer a more specific rule as proposed in the joint proposal.
He accordingly invited comment on Article 5(3)(b) as set out in the joint proposal.
Mr BRENNAN (Australia) supported the proposal contained in the joint proposal. His delegation believed that this proposal satisfied the tests of clarity and precision which his delegation was seeking with respect to the rights set out in Article 5. He noted that the Chairman had, in proposing that the Committee address aircraft at this stage, suggested that delegations confine their remarks to sub-paragraph (b) of the joint proposal but it seemed to his delegation that in discussing aircraft it was proper also to address that part of sub-paragraph (c) dealing with aircraft engines and in this context he announced that his delegation supported such a separate reference to aircraft engines. He added that this specific reference would obviate the necessity referred to in paragraph 15 of the report of the Working Group of Technical Experts that the question of aircraft engines and component parts be dealt with in the explanatory report on the Convention. For the sake of clarifying the *travaux préparatoires* of the Convention, as he understood that there was to be no explanatory report on the Convention, he asked that the summary records take note of this fact in relation to the report of the Working Group of Technical Experts.

Mr REBMANN (Federal Republic of Germany) stated that his delegation felt no need for a separate rule for aircraft, mainly because it did not see a sufficient connection between registration pursuant to the Chicago Convention, which was not designed to give public notice of ownership, and registration for the purposes envisaged in this connection. His delegation accordingly favoured making aircraft subject to the general rule for mobile equipment set forth in sub-paragraph (c) of the joint proposal. He took the view that it was no more difficult for creditors to discover the lessee’s principal place of business and such a connecting factor would moreover have the advantage of making the rule as simple as possible. If aircraft engines were to be subject to sub-paragraph (c), other equipment that was registered for technical reasons such as aircraft should also be subject to this sub-paragraph.

The CHAIRMAN enquired whether there were other views on the desirability or necessity of a special rule for aircraft.

Mr BERAUDO (France) had no objection to a special rule for aircraft, but admitted to concern at the problem this opened up for other equipment subject to registration. He further wished to know why the authors of the joint proposal had chosen to refer to the Chicago Convention rather than the 1948 Geneva Convention on the International Recognition of Rights in Aircraft, Article I of which provided that Contracting States undertook to recognise rights of property in aircraft. He did not understand why the Chicago Convention had been chosen in preference to another Convention specifically dealing with rights of property in aircraft.

Mr REBMANN (Federal Republic of Germany) replied that there were many aircraft that were not registered in this other register. He pointed out that only aircraft subject to liens were registered in this special register. It would accordingly not be appropriate to take this form of registration as the connecting factor for aircraft under this provision.

Mr GOODE (United Kingdom) added that it was the understanding of the proponents of the joint proposal that, while the Chicago Convention was almost universally accepted, the same was not true of the Geneva Convention.

Mr DUARTE (Portugal) supported the joint proposal. However, he did not agree with the special reference to aircraft engines in sub-paragraph (c). When an engine was leased separately, no lease of an aircraft was involved, whereas when the lease of an aircraft included its engine he saw no reason to treat the latter separately.

Mr JACOBSSON (Sweden) agreed with what had just been stated by the representative of Portugal. He furthermore felt that it made the text look almost ridiculous or at best very *ad hoc* as he wondered how many other items might need distinguishing on this basis.

Mr CUMING (Canada), responding to the previous two speakers, admitted that to an uninformed reader it might look ridiculous to find a separate provision dealing with aircraft engines. However,
he assured those speakers that this was not the attitude taken by those involved in the leasing business. To their minds it would be ridiculous for it to be otherwise. Engines were not necessarily treated as part of the aircraft for financing purposes. It was an everyday occurrence for engines to be severed from the aircraft mainframe and placed in an engine pool. Thus it was possible for an engine to have changed aircraft several times since the original aircraft registration which, failing a separate rule for aircraft engines, would make it very difficult for a creditor of the lessee to know whether his debtor had an interest in the engine. A separate rule for aircraft engines was called for in order to enable such a creditor of the lessee to trace his debtor's interest in the engine. While such a separate rule might look a little peculiar, it was dictated by commercial necessity and the peculiarities of this particular branch of aircraft financing.

As regards the reference to avionics (for example, the radio equipment of an aircraft), he pointed out that consideration had been given to such equipment at the time of the preparation of Canadian legislation on this matter but the drafters of that legislation had been informed by industry that in terms of cost significance they came nowhere near aircraft engines so that it would not in his opinion be justifiable to set up a separate system for avionics.

Ms REINSMA (Netherlands) was not convinced by the arguments of the representative of Canada. She found herself in the same position as the representatives of Portugal and Sweden. She explained that under Dutch law it would be impossible to have a different regimen applicable to aircraft engines from that applicable to the aircraft themselves. On the whole her delegation could support the joint proposal but not on this point of a separate reference to aircraft engines.

Mr RÉCZEI (Hungary) wondered whether the difficulty with aircraft engines did not lie in the fact that they were not everyday examples of equipment of a kind normally moved from State to State. If it were desired to give everyday examples of such equipment in sub-paragraph (c), and in particular to list aircraft engines as an example, then he suggested that it might help to mention other more everyday examples of such equipment as containers and cranes.

Mr DUARTE (Portugal) sought to clarify that his objection was not substantive but rather formal in nature. His point was that if the aircraft lease included the engine it would be a case falling under sub-paragraph (b), whereas if the aircraft engine were the subject of a separate lease then it would automatically fall under sub-paragraph (c) without any need to make a specific reference thereto.

Mr JACOBSSON (Sweden) confirmed that his concurrence in the Portuguese representative's objection had been based on an identical understanding of its purport.

Mr MOONEY (United States of America) sought to underscore some of the reasons given by the representative of Canada for having a separate reference in sub-paragraph (c) to aircraft engines. This reference was made necessary by the fact that aircraft were expressly referred to in paragraph 3, with registration being indicated as the appropriate choice of law factor for aircraft. Aircraft engines as such, however, were not registered: what was registered was the aircraft mainframe. Those dealing in aircraft had accordingly voiced concern lest, in so far as "aircraft" was a very common term used in a technical sense to describe two components, the aircraft mainframe and the aircraft engines, its use in this context might be misconstrued. It would in his opinion be wholly inappropriate to treat aircraft engines as part of the aircraft in the context of the Convention because engines were being moved around daily via the pool system, often being moved to aircraft not owned or leased by the same parties. It was quite possible that over the term of a lease an engine which by coincidence had happened to be leased at the same time as the aircraft mainframe might never become reattached to that mainframe until the end of the lease.

Whilst he could sympathise with those arguing that the same result would be obtained without a special reference to aircraft engines in the Convention, he feared lest the failure to include such a reference would upset those dealing with these very expensive items of equipment.

Mr SANTOS (Philippines) enquired of the representative of Canada whether any country required the registration of aircraft engines as distinct from the registration of aircraft mainframes.
If there were countries requiring such registration of aircraft engines, then he could sympathise with the view expressed by the representative of Portugal and those delegations associating themselves with that representative’s point of view that aircraft engines should perhaps not be treated separately from aircraft as such. However, if it emerged that no country required separate registration of aircraft engines then his delegation could support the joint proposal in this regard.

Mr ADENSAMER (Austria), announcing that he in general supported the joint proposal, nevertheless felt that to incorporate a reference to another Convention in this Convention was unwise. This led him to wonder what would under this Convention be the status of aircraft not registered pursuant to the Chicago Convention.

Mr CUMING (Canada), answering the question raised by the representative of the Philippines, pointed out that, whilst he could not speak for other countries, legislation was about to be laid before the Parliament of Canada and its ten provinces designed to facilitate the financing, including financial leasing, of aircraft and aircraft engines. Pursuant to the specific request of those affected by this legislation, it would provide for separate serial number registration of the aircraft mainframe and engines. It was his understanding that the situation was the same in the United States of America but he preferred to leave this matter to be addressed by the representative of that country.

Replying to the question raised by the representative of Austria, it was his understanding that there were very few aircraft not registered pursuant to the Chicago Convention so that he did not consider the problem to be one of any significance.

Mr MOONEY (United States of America), addressing the question raised by the representative of the Philippines, explained that the United States and indeed other States had special registries for the purpose of recording interests, such as liens, in engines. However, a registry where one recorded liens over a particular item of equipment was different from a registration of the particular equipment.

What was important to bear in mind in this connection was that, under the joint proposal, aircraft were the only items of equipment in respect of which the place of registration would be the appropriate connecting factor. The reason for this was that aircraft were the only items of equipment in respect of which it was possible to point to an almost universal system of registration. The place of registration was, on the other hand, rejected as an appropriate connecting factor for other classes of equipment because of the confusion surrounding the question of what registration meant in respect of those different types of property.

The CHAIRMAN asked the Committee whether it was prepared to introduce, as Article 5(3)(b), a special rule into the Convention dealing with aircraft of the kind proposed in CONF. 7/C.1/W.P. 16, leaving to one side for the moment the question of whether aircraft engines should be the subject of a special reference in the following sub-paragraph.

Twenty-four delegations indicated their support for such a special rule, three delegations indicated that they were opposed to such a rule and one delegation abstained.

The proposal to include a special rule on aircraft in the Convention was accordingly carried, it being agreed to refer it to the Drafting Committee at such time as the Committee had agreed on the rest of Article 5.

The CHAIRMAN adjourned the session until after the session of Plenum scheduled for 2.30 p.m.

The meeting rose at 12.40 p.m.
FIFTH MEETING

Wednesday, 11 May 1988, 2.55 p.m.

Chairman: Mr Sevón (Finland)

AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING (Study LIK – Doc. 48; CONF. 7/3; CONF. 7/5; CONF. 7/C.1/W.P. 7-8; W.P. 13 and W.P. 16)

Article 5 (continued)

Paragraph 3 (continued)

The CHAIRMAN proposed proceeding to the remaining part of Article 5(3)(a) of the basic text. He drew attention to the proposals of the Working Group of Technical Experts (CONF. 7/5), to the joint proposal by the delegations of Canada, the United Kingdom and the United States of America (CONF. 7/C.1/W.P. 16) and to the proposal by the delegation of Finland (CONF. 7/C.1/ W.P. 7). He asked whether he was right in presuming that the proposal regarding Article 5(3) submitted by the United States delegation (CONF. 7/C.1/W.P. 8) was withdrawn in favour of the joint proposal.

Mr MOONEY (United States of America) replied that the Chairman's understanding was correct with one exception, to wit the proposal for the relevant law that was included in the joint proposal.

The CHAIRMAN indicated that the Committee would revert to that question at a later stage and asked whether it wished to alter the rule set forth in Article 5(3)(a) of the basic text for equipment other than ships and aircraft.

Mr BERAUDO (France) noted that Article 5(3)(c) of the joint proposal would have the effect of making the question of what, if any, public notice requirements needed to be complied with in respect of a "vehicle or other equipment registered by serial number, name or other identifying mark" in order for the lessor's real rights in such equipment to be enforceable subject to the law of the State where the lessee had its principal place of business, whereas the Working Group of Technical Experts had proposed, in Article 5(3)(b) of its text, leaving the question to the same law as that selected for aircraft, namely the law of the State of registration.

In this respect the joint proposal, to his mind, presented two drawbacks. First, it proposed making public notice rules that were specifically designed to safeguard the lessor's interests subject to the law of the State where the lessee had its principal place of business. Secondly, it failed to take account of the fact that when certain items of equipment subject to registration, such as vehicles, were registered certain particulars regarding possible leasing agreements to which the equipment might be subject would generally be given, designed to give notice thereof to third parties.

He warned that these two contradictions inherent in the joint proposal might in certain circumstances produce absurd results. He gave the example of a motor-car registered in France, the registration of which indicated that it was subject to a leasing agreement, and leased to a lessee whose principal place of business was located in Canada. The Canadian representative had that morning indicated that registration in Canada did not serve the purpose of giving public notice of certain types of contract, for example pledges and financial leases. If the rule proposed in the joint proposal were accepted, then the applicable law would be Canadian law as the law of the State
where the lessee had its principal place of business. There was no provision in Canadian law for giving public notice of financial leases. The lessor’s rights would be protected neither in France nor in Canada in this example, whereas under both the basic text – which for “vehicles or other equipment subject to registration” proposed referring to the law of the State of their registration – and that proposed by the Working Group of Technical Experts they would be protected, in accordance with French law, in the example where the motor-car was registered in France.

He accordingly urged the Committee to adopt the proposal in this respect made by the Working Group of Technical Experts, which was moreover basically the same as that contained in the text adopted by governmental experts in 1987, as the most appropriate rule to safeguard at one and the same time both the interests of the lessor and those of third parties. The text of Article 5 (3)(b) would accordingly refer to vehicles or other equipment subject to registration. Such equipment would vary from country to country. For example, in France equipment used in civil engineering works was subject to registration, even if it did not strictly speaking qualify as a vehicle in so far as its primary purpose was neither the carriage of persons nor the carriage of goods.

As regards aircraft engines liable in certain circumstances to be given a number, his delegation had no fixed position on this point. If in the States where such engines were manufactured the registration number placed on such engines entailed the entering of certain particulars on a register showing the lessor’s rights, his delegation would have no difficulty in aircraft engines being mentioned alongside vehicles in Article 5(3)(b).

By way of explanation of the solution advocated by his delegation, he stressed that registration was something more than just a figure engraved on an asset: a register involved the recording of a certain number of particulars, including a lessor’s real rights. He saw no reason to abandon this special rule for equipment subject to registration in favour of the law of the State where the lessee’s principal place of business was located, since this would contradict the essential purpose of Article 5, namely the protection of the lessor’s real rights, and in certain circumstances lead to absurd results.

Mr SAMSON (Canada) sought to clarify the situation as it existed in Canada in the light of the comments made by the French representative. He explained that in Canada a distinction was drawn between “immatriculation” and “enregistrement”. The former was a procedure designed principally to give public notice of nationality or ownership of movables. “Enregistrement”, on the other hand, in the context of financial leasing, would be designed to give public notice of the lessor’s real rights and the associated guarantees. In the English-speaking provinces of Canada there existed a system of “enregistrement” for financial leasing transactions designed to give public notice of the lessor’s real rights.

Mr ROLLAND (Federal Republic of Germany) supported the joint proposal made in CONF. 7/C.1/W.P. 16. It had the advantage of combining the original proposal with some new ideas. He insisted that Article 5(3) had nothing to do with the question of protection of ownership rights: its only purpose was by referring to a series of connecting factors to identify the applicable law for the purposes of Article 5(2). What was needed in this respect was an unambiguous rule making it easy to find out which law would be applicable. In the opinion of his delegation, the place of registration did not satisfy this criterion in this particular connection. There were different types of registration in the different countries, many of which, particularly those required for vehicles, were required for public law purposes only. He feared lest it would be impossible for the parties involved in leasing transactions to find out which kinds of register there might be and which one should prevail.

Mr KATO (Japan) basically shared the opinion of the French delegation that the original text of sub-paragraph (a) was to be preferred for “vehicles or other equipment subject to registration”. As in France, registration in Japan did not serve an administrative purpose: it rather served the purpose of giving public notice of ownership. A rule of this sort was accordingly crucial for countries like his.

Mr GOODE (United Kingdom) pointed out that the working group draft which referred to the law of the State of registration by serial number, name or other identifying mark of vehicles or other
equipment rested on the implicit assumption that there was a unique serial number, name or other identifying mark so that it would be possible to see without any difficulty which State's law governing public notice was to apply. The difference of opinion that had emerged in the Committee on this point seemed to reflect the fact that in some States there was a unique system, whilst in others there were several systems answering the description contained in the working group's draft. He recalled the Committee's conclusion in respect of ships that if the registration system put forward was not unique so that ambiguity arose the selection of that system would not fulfil a useful purpose. There were clearly a number of countries, including Canada and the Federal Republic of Germany, where the proposed reference in this connection to a system of registration could refer to one of several systems, without it being known which one was meant nor which one was to have priority in the determination of the applicable law. To refer to a system of registration in this connection would not therefore seem to fulfil a universally satisfactory function. This explained why in their joint proposal the delegations of Canada, the United Kingdom and the United States of America had moved away from that proposal.

The CHAIRMAN noted that in the morning session the Committee had discussed the desirability of introducing a special reference to aircraft engines. He suggested that the Committee take a separate decision on this point. Secondly, it fell to the Committee to decide whether to adopt the joint proposal of Canada, the United Kingdom and the United States of America or the proposal of the Working Group of Technical Experts or else to keep the original rule adopted by the governmental experts in respect of "vehicles or other equipment subject to registration". He was not sure whether the specific reference to aircraft engines proposed served any meaningful purpose if the Committee were to decide to maintain the original text, as it would seem to be a case covered by sub-paragraph (b) of that draft. He asked the Committee to decide whether it wished to adopt the text of Article 5(3)(b) as proposed by the Working Group of Technical Experts, except as it applied to aircraft, and thereby retain a reference to the State of registration in respect of vehicles or equipment registered by serial number, name or other identifying mark, or, in the alternative, whether it preferred to adopt the solution proposed for Article 5(3)(c) in CONF. 7/C.1/W.P. 16, in other words to refer to the law of the State where the lessee's principal place of business was located for such equipment.

Mr KATO (Japan) suggested that the text of Article 5(3)(b) as proposed by the Working Group of Technical Experts was not inconsistent with the text of Article 5(3)(c) as it appeared in the joint proposal. It would suffice to add a new sub-paragraph between sub-paragraphs (b) and (c) of the joint proposal covering the case of "vehicles or other equipment subject to registration".

The CHAIRMAN explained that he had understood the basic question at issue to be whether the Committee wished to retain a special rule for "vehicles or other equipment subject to registration" or whether it felt that such assets could be treated in the same way as "other equipment...of a kind normally moved from one State to another".

Mr MOONEY (United States of America) supported the Chairman's reading of the situation.

The CHAIRMAN accordingly asked the Committee whether it wished to retain a special provision dealing with "vehicles or other equipment registered by serial number, name or other identifying mark" of the type included in Article 5(3)(b) of the text proposed by the Working Group of Technical Experts.

* Five delegations supported the inclusion of such a special provision, with twenty delegations indicating their opposition and two delegations abstaining. 

The CHAIRMAN announced that the Committee had thus decided against the inclusion of such a provision in the draft Convention.

The CHAIRMAN next asked the Committee whether it wished this kind of equipment to be treated in the way proposed under the joint proposal for Article 5(3)(c) of Canada, the United
Kingdom and the United States of America.

The proposal was adopted by seventeen votes to seven.

The CHAIRMAN announced that the Committee had thus decided to include a provision to such effect dealing with registered equipment.

Mr GOODE (United Kingdom) pointed out that he did not follow the Chairman's reference to registered equipment. The joint proposal did not contain any reference to equipment of a kind liable to be registered apart from aircraft.

The CHAIRMAN replied that the Committee had been discussing that part of Article 5(3)(a) of the basic text dealing with "vehicles or other equipment subject to registration" and, in so far as the Committee had not yet discussed the rest of Article 5(3), it seemed premature to take a formal decision on the final shape of the rule proposed in Article 5(3)(b) of the basic text. All that the Committee had decided by its last vote was that "vehicles or other equipment subject to registration" should be subject to the same connecting factor as "other equipment...of a kind normally moved from one State to another".

He proposed proceeding to the question of the general rule to be applied for those purposes, that is the question dealt with in Article 5(3)(b) of the basic text and Article 5(3)(c) of the joint proposal. This was the question of "other equipment...of a kind normally moved from one State to another". He suggested that the Committee should take a decision on the question of aircraft engines at an appropriate moment in its discussion of this provision. He indicated that both the basic text and the joint proposal proposed applying the law of the State where the lessee had its principal place of business. There were in addition a number of drafting questions or points of minor substance remaining to be decided.

Before proceeding to those minor questions, he however first asked the Committee whether it wished the law to be applied in respect of mobile equipment normally moved from one State to another to be that of the lessee's principal place of business.

It was so decided.

The CHAIRMAN then referred to the proposal by Spain to delete both the word "mobile" and the square brackets around the words "normally used in more than one State". He enquired of the representative of Spain whether the concerns of his delegation in this respect had been met by the proposal made by the Working Group of Technical Experts or by the joint proposal and, if so, which of those proposals he would be prepared to support.

Mr ILLESCAS (Spain) replied that the objectives behind the proposals of his delegation in this regard had been met by the proposal of the Working Group of Technical Experts and, in a certain way, by the joint proposal.

The CHAIRMAN then enquired of the representative of Japan whether his delegation's comments in CONF. 7/3 regarding the use of the word "mobile" and the relationship between subparagraphs (b) and (c) had also been met by the proposal of the Working Group of Technical Experts or the joint proposal.

Mr KATO (Japan) replied that his delegation's concern in this regard was common to all the texts proposed, that is the basic text, the text proposed by the Working Group of Technical Experts and that proposed under the joint proposal, namely that the criteria employed in subparagraphs (b) and (c) of the basic text and (c) and (d) of the other two texts were not sufficiently clear and could accordingly give rise to ambiguity. He feared lest it might in certain circumstances be difficult to distinguish between the nature of the equipment covered in sub-paragraph (b) and sub-paragraph (c) of the basic text. As an example he took a car or a train which, while they might be considered equipment normally moving from one State to another in Europe, in other countries, such as Japan,
would only normally be used for internal transportation.

The CHAIRMAN enquired whether the representative of Japan had any solution to propose to deal with the problem he had raised.

Mr KATO (Japan) regretted that his delegation had no specific proposal to table on this point. He indicated, however, that one way of removing the ambiguity he had referred to would be to give a limited number of examples of the type of equipment envisaged in sub-paragraph (c). One such example had already been proposed for inclusion, namely aircraft engines. Another example could be containers.

Mr MOONEY (United States of America) appreciated the ambiguities inherent in the text of sub-paragraphs (c) and (d) as proposed in the joint proposal when seen from the point of view of island States.

With a view to facilitating the Committee's discussion of this matter, he pointed out that there was a provision of the Uniform Commercial Code in effect in the United States, to wit Article 9-103 (3)(a), which employed language somewhat similar to that used in the draft Convention in dealing with goods of a type normally moved from one jurisdiction to another. It included a parenthetical clause which read: "such as motor vehicles, trailers, rolling stock, airplanes, shipping containers, road building and construction machinery and commercial harvesting machinery and the like".

He saw the question as being whether the Committee thought it better to list some examples in the text of the Convention or to have the summary records reflect the fact that it was the unanimous view of the Committee that certain particular items of equipment were examples of the type of equipment that it had in mind.

The CHAIRMAN saw some difficulty in this approach. He feared lest, whilst all delegations might well be able to agree on certain types of equipment clearly answering the general description, such as aircraft engines and shipping containers, the comments made by the representative of Japan showed that such agreement might not be so forthcoming for other types of equipment such as motor vehicles and rolling stock.

Mr JACOBSSON (Sweden) suggested that there might be another way of dealing with this problem, although he recognised that it might create major difficulties. This would be to have the same rule applying to all other types of equipment, that is both the equipment covered in sub-paragraph (c) and that covered in sub-paragraph (d) of the text proposed by the Working Group of Technical Experts and in the joint proposal. This would mean making a choice between those two rules and he imagined that the only possible outcome of such a choice would be to take the rule contained in sub-paragraph (c). This would admittedly involve sacrificing the lex rei sitae as a connecting factor but he suggested that this might be a price worth paying in order to overcome the difficulties.

Mr KATO (Japan) stressed that his delegation's only concern in this connection was to remove any ambiguity and thus any risk that a court, say, in Japan might interpret the provision differently from a court in a European country. He indicated that this concern would be met if examples were to be given and the majority of delegations were to record their agreement that motor vehicles were included in sub-paragraph (c).

The CHAIRMAN concluded that two courses of action were open to the Committee in this regard. One, proposed by the representative of Sweden, was to discard the special rule referring to the lex rei sitae, while the other was to draw up a list of suitable examples to be included in sub-paragraph (c) of the joint proposal, such as motor vehicles, trailers, rolling stock, shipping containers and aircraft engines. While the drawing up of such a list might well prove to be a time-consuming matter, it might equally be possible for the Committee to reach agreement on the question rapidly and leave the actual refinement of the list, albeit a matter of substance, to the drafting committee. First, though, he asked whether there was any support for the Swedish proposal to delete the reference to the lex rei sitae.
Ms ASTOLA (Finland) supported the Swedish proposal for the simplification it would bring to the whole article and in view of the fact that, to her mind, most of the cases covered by sub-paragraph (d) of the joint proposal would coincide with those addressed in sub-paragraph (c). She doubted that there were any situations for which the *lex rei sitae* would provide a more appropriate rule than the law of the place where the lessee had its principal place of business.

Mr MOONEY (United States of America) noted that considerable difficulties had had to be overcome within the committee of governmental experts in order to achieve the balance and compromise reflected in all the texts before the Committee. These expressed the twin ideas that, on the one hand, mobile equipment should be subject to public notice requirements in the State where the lessee had its principal place of business and, on the other, that other ordinary equipment should be subject to public notice requirements in the State where it was located, as the place where others might be misled by its presence. His delegation served notice that it would be particularly upset if this balance were to be altered at this stage. It was the view of his delegation that for ordinary equipment used by a business in a particular location the *lex rei sitae* was the appropriate law to look to in respect of the public notice requirements to be complied with. He was not convinced that this would necessarily coincide with the law of the State where the lessee’s principal place of business was located, given the size of contemporary multinational companies and the fact that many entities had plant and facilities in many different countries. He accordingly suggested that any problems of ambiguity as to what equipment was or was not to be considered mobile were far outweighed in importance by the dangers inherent in any attempt to change the balance and compromise established by the committee of governmental experts.

The CHAIRMAN recalled that the representative of the United States of America had earlier referred to a list of equipment included in the Uniform Commercial Code as an illustration of the type of equipment that was intended to be within the purview of sub-paragraph (c) of the joint proposal. This list referred *inter alia* to motor vehicles, trailers, rolling stock and shipping containers, and he assumed that it could be extended to include aircraft engines. He asked the Committee whether this list could be considered a satisfactory basis for its further deliberations, in particular whether the type of examples it gave could serve a useful purpose in this context.

Mr BRENNAN (Australia) indicated that his delegation could support the course of action proposed by the Chairman. However, he was unsure exactly what the representative of Japan was proposing in his last intervention. It seemed to him that provided there was some clarification of the ambiguity to which the representative of Japan had drawn the Committee’s attention he would be satisfied with the existing text.

The CHAIRMAN pointed out that, while delegations might feel satisfied with this matter being clarified in the summary records, it had been his experience that judges were not always the most avid readers of the summary records of diplomatic Conferences. He nevertheless enquired of the representative of Japan whether he would be satisfied with a statement in the summary records that the aforementioned assets corresponded to the type of equipment contemplated by this provision.

Mr KATO (Japan) indicated that his delegation would be satisfied with such a procedure.

The CHAIRMAN asked the Committee whether it could in these circumstances agree to it being recorded that reference had been made during its deliberations to a list of items of equipment as being the type of equipment contemplated at the time of the drafting of this particular provision and that no dissent had been voiced from this idea. He asked the Committee whether it considered the solution to be an adequate and plausible way of dealing with the question without any need for a specific reference in the sub-paragraph itself, although he indicated that aircraft engines might, however, need to be treated differently in the light of the proposal already tabled for them to be mentioned specifically.

*It was so agreed.*
Recalling that objections had been raised to the idea put forward in the joint proposal that aircraft engines should, however, be referred to explicitly in the sub-paragraph, the CHAIRMAN next asked the Committee to indicate by a vote whether it supported this proposal.

_The proposal was adopted by twelve votes to ten with six abstentions._

The CHAIRMAN announced that the Committee had thereby decided to include a reference to aircraft engines in the body of the sub-paragraph.

He then proposed that the Committee move on to consider sub-paragraph (c) of Article 5(3) of the basic text dealing with all other equipment not previously dealt with under that paragraph. Subject to minor differences of drafting, the text of this provision was the same in all the proposals before the Committee: it provided that the applicable law for this type of equipment should be the law of the State where the equipment was located. He called upon the representative of the United Kingdom, as Chairman of the Working Group of Technical Experts and co-sponsor of the joint proposal, to confirm whether the way in which he had indicated the joint proposal differed from the text put forward by the working group was only a matter of drafting or whether it rather raised questions of substance.

Mr GOODE (United Kingdom) explained that those differences reflected what was essentially a question of drafting and that no substantive change was intended by this deviation from the original text. The reason behind the change was that, whereas the reference in the original text to the time at which the person referred to in Article 5(1) was entitled to invoke the rules referred to in Article 5(2) was confined to cases falling within Article 5(3)(c), on further consideration the working group had taken the view that this had not been its intention which had been rather that the fixing of the time at which the person referred to in Article 5(1) was entitled to invoke the rules referred to in Article 5(2) was necessary for all categories of equipment referred to in Article 5(3), that is for those referred to in sub-paragraphs (a), (b) and (c) of the text produced by the working group. Although in one sense a change in substance was involved, it was, he explained, to deal with an unintended restriction of the aforementioned time-factor.

The CHAIRMAN submitted that, whilst it might well be correct to describe the extension of the relevant time to sub-paragraphs (a) and (b) as involving a change in substance, the same could not be said of sub-paragraph (c).

Mr GOODE (United Kingdom) indicated that he entirely concurred with the Chairman’s reading.

The CHAIRMAN asked the Committee whether it could support the proposal that in respect of other equipment the relevant law should be the law of the State where the equipment was situated.

_It was so agreed._

The CHAIRMAN suggested that the Committee next move on to address the question of the “relevant time” for the purposes of Article 5(3) as dealt with both in the text proposed by the Working Group of Technical Experts and in the joint proposal, where it appeared as Article 5(4).

Mr CUMING (Canada) enquired whether, as a matter of procedure, before the Committee leave Article 5(3) it would be the Chairman’s wish to hear the report of the informal working group on ship registration.

The CHAIRMAN indicated that he would be delighted to hear Mr Cuming inform the Committee of the outcome of the deliberations of the informal working group.

Mr CUMING (Canada) indicated that the informal working group had understood its terms of reference as being not to produce a recommendation as to which of the various possibilities put forward was to be preferred but rather as being to explore the feasibility of the proposal regarding
registration as the appropriate connecting factor for ships put forward by the observer from the Comité Maritime International. The working group had explored this proposal by looking at both the problems that might arise and the factual questions that arose in connection with it. The conclusion reached by the working group was that the Committee might wish to consider a proposal for a new text of Article 5(3)(a) based on that put forward by the observer from the Comité Maritime International the wording of which would be as follows: "... in the case of a registered ship the law of the State where the ship has been registered by the owner".

By way of explanation of the thinking of the working group, he pointed out that the reference to "ship...registered by the owner" was considered to be necessary in order to distinguish between two very different situations, that is so as to ensure, on the one hand, the inclusion of a registration by the lessor as original owner of the ship and, on the other hand, the exclusion of a registration by the lessee as a bareboat charterer, permissible under the law of some jurisdictions. While the proposed rule did refer to ownership, it was not thereby intended to require a detailed inquiry into who was and who was not the owner. The purpose of this reference to ownership was simply to distinguish between registrations by bareboat charterers and registrations other than registrations by a bareboat charterer. The question of ownership would fall to be determined by the applicable law. It was the working group's understanding that it was general practice the world over for one State to disallow registration of a ship other than a bareboat charter registration unless there was evidence of ownership and surrender in an appropriate case of registration by the owner in another jurisdiction.

In spelling out the merits of the formula proposed by the working group, he mentioned, first, the way in which it in effect returned to the original formula proposed by the committee of governmental experts, secondly, the way in which it related the question of public notice to the law of the State where the lessor's rights arose and, thirdly, on the basis of the information available to the working group, the fact that it did not seem that it would create any significant problems for third party creditors who, by virtue of the way in which documentation was available, would always be able to find out where a ship other than a ship registered under a bareboat charter had been registered.

It was accordingly the opinion of the working group that its proposal merited consideration by the Committee as a formula that should work reasonably well.

The CHAIRMAN recalled that an indicative vote had been taken that morning in respect of the law to be applied as regards ships.

Mr RÉCZEI (Hungary) feared lest the Committee were losing sight of its task which was to draw up and agree upon a limited number of substantive rules governing leasing contracts, whereas what it now appeared to be doing was simply to draw up a set of conflicts rules. He assured the Committee that such conflicts rules were not needed in his country which was quite satisfied with the way in which its code governing conflicts between substantive rules already worked. He accordingly took the view that where the Committee was unable to agree on a matter of substance it was not necessary for it to decide which law should apply as this could have the effect of preventing States from becoming Parties to the future Convention.

Secondly, he dissociated himself from what seemed to be the general belief that the Committee was empowered to change all municipal conflicts rules. What the Committee was proposing to do was not related to rights ad rem, falling outside the scope of the law of obligations, being rather concerned with rights in rem. It was quite legitimate to provide which law should apply to a contract where what was being drafted was either a contract or an international instrument dealing with a contract. However, where real rights were concerned, the Committee would be acting beyond its powers were it to attempt to draft a rule regarding the law to be applied in respect of such rights.

In his opinion, once agreement had been reached on paragraphs 1 and 2 of Article 5, it was better to leave all other points relating to that article on which it proved impossible to reach agreement as to substantive rules of law to be determined in accordance with the rules of private international law of the forum. If this solution proved unworkable because of the divergencies in national laws, then it would be necessary for the Hague Conference on Private International Law.
to undertake the preparation of uniform conflicts rules.

A vote was to his mind unnecessary in these circumstances. The Committee should seek a substantive solution. It should not seek to draft conflicts rules. If it could not reach agreement on a substantive solution, it should leave the matter to the applicable law.

The CHAIRMAN sought clarification from the representative of Hungary as to whether, with paragraphs 1 and 2 of Article 5 already having been adopted and on the assumption that those parts of paragraph 3 on which agreement had already been reached would be retained, he took the view that there should be a rule stating that paragraph 3 did not apply to ships. He feared lest otherwise the general rule contained in paragraph 3 would be applicable to ships. Alternatively he enquired whether it was suggestion of the representative of Hungary that the whole matter of conflict of laws should not be dealt with in paragraph 3.

Mr RÉCZEI (Hungary) replied that, in his opinion, the wording of sub-paragraph (a) which had just been introduced by the representative of Canada should be drafted as a substantive rule and not as a conflict of laws rule, so as to make it clear whether or not in the case of a registered ship the owner had filed public notice for the purposes of Article 5(2). He repeated that he favoured the reaching of agreement on substantive rules but that, where such agreement proved impossible, then he preferred the matter to be left to the applicable law rather than being covered by the drafting of a conflicts rule.

The meeting was adjourned at 4.10 p.m. and resumed at 4.40 p.m.

Upon the resumption the CHAIRMAN invited the Committee to elect two Vice-Chairmen of the Committee of the Whole, to be designated First and Second Vice-Chairmen and to take precedence in that order in accordance with Rule 51 of the Rules of Procedure. Once that matter had been decided, he indicated that the Committee could then take up the matter, also dealt with under Rule 51, of whether or not it wished to appoint a Rapporteur.

Mr RICHARDS (Antigua and Barbuda) proposed Mr Beraudo (France) as First Vice-Chairman and Mr Thiam (Guinea) as Second Vice-Chairman.

Mr FERRARINI (Italy) seconded the proposal.

There being no other proposals, the CHAIRMAN declared Mr Beraudo (France) and Mr Thiam (Guinea) elected First and Second Vice-Chairmen of the Committee of the Whole respectively.

There being no proposal for the election of a Rapporteur, the CHAIRMAN enquired of the Committee whether he should take it that it was not its wish to elect a Rapporteur.

It was so decided.

The CHAIRMAN suggested that the Committee revert to its discussion of Article 5, but that further discussion of the question of ships should be deferred until the following morning so as to leave delegations sufficient time to consider the various proposals put forward in this regard and to see the text of the proposal emanating from the informal working group.

It was so decided.

With a view to disposing of the other issues relating to Article 5 that were still open, the CHAIRMAN proposed starting with the proposal for a rule regarding the "relevant time" made by the Working Group of Technical Experts in CONF. 7/5. A similar proposal was made in the joint proposal of the delegations of Canada, the United Kingdom and the United States of America. As had already been explained, this proposal would extend the basic text as it would also cover cases other than those falling under paragraph 2.
Mr MOONEY (United States of America) referred to his delegation’s proposal contained in CONF. 7/C.1/W.P. 8 for changing the “relevant time” from the one contained in the joint proposal and in the draft proposed by the Working Group of Technical Experts. By way of explanation of the fact that this proposal had not been incorporated into the joint proposal, he pointed out that the co-sponsors of the joint proposal had simply not had time to consider the necessary reformulation.

He argued that his delegation’s proposal was preferable to the one proposed by the working group in so far as the time which the latter proposed taking was capable of changing with the flow of time. Thus the relevant time would change each time a person referred to in paragraph 1 became entitled to assert a right by virtue of a failure to comply with the relevant public notice requirement. The relevant time factor proposed by his delegation, to wit the “time of conclusion of the leasing agreement”, had the merit of being the time when all three parties consummated their transaction, by which the lessor must have had assurance that the public notice requirements of the applicable law had been complied with and by which the parties must have determined what the applicable law was.

He considered that the “relevant time” proposed by the working group would have some distinct disadvantages. As an example, he took the case of ordinary equipment located in a country which had no public notice requirement. So long as the equipment remained in that country, nothing needed to be done. However, should the lessee then move the equipment to another country where a public notice requirement did exist, any creditor thereafter becoming entitled to assert its rights against the lessee would instantly be able to pre-empt the lessor’s real rights. Precisely the same situation could arise in respect of mobile goods in a case where the lessee changed its principal place of business, as such a change could unilaterally affect the lessor’s compliance with public notice rules.

On the other hand, he suggested that, whilst it might be fair to cut off the lessor’s real rights following a change in the lessee’s principal place of business or in the location of the equipment, it might equally be unfair to third parties protected by public notice rules in certain jurisdictions if the lessor were forever to be allowed to maintain its priority even though the equipment continued to be located in such a jurisdiction and it had not complied with the public notice rules in force there.

Accordingly, his delegation in CONF. 7/C.1/W.P. 8, in addition to proposing that the “relevant time” be the time of the conclusion of the leasing agreement, proposed, as a new paragraph 4, which would presumably have to be renumbered in the light of the new structure being given to Article 5, what he saw as quite a simple rule to deal with cases of a change in the location of the leased asset or the principal place of business of the lessee. Under this rule, in such cases, following the expiration of a given amount of time the law of the new location or of the new principal place of business, depending on the case, would be the applicable law. This would, he felt, represent a fair balance as between not permitting an instantaneous and perhaps wrongful change either of the location of the asset or of the lessee’s principal place of business to divest the lessor of its protection and imposing some burden on a lessor to keep track of the equipment and to realise that after a reasonable period of grace it had to comply with the public notice requirements of the new jurisdiction.

The CHAIRMAN sought clarification from the previous speaker as to whether the proposals submitted by his delegation in paragraph 3, sub-paragraphs (b) and (c) of CONF. 7/C.1/W.P. 8 were alternatives to the basic text. He suggested that, were these alternatives to be adopted, then it would be open to the Committee to decide whether to adopt or whether not to adopt the United States delegation’s proposal for a new paragraph 4. However, if the present text were to be maintained, then he presumed that the United States delegation’s proposal for a new paragraph 4 would fall.

Mr MOONEY (United States of America) confirmed the Chairman’s understanding. He explained that his delegation’s proposals had been prepared at a time when it still had not seen the proposals submitted by the Working Group of Technical Experts.

The CHAIRMAN asked delegates to confine their remarks to the proposals relating to the question of the “relevant time”. He enquired whether there was support for the United States
delegation's proposal to take the time of the conclusion of the leasing agreement as the relevant time.

Mr BRENNAN (Australia) saw some merit in the proposal but added that he would be interested to hear the views of others, in particular as regards its practical effect on leasing transactions.

Mr CUMING (Canada) supported the principle of the proposal submitted by the United States delegation. He agreed that there was a problem of balancing of interests to be dealt with in this connection. Registration requirements, to the extent that they existed in various jurisdictions, were designed to allow third parties to discover the existence of a lessor's interest. Referring to the Committee's consideration of the lessee's principal place of business as a connecting factor, he took the view that, in order to make such a system work, third party creditors of the lessee would have to be able to rely on what they saw, that is the fact that the lessee was conducting business in a particular place and to assume therefrom that they could, by carrying out a check under the law of that jurisdiction, discover whether there was a public notice requirement and whether it had been complied with. On the other hand, as the representative of the United States of America had pointed out, the lessor, in complying with the public notice requirements of the lessee's principal place of business, would face the difficulty of having closely to police the activities of the lessee in order to ascertain any changes. He therefore saw the United States delegation's proposal as a compromise, a balancing of interests between these two positions. It did create an element of risk for third parties relying on the lessee's principal place of business test in that there would be a period of time after the change in the principal place of business during which they would be unable to rely on the registry of that jurisdiction. On the other hand, there was also a risk for the lessor, in so far as there might be a change in the lessee's principal place of business which was not discovered until a long time after it had occurred as a result of which the lessor might find its interest invalid for lack of registration. It seemed to him that the United States delegation's proposal offered a solution that, even if it did not represent a perfect solution for either side, at least balanced the two positions and was in the circumstances the only practical solution available.

Mr ZYKIN (Union of Soviet Socialist Republics) indicated that he wished to address certain more general issues which were not however without relevance to the matter before the Committee at that moment.

His delegation shared the concern voiced by the representative of Hungary that the Convention should primarily concentrate on developing substantive rules. It was the opinion of his delegation that it was a merit of the Convention that it contained a relatively limited number of rules dealing with issues of importance and that it avoided questions of detail which might subsequently risk impeding its acceptability. Going into such detail would not, in the opinion of his delegation, strengthen the Convention but rather weaken it and make it less attractive. This was particularly true, he felt, in respect of an activity subject to such rapid development as financial leasing. The drafting of overly detailed rules for this activity, however good the intentions of the drafters, might have the result, far from assisting the further development of financial leasing, of hampering it.

The issue of the applicable law raised very difficult problems and was a quite separate matter. Moreover, with the question under discussion the Committee was contemplating problems which went beyond the context of leasing. The same problems would, for example, arise in connection with sale transactions subject to a retention of title and with rights in rem in general. The Committee was seeking a solution to a problem with more general ramifications and he feared lest delegates would have problems convincing their Governments to accept the connecting factors which they were drawing up with such care and precision. He feared lest the reaction of Governments would be to ask why special rules governing issues such as bankruptcy had been drafted for financial leasing when the problem at issue was one with much broader implications.

One issue which had not at that stage been raised but which, in his opinion, merited discussion was the question of the relationship between Article 2(1)(b) and Article 5(3). He doubted whether any of the connecting factors being drafted in the context of Article 5(3) would be taken into
consideration in a State which was not a Party to the Convention but the enterprises of which – that is to say, those enterprises having their permanent place of business in that State – made reference to the law of a State which had become a Party thereto. He feared lest the courts of such a State might well be unwilling to recognise such a broad degree of party autonomy in respect of the rules to be complied with regarding public notice as that allowed under the Convention and would be more likely to enforce their own conflict of laws rules in this matter. There was accordingly to his mind a very real danger that by going into so much detail in the drafting of connecting factors in Article 5(3) they might well not work in the context of the Convention’s application by virtue of Article 2(1)(b).

It was accordingly the opinion of his delegation that the suggestion in the joint proposal submitted by the delegations of Canada, the United Kingdom and the United States of America to refer in Article 5(3) to the applicable law as far as the problem of ships was concerned should be considered as offering a solution of more general application than that of just ships.

Mr MOONEY (United States of America) indicated that his delegation agreed substantially with what the representative of the Soviet Union had just stated. He recognised that the Committee’s consideration of the appropriate choice of law rules in this context might be leading it down a path where it became difficult to know at what point to draw the line. In some ways he regretted that the Unidroit committee of governmental experts, when it was deciding to remain neutral on the question of whether public notice should be required for financial leases, did not also decide to remain neutral on the choice of law rules, which, as the Committee had seen, went to the heart of any public notice regimen. There might even be some merit in adopting a choice of law rule which simply referred to the existing rules of private international law without endeavouring to speak to them. It was, however, possible that the Committee had already gone too far in one direction to adopt that solution.

He asked the Committee for its view on the meaning of what was stated to be the applicable law in paragraph 3. When the Committee referred to the applicable law of a State, he wondered whether that included that State’s conflicts of law rules. If it did not, then he feared lest the then text risked substantially increasing the burden for financial leasing transactions.

Returning to the example he had given in his previous intervention but with the difference that the State to which the equipment was moved or to which the lessee had moved its principal place of business had a rule allowing a period of grace within which to comply with the requirements of that country, he indicated that, if this were to be considered a conflict of laws rule and if the reference in the Convention to the applicable law did not include it, the lessor would even be unable to take advantage of a period of grace in the State of destination of the equipment or the State to which the principal place of business had been moved.

He took the view that it was important for the Committee to be clear in its mind as to whether it intended to include a State’s choice of law rules by the reference to the applicable law. He thought that as the rule was then drafted this was probably not the intention but he was not sure.

The CHAIRMAN noted that it seemed impossible for the Committee to terminate its examination of Article 5, even leaving aside the question of ships, during that session. He did not exclude the possibility that there might be requests for the re-opening of discussion on those provisions of paragraph 3 which the Committee had already adopted, requests which, he reminded the Committee, would require a two-thirds majority. He accordingly proposed adjourning the session to allow delegates until the following morning to reflect on the questions that had been raised and left unanswered.

The meeting rose at 5.10 p.m.
SIXTH MEETING

Thursday, 12 May 1988, at 9.35 a.m.

Chairman: Mr Sevón (Finland)

AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING (Study LIX – Doc. 48; Study LIX – Doc. 49; CONF. 7/3 and Add. 2; CONF. 7/5; CONF. 7/C.1/W.P. 8; W.P. 11-12; W.P. 16; W.P. 18 and 19)

Article 5 (continued)

Paragraph 3 (continued)

The CHAIRMAN recalled that the Committee had the previous day had an extensive discussion of certain issues relating to Article 5, without however being able to conclude many of those matters. The Committee still had to take a decision on the question of the applicable law for the public notice requirement to be complied with in respect of registered ships and on the question of the “relevant time”. The Committee also had before it proposals for a number of new paragraphs to Article 5, in particular the United States delegation’s proposal for new paragraphs 4 and 5 and the proposals of the Working Group of Technical Experts.

He recalled how at least three representatives had expressed concern toward the end of the previous evening’s discussions at the direction the Committee was taking and had suggested that a simpler solution might be contemplated, bearing in mind that the Committee’s task was not to draw up a private international law Convention nor even a Convention on the law applicable to public notice requirements but rather a Convention dealing at least at times with the rights of the lessor and the lessee. In view of those expressions of concern he suggested that the Committee might wish to consider the advisability of changing direction in the way that had been proposed the evening before. In particular, he would be interested to hear the Committee’s reaction to a proposal referring all the matters addressed in Article 5(3) as well as most of the rest of Article 5, that is Article 5(4) onwards, to the applicable law. This could be achieved quite simply by slightly redrafting the proposal on ships contained in the joint proposal made by the delegations of Canada, the United Kingdom and the United States of America (CONF. 7/C.1/W.P. 16). All that would need to be said in paragraph 3 under such a solution would be: “For the purposes of the previous paragraph the applicable law is the law of the State that is applicable under the rules of private international law”.

Whilst he recognised that such a solution would leave certain matters unresolved, he thought the Committee should first ask itself whether these were matters that should be resolved only in the context of the exercise being carried out by the Committee or whether they were matters that were not decisive for the purposes of this particular Convention and therefore able to be left unresolved.

He suggested that the Committee should therefore begin by seeing whether this course of action, if not perfect, might be acceptable in so far as it would facilitate its discussions and enable it to concentrate more on the substance of the Convention than on questions of purely private international law.

Mr Richards (Antigua and Barbuda) noted that Article 15(2) contained an omnibus provision dealing with issues on which the Convention remained silent. He pointed out that this provision employed wording precisely like that advocated by the Chairman. He maintained that some of the matters under discussion did not admit of easy solutions at this juncture and for this reason he thought that this omnibus provision could spare the Committee much difficulty on this score. There was, moreover, a precedent for this course of action in Article 7(2) of the United Nations Convention on Contracts for the International Sale of Goods which read as follows: “Questions concerning
matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law”.

He indicated that this rule enshrined recognition by the draftsmen of the Convention of the fact that there would be matters on which they did not have sufficient knowledge at the time or which would not admit of an immediate solution and which were therefore best left to be resolved by national courts.

Mr MOONEY (United States of America) pointed out that his delegation would have some comments to make but first, noting that the possible course of action described by the Chairman bore a striking similarity to the concerns voiced the day before by the representative of Hungary, wondered how the representative of Hungary viewed the course of action proposed by the chair.

Mr RÉCZEI (Hungary) declared himself fully satisfied with Article 5(3) as proposed by the representative of the United States of America.

He pointed out that the rule contained in Article 15(2), however, was designed to serve a quite different purpose from the one under consideration in the context of Article 5(3): it rather set forth a rule of interpretation for two cases, on the one hand, that of questions concerning matters governed by the Convention but not expressly settled in it, in respect of which a solution was to be found in the general principles on which the Convention was based and, on the other, that of questions also concerning matters governed by the Convention but not expressly settled in it in respect of which no such solution was to be found in general principles. In the latter case recourse was to be had to the rules of private international law. In his opinion the provisions of Article 15(2) did not render the provisions of Article 5(3) superfluous.

The CHAIRMAN indicated that he had not understood the sense of the intervention by the representative of Antigua and Barbuda to be that the problem of Article 5(3) should necessarily be solved in Article 15(2) but rather as meaning that he would go along with the idea that the issues raised in Article 5(3) could be left to the rules of private international law and that the question of how to achieve this end was simply a matter of technique.

Mr CUMING (Canada), raising a point of order, enquired, in the light of the representative of Hungary’s reference to a proposal by the delegation of the United States of America enjoying his support, whether a new proposal had been tabled by that delegation.

The CHAIRMAN, stating that he was not aware of a proposal by the United States delegation, confirmed that there was, however, a proposal made by the chair.

Mr RÉCZEI (Hungary) explained that he had been referring to an informal proposal given to him by the representative of the United States which had not yet been tabled formally.

The CHAIRMAN stated that the proposal which he had read out was to be seen as a means by the chair of sounding the wishes of the Committee.

Mr MOONEY (United States of America) indicated that his delegation would at this stage support the proposition that the choice of law rules specified in all the proposed texts of Article 5 be deleted in favour of a general reference the effect of which would be essentially to leave the world just as it was. When a couple of years earlier the committee of governmental experts had decided that the Convention could not solve problems of public notice and would accordingly remain neutral on this issue, it was decided that the question would simply be left to be settled under the applicable law, thus respecting each State’s right to decide who should be protected and how by public notice requirements. However, this decision had then raised the question of what was the applicable law, which had given rise to lengthy deliberations concerning the comparative merits of the lex rei sitae and the law of the State of the lessee’s principal place of business. At its final session the committee of governmental experts had settled on the general principle that for the generality of equipment the applicable law should be the law of the situs and for mobile goods the law of the lessee’s principal place of business. This had however raised the question of equipment that was registered, leading in
turn to the question of what was meant by the term "registration". Other questions too had been raised, such as what should happen when the lessee's principal place of business changed. As a result it could perhaps be considered that a monster had been called into being, albeit a monster that was to his mind very useful and worthy of being followed up in another Convention or model rules for States to adopt, that sought to intervene in the most crucial aspects of a public notice rule, that is the questions of who should receive the public notice and of the place where it should be given. The Committee was as a result faced with very detailed rules on a subject on which the committee of governmental experts' main decision had been to remain neutral.

For these reasons, and not because he doubted the importance of the issues involved, he suggested that the Committee should move on to the substantive issues addressed by the Convention and refrain from intervening in the issues under consideration for the sake of financial leasing transactions alone.

Mr ROLLAND (Federal Republic of Germany) stated that his delegation strongly supported the proposal for the deletion of Article 5(3) in favour of a simple reference to the rules of private international law, since otherwise the Committee would find itself faced with a good many insoluble problems. He regretted that he could not comment on the drafting of such a clause as he had not yet seen it.

Mr JACOBSSON (Sweden) signalled his agreement with the previous speakers. He too favoured the simple solution of deleting Article 5(3) in its entirety.

The CHAIRMAN suggested that it would be appropriate to discuss the technique for achieving such a result only at such time as it had been ascertained that the Committee indeed desired such a result.

Mr KOMAROV (Union of Soviet Socialist Republics) indicated that his delegation could support the Chairman's proposal.

Mr FERRARINI (Italy), whilst indicating that his delegation had always favoured retaining the wording of Article 5(3) as proposed by the Working Group of Technical Experts (CONF. 7/5), noted, however, that strong opposition had been registered to the idea of keeping Article 5(3). His delegation consequently accepted the proposal for deleting Article 5(3).

He nevertheless disputed the claim made by the representative of the United States of America that the effect of the deletion of paragraph 3 would be to leave the world unchanged. He pointed out that the current situation was much better for those States with public notice systems than for those States without such systems. An Italian lessor would, as a result of the proposed deletion of Article 5(3), in every case of international lease financing have to register in the United States of America and every other State where there might be a problem of public notice with respect to creditors.

Mr BRENNAN (Australia) appreciated the difficult situation in which both the Chairman and the Committee found itself. However, the perhaps inordinate amount of time spent the day before on the various provisions of Article 5(3) had revealed considerable support for a certain number of those provisions. His own delegation had expressed support for a number of the proposals relating to those provisions, in particular the joint proposal of the delegations of Canada, the United Kingdom and the United States of America. This support had been given for the clarity and precision the proposals in question added to the text. It seemed to his mind that the course of action being contemplated risked overturning all the previous day's work. His delegation accordingly opposed the course of action being proposed, preferring to see whether some means could not be found of maintaining the approach that had been followed the day before. In this context he suggested that the Committee should also bear in mind that towards the closure of proceedings the day before it had been seised of a report from the informal working group which had been asked to consider the proposal made by the observer from the Comité Maritime International for a rule on the applicable law in relation to ships (CONF. 7/C.1/W.P. 19). It was the opinion of his delegation that there could well be support within the Committee for continuing with the approach that had been employed in connection with this question the day before. If his delegation were misreading
the sentiment of the Committee on this point, he however recognised that at the end of the day the Committee might have to revert to the type of solution proposed by the chair but this was a solution that caused his delegation concern.

Mr CUMING (Canada) indicated that he agreed with what had been said by the representative of Australia. He pointed out that the Committee had spent a considerable amount of time on these provisions and its votes had been by no means close on most of the issues addressed, revealing a broad measure of support for most of the proposals contained in the joint proposal of the delegations of Canada, the United Kingdom and the United States of America. He expressed surprise that the Committee should wish to reconsider its decision on these points which would, he pointed out, require a two-thirds majority.

He took issue with those who argued that it was not worth taking all this trouble in the context of the drafting of Article 5(3) just for leasing transactions when these problems also arose in respect of all sorts of other international financing transactions. He took the view that, while this was true, all aspects of human endeavour required starting somewhere, and this was equally true of problems of a complex international nature. The attempt being made within this Committee was indeed a pioneering effort but, if successful, it could well set a precedent for other areas of international financing. He therefore counselled against shying away from this challenge just because it was the first time it had been encountered.

He also pointed out that, insofar as one of the objectives of the exercise was to encourage international leasing, a major element of the task was to give lessors some certainty as to their rights and how those rights could be protected. By apparently deciding to throw to the wind the issue of the applicable law so far as registration was concerned, he maintained that the Committee was shirking the task it had set itself and, to the extent that it would thereby place lessors in a position where they would continue to face a considerable degree of uncertainty as to the protection of their real rights, could not be considered to be encouraging international lease financing.

The complexity of the rules contained in the joint proposal made by his delegation and the delegations of the United Kingdom and the United States of America had in his opinion been exaggerated. The provisions themselves were, he maintained, quite straightforward. He admitted that some of the amplifications made just before the closure of the previous day's proceedings by the representative of the United States of America had added new levels of complexity and he suggested that the Committee should perhaps rather be on its guard against making the provisions of Article 5(3) any more complex than they already were.

The Committee's best course of action, in the opinion of his delegation, would accordingly perhaps be to reject such additional new complexities. The joint proposal made by his delegation and the delegations of the United Kingdom and the United States of America would not, he maintained, make Article 5(3) particularly complex: it would rather mark a significant advance in the clarification of what was otherwise a very difficult area of the law and could well set a starting point for the resolution of analogous problems in other contexts.

Mr ILLESCAS (Spain) stated that his delegation attached importance to the work carried out by the committee of experts in this connection and therefore to the maintenance of Article 5(3). He agreed with those delegations that had drawn attention to the substantial progress already realised the previous day and stated that, while some problems remained to be solved, in particular the question of the applicable law in relation to ships and, less clear, that of the "relevant time", this was a job that had to be completed.

It was true that the issues involved were extremely complex, Article 5 addressing the most delicate of all the moments in the life of a leasing transaction, namely the case where the debtor went bankrupt. He nevertheless felt it was important for the Committee to seek a uniform solution, however difficult the problem in question.

The CHAIRMAN, after noting that the representatives of France, the United Kingdom and Mexico had all asked for the floor, indicated that he intended thereafter closing the Committee's discussion as to what it should do next.
Mr GAVALDA (France) indicated that his delegation shared the concerns voice by the
degulations of Italy, Canada and Spain, believing that it would be most unfortunate to abandon all
that had been done on Article 5(3). He recognised that it was overly complicated in certain places,
in particular regarding the question of the “relevant time”, which suggested that there was therefore
probably a good case for abandoning certain elements thereof. However, he insisted that if the
Convention failed to give some directions on such a sensitive feature of the complex triangular
leasing transaction which was both so practical and so widely used, then it would be like manufact-
turing cloth with a gaping hole in the middle.

Whilst he acknowledged that the proposal of the United States delegation was heading in the
right direction, he pointed out that it was overly complicated and needed to be simplified. Equally
Article 5(3) addressed an issue on which it was not possible for the Convention to remain silent. It
was therefore out of the question for Article 5(3) to be abandoned. Such a course of action would
not be in the interests of any party.

Mr GOODE (United Kingdom) recalled that, as the complexities of the issue were emerging
the day before, he had begun to feel strong sympathy for the views expressed by the representative
of Hungary. The latter’s intervention had been valuable if for no other reason than to put the
Committee on its guard against becoming embroiled in unnecessary complication. Indeed it was his
opinion that if the Committee had continued to go more and more deeply into the complexities in
which it had become immersed the day before, then there would have been much to be said for the
proposal emanating from the chair.

However, the position of his delegation was the same as that of the delegations of Canada,
Italy and the United States on this issue: he believed that the formula expressed in the joint proposal
of the delegations of Canada, the United Kingdom and the United States of America (CONF. 7/C.1/
W.P. 16) was significantly simpler than the version that had emerged from the meeting of the
Working Group of Technical Experts in Rome. First, following the intervention of the represent-
tive of Canada, the reference to registration as regards everything save ships and aircraft had been
removed, thus avoiding one considerable complication. Secondly, in the case of aircraft, the joint
proposal had the merit of identifying precisely the register to which reference was to be had, thus
making it a unique connecting factor. The Chicago Convention was, he suspected, a common point
of reference for matters pertaining to aircraft. These were but two instances of the manner in which
many of the previous complications would disappear under the joint proposal. His delegation
therefore supported the stand taken by the delegations of Australia, Canada, Italy and others in
favour of the retention of Article 5(3), whilst at the same time expressing the hope that its contents
might be kept from becoming overly complicated.

Mr PÉREZ-AGUILAR (Mexico) expressed his delegation’s desire to see paragraph 3 remain
in Article 5.

The CHAIRMAN noted that the purpose of the Committee’s discussion had essentially been to
see whether its consideration of the issues raised by paragraph 3 et seq. of Article 5 had not, through
the seemingly unlimited ingenuity of delegations in coming up with new proposals, caused these
issues to become unduly numerous and complex.

While his own proposal, coming from the chair, had not been tabled formally, it would be
distributed in writing (CONF. 7/C.1/W.P. 18) so that it would then be open to the Committee to
decide whether it felt that the difficulties implicit in paragraph 3 et seq. of Article 5 had by then
been satisfactorily resolved, in which case it would not be necessary to seek a different solution. If,
on the other hand, the Committee were by that time to find itself in even deeper trouble over
Article 5, it might need to reconsider the destiny of paragraph 3 as a whole.

He accordingly suggested that the Committee leave to one side his proposal to substitute
paragraph 3 by a general reference to the applicable law for the time being, until, that is, such time
as it had been distributed in writing, and in the meantime seek to settle the issues emerging out of
Article 5 that had thus far been left unresolved in as simple a manner as possible and on the basis of
as broad a measure of support as possible.
It was so decided.

He then proposed that the Committee continue its discussion at the point where it had left off the day before, that is with the United States delegation's proposal on the "relevant time" and the "principal place of business", after which it could move on to the question of the applicable law in relation to registered ships and thereafter consider the other issues left to be dealt with in Article 5. He reminded the Committee, however, that it had already spent a considerable amount of time on this article and that it might therefore be appropriate to seek to settle these outstanding issues as expeditiously as possible.

As regards the United States delegation's proposal, he referred to CONF. 7/C.1/ W.P. 8, where it was suggested that the rule on the relevant time to be found in Article 5(3)(c) should be replaced by a reference to the time of the conclusion of the leasing agreement.

He invited delegates to indicate whether there was any support for this proposal. He assumed that it was better to discuss the proposal as regards the "relevant time" and as regards a change in the principal place of business separately.

Mr CUMING (Canada) recalled that the Canadian delegation had the day before spoken in support of this proposal. However, subsequent events had convinced his delegation that over refinements which in another context might be useful could in this context create problems which might threaten the acceptability of the whole system being proposed. His delegation was accordingly withdrawing the support it had stated the day before for the United States delegation's proposal.

Mr MOONEY (United States of America) suggested that the matter could be speeded up by dealing with the definition of the "relevant time" and the definition of the principal place of business at the same time. His delegation was inclined to agree with the representative of Canada that these refinements were unlikely to attract wide support and could indeed in some jurisdictions jeopardise the very adoption of the Convention. He still felt, however, that they were both necessary and important and as such ought to be confronted. He noted that many speakers had recognised that the issues involved were challenging, difficult and important. Since there appeared, however, to be an unwillingness to focus on some of these points, his delegation was prepared to withdraw its proposal, unless some other delegation was ready to come forward and sponsor it, and move on to deal with the question of ships.

The CHAIRMAN, noting that no other delegation was willing to re-introduce the proposal, accordingly proposed that the Committee revert to the question of ships since the final shape of some of the remaining provisions of Article 5 depended on what was to be decided in respect of ships. He recalled that the representative of Canada had the day before made an oral presentation of the outcome of the deliberations of the informal working group. In the absence of a written proposal, he proposed inviting the representative of Canada to reiterate the working group's proposal.

Mr CUMING (Canada) recalled that the informal working group had examined a proposal put forward by the observer from the Comité Maritime International and had come to the conclusion that, whilst it did not have a mandate to support this proposal as the most favoured alternative, the proposal was workable and as such should be considered by the Committee. The proposal for a new Article 5(3)(a) as endorsed by the working group read as follows: "in the case of a registered ship, the law of the State where the ship has been registered by the owner".

He pointed out that he had already illustrated the thinking behind this proposal the day before and did not think it was necessary for him to repeat what he had said then unless some delegates required such additional explanation.

The CHAIRMAN recalled that the Committee had already discussed the question of ships extensively, submitting that the combination of maritime law and private international law did not make for the easiest of progress. He invited delegates to indicate whether the proposal emanating from the informal working group commanded broad support.
Mr GOODE (United Kingdom) indicated that his delegation supported the proposal as one that was eminently sensible and capable of working.

Mr BRENNAN (Australia) endorsed the comments made by the representative of the United Kingdom.

Ms REINSMA (Netherlands) stated that her delegation too supported the proposal as an improvement on the previous text.

Mr BERAUDO (France) indicated that his delegation could also support the proposal, subject to a minor drafting amendment. What was important to his mind was that reference should be made to the law of the State where the owner was indicated as such, whereas the text produced by the working group referred to the act of registering which could just as easily have been carried out by an agent of the owner or some person other than the owner. He suggested it was a matter that could be referred to the Drafting Committee. The idea to be embodied in the text was that in the case of registered ships the applicable law should be the law of the State where the identity of the owner was registered. He pointed out that the point he was making followed from Article 11(1) and (2)(f) of the 1986 United Nations Convention on Conditions for Registration of Ships.

Mr YUAN (China) stated that his delegation too was able to support the proposal.

The CHAIRMAN noted that there were no strong objections to the proposal, subject to the minor drafting amendment requested by the French representative. After noting that it was not the Committee’s wish to proceed to a vote on the proposal, he proposed that it be adopted.

_It was so decided._

_Proposed new paragraph 4_

The CHAIRMAN next directed the Committee’s attention to two further proposals to be found in the text submitted by the Working Group of Technical Experts (CONF. 7/5), the first of which contained a new paragraph 4, which read as follows: "Paragraph 2 shall not affect the provisions of any other international agreement under which the lessee’s real rights in the equipment are required to be recognised".

He invited the Chairman of the Working Group of Technical Experts to explain the thinking behind this proposal.

Mr GOODE (United Kingdom) explained that it had come to the notice of the Working Group of Technical Experts that there were other international Conventions providing for the recognition of rights of ownership and their registration, in particular the 1948 Geneva Convention on the International Recognition of Rights in Aircraft which provided for the mutual recognition of ownership rights duly registered in the appropriate State. It was felt that it would not be desirable to override the ability of a lessor to perfect its title in accordance with the public notice requirements of any other international Convention or agreement and this was why the working group was proposing the introduction of this new paragraph 4.

The CHAIRMAN invited delegations to comment on this proposal with a view to seeing whether it enjoyed any support.

Mr CUMING (Canada) indicated that his delegation supported the proposal.

Mr KATO (Japan) enquired what was the relationship between this provision and Article C of the draft Final Provisions (Study LIX – Doc. 49).

Mr GOODE (United Kingdom), indicating that the remit of the Working Group of Technical Experts had not included consideration of the draft Final Provisions and that it could not have judged whether Article C would be adopted nor, if so, in what form, stated that its concern had been rather to ensure that the perfection rights under international Conventions such as the 1948 Geneva
Convention should be respected, regardless of any more general provisions in Article C. He did not see any conflict between this proposed paragraph and Article C, although he recognised that to some extent they moved in the same direction.

Mr KATO (Japan) explained that, if what was proposed for paragraph 4 was already covered in Article C, he saw no need for paragraph 4.

Mr REBMANN (Federal Republic of Germany) had problems with the term “international agreement” as employed in the proposal for paragraph 4. He asked whether this meant a Convention between States or referred equally to a contract between private individuals. He felt that the whole paragraph was a little superfluous.

Mr GOODE (United Kingdom), whilst indicating that his delegation supported paragraph 4, admitted that there was a question whether it might ultimately be found more convenient to subsume this rule under a provision along the lines of Article C, particularly if Article C were to become more specific. In reply to the question from the representative of the Federal Republic of Germany, he stated that the meaning that the Working Group of Technical Experts had attributed to the term “international agreement” was an agreement between States and not a private agreement.

Mr FERRARINI (Italy) felt that there might be a conflict between Article C and the proposed paragraph 4, in that Article C referred also to the places of business of the parties, to that of the supplier, for instance. This raised the question whether paragraph 4 should also refer to these places of business, although he himself took the view that it should not.

The CHAIRMAN invited the Chairman of the Working Group of Technical Experts to answer this query.

Mr GOODE (United Kingdom) indicated that his delegation would at the appropriate time, in the Final Clauses Committee, have something to say on the wording of Article C. As a matter of interpretation, it was his belief that the general yielded to the particular and therefore the proposed paragraph 4 would not, he suggested, be affected by Article C which was a provision of a more general nature.

The CHAIRMAN noted that he had heard support for the idea expressed in the proposed paragraph 4 on the understanding that the word “agreement” as employed therein meant an agreement between States. He invited delegations to indicate whether there would be any support for the idea of the Committee of the Whole asking the Final Clauses Committee to insert a provision along the lines of the proposed paragraph 4 among the Final Clauses, whether as part of Article C, as a paragraph thereof or as a separate provision altogether.

Mr BRENNAN (Australia) suggested that the question raised by the chair was simply a question relating to the location of the proposed paragraph 4. His delegation supported this proposal and agreed with the reasoning of the representative of the United Kingdom both as to why such a paragraph should be included in the text and on the question of interpretation. His delegation took the view that, as the paragraph addressed a quite specific issue, it was probably preferable in drafting terms to keep it in the article where its subject-matter was also dealt with. On balance, his delegation came down in favour of keeping the paragraph where it was, leaving any difficulties of balancing this provision with Article C to be looked at by the Drafting Committee.

He suggested that, with a view to the work of the Drafting Committee, it might help to find another term to replace the term “international agreement” employed in the proposed paragraph 4. Bearing in mind the meaning attributed to the term “treaty” under the Vienna Convention on the Law of Treaties, he noted that this seemed to be the same as that attributed to the term “international agreement” in paragraph 4.

The CHAIRMAN noted that support had been voiced for the substance of paragraph 4 as proposed by the Working Group of Technical Experts and that the only objections that had been raised concerned whether the proposed provision was superfluous or involved a conflict with Article
C and did not relate to the substance of the proposal. Having noted that no delegation seemed to wish to comment further on this issue, he suggested, in the light of the intervention of the representative of Australia — and here he added that an additional merit of this intervention was that final clauses were not necessarily brought to the attention of judges who rather tended to look mainly at the substantive provisions of international Conventions — that the proposed paragraph 4 should be considered to have been adopted by the Committee and should be sent to the Drafting Committee with a view to its reformulation in such a way as clearly to indicate that it was intended to deal with international agreements between States, and that those delegations participating in the Final Clauses Committee should be invited to ensure that there be no conflict between Article C and Article 5(4). This was an issue which the Committee of the Whole could not itself resolve as the Final Clauses Committee had still to be convened and it was not within the Committee of the Whole's remit to examine the substance of Article C. He asked whether this course of action was acceptable to the Committee.

Mr KATO (Japan) expressed the concern of his delegation, at the purely formal level, at the idea of sanctioning a redundancy of the type entailed in keeping both Article 5(4) and Article C.

The CHAIRMAN, while fully understanding the reason behind the concern expressed by the Japanese delegation, pointed out that he however had no means to resolve the conflict referred to, unless the Committee decided against including paragraph 4 in Article 5 and the Committee seemed rather to support the proposed paragraph 4. He reiterated that the Committee's freedom of manoeuvre on this issue was necessarily circumscribed by the limitations of its terms of reference and to take the matter any further would be to interfere in the remit of another organ of the Conference, to wit the Final Clauses Committee. He pointed out in addition that the Drafting Committee would in due course have an opportunity to indicate to the Plenary whether it saw any conflict between the decisions of the Committee of the Whole and the Final Clauses Committee on this issue.

He proposed that the new paragraph 4 should therefore be considered to have been adopted by the Committee and be sent to the Drafting Committee for review.

*It was so decided.*

*Paragraph 4*

In relation to Article 5(4) of the basic text, the CHAIRMAN indicated that there were two proposals, one to be found in the text proposed by the Working Group of Technical Experts (CONF. 7/5), where a new paragraph 5 was put forward, corresponding to paragraph 4 of the basic text but in an expanded version, and the other to be found in the proposal by the United States delegation (CONF. 7/C.1/W.P. 8), suggesting a redraft of paragraph 4 of the basic text. He enquired of the representative of the United States whether his delegation's proposal still needed to be considered or whether it could be deemed to be subsumed under the proposal made by the Working Group of Technical Experts.

Mr MOONEY (United States of America) replied that the point which his delegation had been seeking to make in its proposal, that is the need to eliminate any inconsistency between paragraph 1 and paragraph 4 of Article 5 had been met in the joint proposal of the delegations of Canada, the United Kingdom and the United States of America (CONF. 7/C.1/W.P. 16) where it was suggested adding a reference in paragraph 6 to liens arising by virtue of an execution. His delegation's proposal in CONF. 7/C.1/W.P. 8 was therefore to be considered as having been withdrawn in favour of the joint proposal.

The CHAIRMAN apologised for having omitted to mention the proposal relating to paragraph 4 of the basic text contained in the proposal for a new paragraph 6 put forward in the joint proposal. He invited, first, the Chairman of the Working Group of Technical Experts to illustrate the thinking behind its proposal in this connection and, then, the representative of Canada to illustrate the thinking behind the joint proposal in this regard.
Mr GOODE (United Kingdom) explained that the revision of paragraph 4 of the basic text that appeared in the Working Group of Technical Experts’ proposal for a new paragraph 5 reflected a concern that the original text was not broad enough to cover various rights that partook of the nature of rights in rem, particularly in relation to ships and aircraft, such as the right of arrest, the right of detention, for example in the case of an aircraft for unpaid wages or unpaid aerodrome dues. This had caused great concern in aircraft and shipping circles. The effect of the proposed new paragraph 5 was to leave intact paragraph 4 of the basic text, as sub-paragraph (a) of this proposed new paragraph, whilst adding a new sub-paragraph (b) to cover rights of arrest, detention or disposition, but only such rights of arrest, detention or disposition as were conferred by law specifically in relation to ships and aircraft. The wording “conferring by law specifically in relation to ships and aircraft” was designed to make it clear that the provision did not affect the rights of general unsecured creditors, being limited to ships and aircraft, which was where the problem was seen to lie.

Mr CUMING (Canada) first pointed out that the proposed new sub-paragraph 6(1)(b) put forward in the joint proposal of the delegations of Canada, the United Kingdom and the United States of America was merely a transposition of the text proposed by the Working Group of Technical Experts that had just been introduced by the representative of the United Kingdom. As regards the balance of the joint proposal, he explained that there was no intention to change the substance of paragraph 4 of the basic text. It rather sought to clarify the types of interest being dealt with, being designed to make it clear that the article in general applied to ordinary creditors proceeding through the appropriate judgment enforcement mechanisms of their countries and would not apply to creditors who had obtained liens, whether these be consensual or non-consensual, or security interests in the equipment. The proposed new sub-paragraph 2, specifying that the term “lien” as understood in sub-paragraph 1(a) did not include a lien arising by virtue of an execution, was judged to be necessary because in some jurisdictions, in particular in the United States of America, when an execution creditor seized goods or had them seized by a sheriff he would be described as having a lien against those goods, whereas it was not the intention in sub-paragraph 1(a) to refer to that type of lien.

The CHAIRMAN invited the Committee to indicate which of the three variants of paragraph 4 of the basic text it preferred: that featuring in the basic text itself, that proposed by the Working Group of Technical Experts or that featuring in the joint proposal of the delegations of Canada, the United Kingdom and the United States of America. He first invited comments on Article 5(6)(1)(a) of the joint proposal.

Mr BRENNAN (Australia) indicated that his delegation supported Article 5(6)(1)(a) as proposed in the joint proposal, believing that the addition of the word “priority” in the chapeau reflected paragraph 97 of the Explanatory Report.

Having ascertained that there were no objections to the proposal, the CHAIRMAN proposed that the new text of Article 5(6)(1)(a) as contained in the joint proposal should be considered to have been adopted.

*It was so decided.*

The CHAIRMAN next invited comments on Article 5(6)(1)(b) as it appeared in the joint proposal. This corresponded to Article 5(5)(b) of the text proposed by the Working Group of Technical Experts.

Mr PELICHET (Hague Conference on Private International Law) noted that once again, as in Article 5(2), both the joint proposal and that of the Working Group of Technical Experts referred to the applicable law without specifying which law this was. He pointed out that the Committee thus ran the risk of encountering the same difficulties it had come across with Article 5(2), and which had necessitated the drafting of Article 5(3). He suggested either that it should be made clearer in
the text what was meant by the applicable law or, if that should not prove to be possible, that the sub-paragraph should not be adopted at all.

Mr GOODE (United Kingdom) explained that the intention behind this sub-paragraph was simply to leave the matter to be dealt with by the law applicable under the rules of private international law. He suggested that it would probably be difficult to identify the applicable law for this purpose.

Mr PELICHERET (Hague Conference on Private International Law) suggested that, whilst he was in agreement with what had been stated by the representative of the United Kingdom, there was a drafting problem that needed to be dealt with. If an article of an international Convention referred without more to the applicable law, this would normally be taken as a reference to the law applicable to the subject-matter of the Convention, which in this case would mean the law applicable to the leasing agreement. As he did not believe that this was what the drafters of the proposal for sub-paragraph 1(b) had intended, he suggested that it was a matter which should be looked at by the Drafting Committee.

The CHAIRMAN agreed that, to the extent that a point of drafting was involved, it would have to be referred to the Drafting Committee. Having ascertained that there were, however, no objections of substance to the proposed new sub-paragraph, he proposed that it be considered to have been adopted by the Committee.

It was so decided.

The CHAIRMAN next invited comments on the acceptability of the proposed new Article 5(6)(2) contained in the joint proposal of the delegations of Canada, the United Kingdom and the United States of America (CONF. 7/C.1/W.P. 16). He took the Committee's silence to signify acceptance. There being no objections, he proposed considering this sub-paragraph to have been adopted.

It was so decided.

The CHAIRMAN believed that the only proposal relating to Article 5 still outstanding was that for substituting paragraph 3 by a general reference to the rules of private international law. He recalled how earlier he had indicated that the need for such a solution was clearly dependent on the extent to which other issues could not be settled otherwise. He added that, to the extent that such a proposal would involve reconsidering certain questions already decided by the Committee, it would under the Rules of Procedure need to be sanctioned by a vote. Having ascertained that no delegation was in favour of reconsidering the contents of Article 5(3), he proposed that Article 5 be considered to have been adopted as a whole and referred to the Drafting Committee for consideration.

It was so decided.

The meeting was adjourned at 11.05 a.m. and resumed at 11.35 a.m.

Article 6

The CHAIRMAN suggested that the Committee take up Article 6. In the absence of any proposals for changes to this article, he asked whether he should deduce therefrom that it was acceptable to the Committee and could simply be referred to the Drafting Committee for consideration.

It was so decided.
Article 7

The CHAIRMAN proposed that the Committee commence its consideration of Article 7 by paragraph 1 of that article. He noted that there were a number of proposals relating to this paragraph. He referred, first, to the proposals by the Government of Japan (CONF. 7/3), suggesting, first, that the words "[e]xcept as otherwise provided by this Convention" should be replaced by a reference to specific provisions of the Convention, secondly, that the words "or the leasing agreement" should be deleted and, thirdly, that the words "save to the extent that it has intervened in the selection of the supplier or the specifications of the equipment" appearing at the end of sub-paragraph 1(a) were also relevant to sub-paragraph 1(b) and should be moved to a new sub-paragraph 1(c). Secondly, he drew attention to the proposal of the United States delegation (CONF. 7/C.1/W.P. 11) in the form of alternatives. Thirdly, he pointed out that there was a proposal by the delegation of Australia (CONF. 7/C.1/W.P. 12) to insert the word "expressly" before the word "provided" in sub-paragraph 1(a). Finally, there was a proposal by the Government of Pakistan (CONF. 7/3 Add. 2) to insert the words "use, operation or possession of" before the word "equipment" in sub-paragraph 1(b).

He asked delegates first to indicate whether they had any general comments to make on paragraph 1.

Mr TAYLOR (World Leasing Council) pointed out that the purpose of his representing the World Leasing Council at the Conference was to bring to the proceedings the benefit of his nearly fifteen years of practical experience with several multinational financial institutions, both as a lawyer and as a businessman, in the area of international capital equipment finance. As the Committee began its consideration of the question of the lessor's liability to the lessee and third parties, both as set forth in Article 7 and in subsequent articles, he noted that it had reached the most substantive areas of the Convention. He expressed his deep concern that the results of the Committee's labours on these articles should reflect economic realities as they prevailed in global capital markets.

He begged the Committee's leave to attempt to put international leasing transactions in the context of these global capital markets. He believed first that the nature of the entities that had access to global capital markets both for leasing and other types of financing should be kept in mind at all times. Those entities were nearly always large national or multinational companies or sovereign entities all of which had extensive credit facilities of their own, whether within their own domestic capital market or otherwise. To his knowledge, those entities always had the sophistication and, usually, the creditworthiness to attract a wide variety of financing proposals in any given instance where their capital equipment requirements became known to the market. The competition among financial institutions to win such quality medium-term financing business from those entities became fiercer each year and very severely limited the ability of lessors to impose such harsh terms on lessees as some members of the Committee might imagine.

Secondly, he asked the Committee also to keep in mind the way in which such opportunities to extend medium-term credit to those entities arose. Typically the entity seeking credit would already have decided precisely what equipment would satisfy its particular needs and would have gone out to the capital markets on a global basis, on its own or with the help of advisers, well in advance of the anticipated delivery date of the equipment, in order to find the cheapest method of financing the acquisition of the particular item of equipment. It would typically provide a "term" sheet to interested financial institutions and invite them to submit financing proposals within a set period of time. At that point each financial institution having received this information would begin consideration of the financial products it might be able to offer, selecting one, two or three such products it could offer most competitively in satisfaction of the debtor entity's needs. Among these might well be international leasing, but it would certainly not be the only alternative offered.

He wished to emphasise in the light of this that the primary reason a financial institution would offer international leasing and an entity seeking credit would accept international leasing as a means of financing equipment acquisition would be simply that it was the cheapest alternative
available among those presented. The customer was simply interested in financing the acquisition of the equipment it needed at the lowest possible cost. The financial institution, on the other hand, was simply interested in employing its funds with creditworthy entities and in being repaid over time so as to earn as high a profit as possible. For both parties the form that the extension of credit took was irrelevant, so long as each of their objectives were met. Once one accepted this basic premise, namely that the lessor or any other such financial entity was merely a supplier of credit to the lessee and that the form of that extension of credit as a lease was offered and accepted usually for reasons of price alone, it should logically follow that the allocation of risk in an international lease should not differ in material respects from other more conventional forms of extending credit. A lessor merely because it had been resourceful enough to structure a lease financing facility more attractive to the lessee than other alternatives should not be asked to assume different or additional risks from those it would have to assume in a comparable lending situation. As a corollary, to be sure, a lessor should also be willing to assume the same risks that a creditor would otherwise assume in respect of other financial products.

When one applied this basic premise to Article 7(1), he suggested that, while sub-paragraphs 1(a) and (b) stated the correct view of the lessor’s liability to the lessee and third parties, sub-paragraph 1(c) so muddied the waters. He recognised that the intent behind this provision was a good one, namely that of excluding from the application of sub-paragraphs 1(a) and (b) those situations where concepts of strict liability might be applied to a lessor on the basis of the applicable law or via the application of special international rules. He suggested that delegates might wish to consider modifying sub-paragraph 1(c) so as to clarify this concept.

As regards Alternatives I and II of Article 7(2), it seemed to him that, if one accepted the lessor’s role as being simply to supply capital so as to enable a lessee to acquire equipment, Alternative II stated a rule which was more in line with the allocation of risk as between international financial institutions and those who used their services and capital. He submitted that his analysis was reflected in longstanding practice in global capital markets where these matters came up in lease negotiations. He asked the Committee when considering Article 7 and the subsequent substantive articles to ensure that what it did would reflect those economic realities.

**Paragraph 1**

The CHAIRMAN proposed beginning the Committee’s consideration of Article 7, paragraph 1. He first invited the representative of Japan to illustrate the proposal of his Government as far as it concerned the opening language of this paragraph (“[e]xcept as otherwise provided by this Convention”), after which he indicated that he thought it would be best to call upon the representative of Australia to illustrate his delegation’s proposal given the close connection between this proposal and that of the Japanese Government.

Mr KATO (Japan) explained that his Government’s proposal in this regard was designed to clarify what it saw as the ambiguity inherent in the words “[e]xcept as otherwise provided by this Convention”. His delegation believed it was preferable to specify which article was being referred to in those words.

He added that his delegation proposed the deletion of the words “or the leasing agreement” which also appeared in the opening language of paragraph 1 on the ground that they were redundant, in view of Article 14(2), providing that “[t]he parties may, in their relations with each other, derogate from or vary this Convention ...”.

The CHAIRMAN invited the representative of Japan to indicate which articles his delegation wished to see a specific reference to in its proposal to clarify the opening language of Article 7(1)(a).

Mr KATO (Japan) indicated that his delegation was not completely sure as to the precise scope of this language but imagined that it referred to paragraph 2 of Article 7 and Article 10. However, he stressed that this attempt to identify more clearly the provisions referred to in the opening
language of Article 7(1)(a) was nothing more than a guess on the part of his Government and he suggested that this was therefore a question which should rather be put to the drafters of this provision.

The CHAIRMAN feared lest delegates might have a slight difficulty in formulating a view on this proposal unless they were told which articles it referred to, as otherwise there would be the risk of some things being excluded which others might wish to see included just as there would also be the risk of some things being included which others might wish to see excluded.

Mr YUAN (China) stated that his delegation took the view that the basic text of Article 7 as it had emerged from the Unidroit committee of governmental experts should serve as the basis for the Committee's deliberations on this article. This text was the result of many years of work and his delegation took the view that the Committee should maintain the substance of those of its provisions on which agreement had been reached, for example paragraph 1.

Furthermore, he reminded delegates of the need in Article 7 to bear in mind that one of the objectives of the Convention as spelled out in the Preamble was to maintain "a fair balance of interests" as between the three parties to international leasing transactions. The purpose of paragraph 1, in the view of his delegation, was primarily to protect the interests of the lessor, by indicating that the lessor should not incur any liability to the lessee in respect of the equipment.

Mr JACOBSSON (Sweden) stated that his delegation supported the proposal of the Japanese delegation. While this proposal was indeed incomplete, he suggested that the very fact that the Committee might have problems in completing it, by identifying the relevant provisions of the Convention, nevertheless clearly showed the importance of this being done, as if the Committee was unable at once to identify which provisions were contemplated by those words then it could hardly expect others to be able to do so.

Mr GOODE (United Kingdom) indicated that his delegation supported both the proposal of the Japanese delegation to identify more precisely the provisions referred to in the opening words of sub-paragraph 1(a) and also its proposal to delete the reference to the leasing agreement in the same opening words on the ground that this was adequately covered by Article 14. The removal of that reference to the leasing agreement would also, he believed, have the effect of dealing with any possible difficulty to which the amendment suggested by the delegation of Australia might give rise.

The CHAIRMAN suggested that the Committee first restrict itself to disposing of the proposal by the Japanese Government to identify more precisely the provisions of the Convention referred to in the opening words of sub-paragraph 1(a) before coming back to the other limbs of that proposal. He therefore asked the Committee to indicate whether there was any support for the idea of substituting the words "[e]xcept as otherwise provided by this Convention" by a reference to specific provisions thereof and, if so, which provisions should be so identified. He recalled that the representative of Japan had suggested that one possibility would be to see this as a reference to Article 7(2) and Article 10.

Mr REBMANN (Federal Republic of Germany) voiced his hesitations as to the wisdom of enumerating specific provisions of the Convention in this place. However, if it was indeed decided to go ahead with such an enumeration, then he felt that Article 4 should also be mentioned, although, to his mind, such an enumeration was both unnecessary and dangerous because of the risk of forgetting something important.

Mr WUJEK (Poland) indicated that his delegation supported the position taken by the representative of the Federal Republic of Germany on this issue, believing it was safer to keep the general reference to the Convention.

The CHAIRMAN noted that two proposals had emerged on this point. One of these would substitute the general reference to the Convention by a reference to specific provisions thereof. Missing from this proposal, however, was any identification of those provisions, although reference
had been made in this context to Article 4, Article 7(2) and Article 10. The other proposal would favour the retention of the basic text on this point. He asked the Committee whether there were any further views on this matter.

Mr DE PAIVA (Brazil) indicated that his delegation took the view that this was one of the most important provisions of the Convention and that all efforts should be made to clarify its terms. He wondered whether the proposal tabled by the delegation of Australia might not offer a compromise solution as between the proposals on the table.

The CHAIRMAN called upon the representative of Australia to present his delegation’s proposal (CONF. 7/C.1/W.P. 12).

Mr BRENnan (Australia) explained that his delegation would propose that Article 7(1)(a) be amended by the insertion of the word “expressly” before the word “provided” in the opening clause. This opening clause would then read: “[e]xcept as otherwise expressly provided by this Convention or the leasing agreement”.

The original reason behind this proposal was to preclude any possibility that the words “the leasing agreement” in sub-paragraph 1(a) might be interpreted as including not only the express terms of that agreement but also implied terms thereof. This appeared to his delegation to run counter to the intentions of the drafters of this provision as was to be gleaned from paragraph 108 of the Explanatory Report, where it was stated that Article 7(1)(a) had the effect of excluding those contractual terms implied by law from the supply of equipment, notably the duty to ensure that the equipment supplied was of merchantable quality and fit for its known purpose.

It seemed to his delegation that its proposal might have the merit not only of dealing with this problem of interpretation but also of resolving the difficulty raised by the representative of Japan.

The CHAIRMAN enquired of the representative of Japan whether the proposal of the delegation of Australia would meet his delegation’s concerns. If not, then he would seek clarification from those supporting the Japanese proposal as to which provisions of the Convention they would wish to see a reference in this sub-paragraph. This was a matter of substance which needed to be settled before the Committee could take a stand on the Japanese proposal.

Mr KATO (Japan) recalled that his delegation’s proposal was two-pronged, being designed, on the one hand, to identify the provisions of the Convention to which reference was made in Article 7(1)(a) and, on the other, to avoid, in the reference to the leasing agreement, something that was redundant. Whilst he considered the proposal of the Australian delegation to be better than the basic text, he still feared lest the fact that this was the only article prefaced by the expression “[e]xcept as otherwise expressly provided by ... the leasing agreement” might prove to be a source of doubt. His delegation would therefore still prefer to see these redundant words deleted.

The CHAIRMAN recalled that he had been trying to deal with the Japanese delegation’s different proposals separately. He suspected that the question of the reference to the leasing agreement in the opening clause of Article 7(1)(a) was rather a question of drafting than one of substance and for that reason suggested that it should be discussed separately. His question to the representative of Japan was therefore whether the proposal of the Australian delegation would meet the Japanese delegation’s concern about Article 7(1)(a)’s general reference to the Convention. He noted that the representative of Japan had indicated that he found this proposal to represent an improvement on the basic text. He enquired, however, of the representative of Japan whether he had correctly understood him to be stating that he would still prefer reference to be made to specific provisions of the Convention, if this could be achieved.

Mr KATO (Japan) indicated that the Chairman had indeed understood him aright.

The CHAIRMAN indicated that, were someone to supply him with a list of the provisions to be referred to under the Japanese delegation’s proposal, he would be perfectly happy to proceed with this proposal. He however did not believe it would be possible to discuss this proposal without knowing which provisions of the Convention were contemplated. He asked whether he could
assume that the provisions thus contemplated were Article 7(2) and Article 10, as suggested by the representative of Japan. He further asked that representative whether he could agree with the suggestion made by the representative of the Federal Republic of Germany that Article 4 should also be referred to in this connection.

Mr KATO (Japan) replied that he did not see any need to make Article 4 mandatory. He therefore could not accept the German suggestion.

Mr GOODE (United Kingdom), while pointing out that Article 4 had been reformulated in the Drafting Committee and that this reformulation would be laid before the Committee at the appropriate time, indicated that he doubted whether there was any need for a reference to Article 4 on the basis of the language that appeared in the basic text and he suspected that it would be found even less necessary on the revised language, should that revised language meet with the approval of the Committee at such time as the Drafting Committee reported back.

Mr MOONEY (United States of America) suggested that it might be wiser for the Committee to defer drawing up a list of the provisions in question for the time being and simply to consider whether in principle it favoured listing the specific provisions or else the general reference as it appeared in the basic text, with the Australian alternative. He pointed out that the Committee did not yet know what the shape of the remaining articles would be so that, to his mind, it was premature to consider this matter. He added that the Committee might wish to set up a special ad hoc working group or else ask the Drafting Committee to try to identify the relevant provisions once it had completed its work so that such a list would be available for the Committee’s final reading. In the meantime delegates could ask themselves as they considered the remaining provisions whether any of them should feature in such a list.

Finally he indicated that his delegation in principle supported the proposal of the Japanese delegation to enumerate the specific provisions referred to in the opening clause of Article 7(1)(a).

The CHAIRMAN recognised that this was one way of proceeding but pointed out that it would entail discussing the question twice over.

Mr ZIEGEL (Canada) regretted that his delegation could not support the Japanese proposal to provide a detailed enumeration of the specific provisions of the Convention contemplated in Article 7(1)(a).

It doubted whether it would be easy for delegates to reach agreement as to which of the provisions of the Convention imposed duties on the lessor. To his delegation, for example, it seemed that there was very little in Article 4 that appeared to do so. Neither did it appear to his delegation that Article 10 did so: all that Article 10 provided was that a lessee had a right of rejection of the goods in certain circumstances and it did not seem to impose any duties on the lessor with respect to rejected goods. He noted that every day courts in all jurisdictions had to construe and reconcile the different provisions of statutes and international Conventions.

Mr BERAUDO (France) expressed himself to be in complete agreement with what had just been stated by the representative of Canada. He added that it was not for the Drafting Committee to undertake work of a substantive nature in drawing up an inventory of those provisions of the Convention the effect of which would be to relieve the lessor of any liability to the lessee it might otherwise have in respect of the equipment. He suggested that the text resulting from such an exercise might turn out to be very odd in that the list to be drawn up would be, on the one hand, limited, finite and restrictive with regard to the Convention and, on the other, open-ended and extensive as regards the exemption clauses that might appear in the leasing agreement. He accordingly favoured retaining a general reference to both the Convention and the leasing agreement.

Mr REBMANN (Federal Republic of Germany) indicated that the reactions registered to his proposal to include a reference to Article 4 in the opening clause of Article 7(1)(a) had convinced him that the system proposed by the delegation of Japan would not work. To him it was quite clear that if the supply agreement were changed without the consent of the lessee this could result in the
lessor being found liable, but he added that there would be other possible cases of breach of contract which could also result in the lessor being found liable. He took the view that it would be unfortunate if such cases of breach of contract were to be reduced by the effect of the proposal of the Japanese delegation to a limited number of specific provisions. For this reason his delegation was unable to support the proposal tabled by the Japanese delegation.

Mr SANTOS (Philippines) indicated that in principle his delegation had no objections to the proposal of the Japanese delegation but that, in view of the difficulties involved, it preferred the proposal of the Australian delegation.

The CHAIRMAN proposed taking an indicative vote to see whether there was such support for the proposal of the Japanese delegation as to indicate that the delegations supporting that proposal would also support redrafting the opening clause of Article 7(1)(a) in such a way as to incorporate a reference to specific provisions of the Convention, whether there was broad support for the proposal of the Australian delegation on the assumption that this would improve the text in the direction desired by the Japanese delegation but without engendering the difficulties that some delegations saw arising out of that proposal or whether delegations would rather prefer to keep Article 7(1)(a) as it was.

He accordingly asked which delegations would support the Japanese delegation's proposal for introducing a reference to specific provisions of the Convention in the opening clause of Article 7(1)(a).

Two delegations indicated their support for the proposal.

He next asked which delegations would support the proposal of the Australian delegation for introducing the word "expressly" before the word "provided" in the opening clause of Article 7(1)(a).

Seven delegations indicated their support for the proposal.

He finally asked which delegations were of the opinion that the text should be left as it stood on this point.

Twenty-two delegations indicated that they were of this opinion.

The CHAIRMAN assumed from this indicative vote that there would be little point in postponing the Committee's discussion to permit the drafting of a new text based on the Japanese delegation's proposal. He then sought to see whether the proposal of the Australian delegation should be put to the vote.

Mr BRENNAN (Australia) stated that, in the light of the indicative vote that had just been taken by the chair, he wished to withdraw his delegation's proposal which had originally been in any event intended as nothing more than a clarification of drafting.

The CHAIRMAN indicated that he nevertheless believed that what the representative of Australia had said earlier regarding the construction of the Convention, namely that the word "the leasing agreement" in Article 7(1)(a) did not include implied terms of that agreement, should be duly reflected in the summary records as he had heard no opposition to the idea behind this proposal.

Mr YUAN (China) indicated that his delegation supported the text of Article 7(1)(a) as it stood on this point.

The CHAIRMAN enquired whether the Committee wished him to put the proposal of the Japanese delegation to the vote.

Mr KATO (Japan) stated that, in the light of what had happened, he wished to withdraw his delegation's proposal in this regard.
The CHAIRMAN then proposed that the Committee should look at the second part of the Japanese delegation’s proposal, to wit that the reference in Article 7(1)(a) to the leasing agreement should be deleted, on the understanding that this was already covered by Article 14 of the Convention and that the reference was accordingly redundant. He enquired whether delegations considered the proposal by the Japanese delegation to be one of drafting or rather one of substance.

Mr REBMANN (Federal Republic of Germany) indicated his opposition to the proposal. He criticised the argument that the parties would be able under Article 14 to derogate from virtually all the provisions of the Convention as sophistry. He took the view that superfluous language was sometimes very useful. The parties to the leasing agreement would be free, he reminded the Committee, to grant the lessee other rights than those provided under the Convention and he accordingly found it very useful that this clause should spell out that freedom. He did not understand the idea behind the proposal and in any event did not regard it as being the Committee’s task to produce a Convention that would limit the lessor’s liability exposure as far as possible in all possible places. He accordingly preferred to see the clause remain as it was.

Mr WUJEK (Poland) indicated that his delegation shared the point of view just expressed by the delegation of the Federal Republic of Germany. Article 7, he submitted, a very special article in that, according to Article 14, it was intended to contain one of the mandatory provisions of the Convention. He feared lest the deletion of the words “or the leasing agreement” could give rise to confusion and accordingly preferred to see the text of Article 7(1)(a) on this point remain as it was.

Mr RONCORONI (Switzerland) indicated that his delegation shared the point of view of the delegations of the Federal Republic of Germany and Poland. He failed to see the point of ruling out the possibility that the lessor might assume a greater measure of liability under the leasing agreement than under the Convention.

The CHAIRMAN pointed out that when he had opened discussion on the proposal of the Japanese delegation on this point he had assumed that the point raised was a question of drafting rather than one of substance. This assumption did not appear to have been borne out by the discussion that had gone before. In view of the fact that a number of delegations had voiced the fear that a change of wording in the clause might have an undesired impact on the understanding of the substance of the Convention, he suggested, in the absence of further comments, proceeding to a vote on the proposal for the deletion of the words “or the leasing agreement” appearing in the opening clause of Article 7(1)(a).

_The proposal was rejected by twenty-three votes to four, with one abstention._

The CHAIRMAN next invited the Committee to consider that part of the proposal of the United States delegation (CONF. 7/C.1/W.P. 11) which had a bearing on Article 7(1)(a) before coming to the last of the Japanese Government’s proposals regarding Article 7(1).

Mr GOODE (United Kingdom) enquired whether the proposal of the United States delegation related to the provisions of the Convention or to the provisions of the leasing agreement, as he understood that that part of the proposal of the Australian delegation seeking to qualify the words “the leasing agreement” by the word “expressly” was still outstanding.

The CHAIRMAN apologised for not having noted that the Australian delegation’s proposal for the introduction of the word “expressly” in Article 7(1)(a) also referred to the leasing agreement. He accordingly invited the representative of Australia to speak to this point.

Mr BRENNAN (Australia) indicated that his delegation’s proposal to insert the word “expressly” had indeed been designed to qualify the words “the leasing agreement”, the positioning of the word “expressly” in the proposal having been dictated purely by considerations of ease of drafting. He recalled that he had in his introduction of his delegation’s proposal referred to paragraph 108 of
the Explanatory Report which dealt specifically with this question in relation to the leasing agreement.

The CHAIRMAN noted that the effect of the Australian delegation's proposal would be therefore, subject to drafting, to amend the opening language of Article 7(1)(a) so as to read: "[e]xcept as otherwise provided by this Convention or expressly in the leasing agreement".

He then invited comments on this proposal to insert the word "expressly" in relation to the words "the leasing agreement".

Mr GOODE (United Kingdom), whilst unsure whether the additional word that was being proposed was strictly necessary, nevertheless thought it might be desirable to avoid doubts and his delegation would accordingly support the proposal.

Mr RÉCZEI (Hungary) also supported the Australian delegation's proposal.

Mr BERAUDO (France) feared lest the introduction of this adverb in Article 7(1)(a) could give rise to divergencies of interpretation, in view of the fact that the concept of an express term of the contract was understood differently in certain jurisdictions. For instance, there could be a question as to whether an exemption clause relieving the lessor of liability needed to be accepted expressly, that is by the lessor and the lessee both affixing their signature thereto. Likewise, questions could arise as to whether the express term containing the exemption clause needed to be printed in larger type than the rest of the contract, as to whether such an express term needed to appear on the front or the back of the contract or in the materials annexed to the contract. All these examples of problems were, he pointed out, taken from the case law of the Court of Justice of the European Communities in cases where that court had sought to interpret the express choice of a jurisdiction clause. He believed that the introduction of this term "expressly", whilst at first sight appearing a piece of redundant drafting, could well give rise to much confusion in the scheme of the Convention. It sufficed in his opinion to know whether or not the clause was to be found in the leasing agreement. He feared lest the Committee in its desire to add clarification was in danger of simply stoking the fires of litigation.

The CHAIRMAN expressed the hope that the Committee had not embarked on a discussion of the type generated in connection with the interpretation of air tickets under the Warsaw Convention, as he feared that this would very quickly lead the Committee into considerable difficulties.

Mr DE PAIVA (Brazil) indicated that his delegation had been prepared to support the proposal of the Australian delegation as originally tabled, but in the light of the intervention made by the representative of France he now felt that the change of wording proposed thereunder could introduce an undesirable element of confusion into the provision.

Mr BRENNAN (Australia), replying to the question put by the representative of France, indicated that his delegation understood the term "expressly" to mean that an express clause to that effect needed to be included in the leasing agreement. He recalled that the reason for this proposed amendment was to preclude the possibility that existed under Article 7(1)(a) as it then stood that the words "the leasing agreement" might be interpreted as including not only the express terms but also the implied terms of that agreement. The purpose of this proposal was to underline what his delegation saw as the inconsistency between such a possible interpretation and the contents of paragraphs 101 and 108 of the Explanatory Report (Study LX – Doc. 48). Paragraph 108 stated that: "Article 7(1)(a) has the effect of excluding those contractual terms implied by law from the supply of equipment, notably the duty to ensure that the equipment supplied is of merchantable quality and fit for its known purpose".

His delegation's proposal was designed to clarify the meaning of Article 7(1)(a), that is, if implied terms of the leasing agreement were to be exempted from the article and immunity from liability for breach of such implied terms was not to be granted to the lessor, this would substantially reduce the effect of Article 7 and undermine its purpose as outlined in the aforementioned paragraphs of the Explanatory Report.
Mr RICHARDS (Antigua and Barbuda) endorsed the view expressed by the representatives of France and Brazil. In the light of the explanation given by the observer from the World Leasing Council as to the manner in which leasing arrangements were mounted, in particular the lessor’s role as a pure financier and therefore the inappropriateness of saddling this type of lessor with all the duties that would be incumbent on a traditional lessor, he thought that to employ the word “expressly” in relation to the leasing agreement and to avoid it in relation to the Convention would introduce into the text an undesirable element of inconsistency in terms of drafting and confusion as regards interpretation.

Mr SAMSON (Canada) agreed with the French representative’s reasons for opposing the proposal of the Australian delegation. His delegation too feared lest the addition of the word “expressly” in Article 7(1)(a) would only complicate the interpretation of the Convention.

Mr YUAN (China) indicated that his delegation too supported the position taken by the French representative and would prefer to see the text of Article 7(1)(a) on this point remain unchanged so as to avoid any potential ambiguity.

Mr GOODE (United Kingdom) announced that his delegation wished to put forward a compromise solution designed to meet the concerns of both those supporting the Australian delegation’s proposal and those opposing it. The effect of the compromise would be to drop the word “expressly” and to substitute the word “stated” for the word “provided”. Making it a requirement that a term be stated by the leasing agreement would have the effect both of excluding terms implied by law, thus dealing with the problem that was troubling the Australian delegation, and also of avoiding reference to the term “expressly” which was bothering other delegations.

The CHAIRMAN enquired of the representative of the United Kingdom whether his compromise proposal raised an issue of substance or was rather to be considered a drafting point.

Mr GOODE (United Kingdom) replied that his proposal was intended as a drafting point.

Mr BRENNAN (Australia) indicated that he thought the proposal that had just been put forward by the representative of the United Kingdom was one that would meet the drafting problem raised by his delegation and that he therefore withdrew his delegation’s proposal in favour of this new suggestion.

The CHAIRMAN noted that there was no longer any proposal on the table for the addition of the word “expressly” to the text of Article 7(1)(a). He enquired whether the Committee could accept the submission that the proposal for substituting the word “stated” for the word “provided” in the same sub-paragraph, was only a drafting point and could therefore be left to the Drafting Committee or whether it rather considered the proposal to raise a question of substance which the Committee would have to resolve. He asked the Committee whether, in the absence of any indication to the contrary, he could assume that this was a drafting point to be referred to the Drafting Committee.

It was so decided.

The CHAIRMAN next invited the Committee to consider a proposal by the United States delegation (CONF. 7/C.1/W.P. 11) relating to another part of Article 7(1)(a). This proposal contained two alternatives. The first of these, which he had understood to be the first preference of the United States delegation, would involve the deletion of the last part of the sub-paragraph as from the words “save to the extent that”. He called upon the representative of the United States of America to introduce its proposal.

Mr MOONEY (United States of America) explained first of all that it was not the position of his delegation that no liability should attach to a financial lessor in all circumstances where it had intervened — whatever the word “intervened” meant — in the selection of the supplier or the specifications of the equipment. His delegation was not proposing an affirmative rule providing that no liability should attach to a lessor notwithstanding such an intervention.
His delegation's proposal was rather concerned with resolving the issues raised in the most appropriate manner. It had already been established that primary responsibility for the type of act contemplated under Article 7 was incumbent under the scheme of the Convention upon the lessee. The problem as it had been presented to him since the last session of governmental experts by many, including representatives of industry and lawyers called upon to document these transactions and give assurances to their clients as to enforceability, was that the mere fact that the lessor joined in the transaction indicated logically some form of intervention in the details of the supplier or the equipment, because the lessor had the alternative of not entering into the transaction.

He referred to the example he had cited in CONF. 7/C.1/W.P. 11 of the sort of problem to which the "save to the extent" language caused for him. The lessee in this example approached a lessor with the request that the latter enter into a financial leasing transaction. The lessor was totally unfamiliar with the equipment to be leased, a Brand X computer, and with the supplier, about which it had no information. A lessor being asked to be a co-investor in the equipment, either because there was a residual value or because during the term of the lease the equipment would in effect serve as collateral for the lessor's advance of funds, would naturally be concerned about these matters. The lessor might therefore well answer the lessee that it was not interested in becoming a co-investor in the proposed transaction, on the ground that it did not know anything about the equipment, about its manufacturer or about its supplier. At this point the lessee might decide instead to lease an I.B.M. computer to be purchased from a very reputable authorised I.B.M. dealer and the lessor agree to enter into that transaction. He asked whether on the facts outlined in this example a lessor would be considered to have "intervened" for the purposes of Article 7(1)(a). He confessed that he did not know because he did not know what the term "intervened" meant.

As another example, he took the case of a lessee that approached the lessor indicating both the item of equipment it required and the supplier from which it wished the equipment to be acquired. The lessor agreed to the proposed transaction but insisted, as was virtually standard with respect to some types of property, on the lessee purchasing a maintenance contract with a firm authorised to carry out maintenance on such equipment because otherwise the equipment could deteriorate and lose value. Subsequently a problem might arise with the maintenance contract or with the equipment. He asked whether the lessor would be liable for this type of problem under Article 7(1)(a).

He suggested that the text of Article 7(1)(a) was less than clear in giving guidance to the courts on this point. To his mind, the Committee had two options in this situation, either to delete the relevant words or to improve on them. His delegation's proposal envisaged both options as alternatives. However, should the words in question be deleted, the question would arise as to whether, in circumstances where the lessor had intervened in such a way that it ought to bear some measure of responsibility, it would in fact bear that responsibility. It clearly would, were as much provided for in the leasing agreement. The lessee would be the first person to know if the lessor had intervened. It would clearly always be open to the parties to the leasing agreement to provide therein the extent to which the lessor should incur liability in the event of there being reliance by the lessee on the lessor's skill and judgment. He however had serious doubts as to whether there would be a majority in the Committee prepared to abandon totally the concept of some sort of affirmative liability on the lessor for what were termed "interventions" that had been current throughout the work of the committee of governmental experts. In these circumstances he called the Committee's attention to Alternative II of his delegation's proposal. Whilst in part this raised a question of drafting, it was also concerned with the substance of the proviso to Article 7(1)(a) and to that extent required the approval of the Committee.

As it stood ("save to the extent that it has intervened ..."), the proviso was the source of two problems. First, it could be read as meaning that if the lessor had intervened in a manner that constituted, say, 20% of the overall motivation, where damage ensued the lessor's resultant liability would be for 20% of that damage. He did not, however, believe that to be a proper reading, feeling that there should be a causal nexus between the intervention and the resultant liability. Where the lessor had, for instance, insisted on a certain specification and the lessee had relied on the lessor 100% for that specification, the lessor should still, to his mind, bear no liability for some unrelated loss. The second problem which his delegation had with the proviso to Article 7(1)(a) was that it could be read—and he added that it had indeed been so read by some of his colleagues, distinguished
experts in private international law – as meaning "if", so that, where the lessor had intervened to any extent at all, it would thereby forfeit the immunity conferred upon it under the basic rule of Article 7(1)(a). He could not believe that that was the intention of the draftsmen of the proviso.

Without wishing to embroil the Committee in drafting, he pointed out that the drafting proposed by his delegation was designed to preserve lessor liability only to the extent of damage which resulted primarily from the lessee’s reliance on the lessor’s skill and judgment and direct intervention. This could, he added, be divided up so that one point would be damage resulting primarily from the lessor’s activities and another what the activities were. His delegation was suggesting a dual test, to wit reliance on the lessor’s skill and judgment and direct intervention by the lessor. The reason for this was that, if a lessor could be construed as intervening but the lessee was independently in complete agreement with the lessor, it seemed to him that that direct intervention should be of no consequence to the extent that the lessee did not rely at all on the lessor. Similarly, if the lessor did not intervene directly but the lessee relied on the lessor’s skill and judgment, his delegation did not believe that that should be sufficient for the lessor to be liable either. For example, the lessee might consider the particular lessor to be very experienced and deduce therefrom that such a lessor would not be involved in equipment unless it was very good. Here again he did not believe that this alone should be sufficient for the lessor to incur liability in the absence of direct intervention.

He asked that the Committee’s attention be drawn to the practical problems that the proviso to Article 7(1)(a) as it stood would cause both to persons seeking to consummate transactions and to be assured of their position in these transactions and to the courts, should they be called upon to interpret this proviso.

The CHAIRMAN wondered whether the proposal made by the United States delegation might have a bearing on the proposal made by the Government of Japan in CONF. 7/3 that, the language featuring at the end of Article 7(1)(a) being also relevant to Article 7(1)(b), it should be moved to a new sub-paragraph (d). He feared lest, should the Committee adopt Alternative I of the United States delegation’s proposal, this would prejudice the possibility of the Japanese proposal being adopted. He accordingly called upon the representative of Japan to present his Government’s proposal in this connection prior to the Committee commencing its discussion of the United States proposal.

Mr KATO (Japan) indicated that, if the United States delegation’s proposal were to be accepted, there would be no need for his Government’s proposal in this connection to be discussed.

The CHAIRMAN invited the Committee to comment on the proposal made by the United States delegation. He indicated that discussion was open on both alternatives contained in this proposal, although clearly, should the Committee decide to accept the United States delegation’s proposal, it would then have to decide which of the alternatives it preferred.

Mr MOONEY (United States of America) indicated that, with a view to speeding up the discussion, his delegation was prepared, unless some other delegation was prepared to speak in its favour, to withdraw Alternative I of its proposal. In making this offer he was particularly aware of the longstanding attachment of the committee of governmental experts to this proviso. This would, he suggested, enable the Committee to focus better on the type of language that was required.

Mr ROLLAND (Federal Republic of Germany) indicated that his delegation would support Alternative II of the United States delegation’s proposal. This text seemed to have the advantage over the basic text of introducing the element of a causal relationship between the intervention of the lessor and the damage sustained by the lessee.

Mr NISHIKAWA (World Leasing Council) felt that, taking account of the realities of the market, Alternative I of the United States delegation’s proposal was strongly to be preferred. He believed Alternative II would take the transaction outside the scope of the Convention, in that, under Article 1(2)(a), the latter’s application was delimited by reference to transactions a characteristic of which was that “the lessee specifies the equipment and selects the supplier without relying
primarily on the skill and judgment of the lessor”. He maintained that this meant that if there was reliance by the lessee on the lessor’s skill and judgment the transaction was no longer a financial leasing transaction as contemplated by the Convention. Alternative II proposed introducing the words “of the lessee’s actual damages resulting primarily from the lessee’s reliance on the lessor’s skill and judgment and direct intervention”. He interpreted the United States delegation thereby to be saying that if the lessee relied primarily on the lessor’s skill and judgment then the lessor was to that extent liable. He suggested that, by virtue of Article 1(2)(a) of the Convention, such a transaction was no longer encompassed by the Convention.

The CHAIRMAN pointed out that, the United States delegation having withdrawn Alternative I and no other delegation having as yet sought to reintroduce it, Alternative I was no longer on the table.

Mr MOONEY (United States of America) begged leave to clarify his proposal in the light of the point made by the observer representing the World Leasing Council. He explained that the circumstances which were envisaged under the Convention necessarily involved a situation where the lessee did not rely primarily on the lessor’s skill and judgment. Where, however, the lessee relied to an extent that was less than “primary”, for instance where the lessor indicated that it was only going to intervene on one point, namely by insisting on the use of certain tyres and those tyres proved to be defective, the question would arise as to when and under which circumstances the lessor should be liable. Such a transaction was, he indicated, still a financial leasing transaction as contemplated by the Convention, the lessee’s reliance on the lessor’s skill and judgment being less than “primary”. It would therefore be necessary to determine what should be the extent of the lessor’s liability for this less than “primary” reliance.

Mr GOODE (United Kingdom) signalled his agreement with what had just been stated by the representative of the United States of America, there being no inconsistency between Article 1(2)(a) and the proposal of the United States delegation to amend Article 7(1)(a) because the “primary” reliance in Article 1(2)(a) related to reliance in the specification of the equipment and the selection of the supplier whereas the “primary” reliance referred to in Article 7(1)(a) as proposed was the reliance which led to the suffering of the loss. He pointed out that these were two entirely different notions.

The CHAIRMAN suggested adjourning the discussion of the proposal until the afternoon.

The Committee rose at 1.00 p.m.
Article 7(1)(a) (CONF. 7/C.1/W.P. 11) had been withdrawn, invited comments on Alternative II.

Mr MOONEY (United States of America) indicated that, following the morning session, he had discussed his delegation's proposal contained in Alternative II with several delegations and those discussions led him to believe that, while there might well be substantial support for the principles embodied in his proposal, an attempt to come up with agreement on precise drafting might be difficult in the Committee. He accordingly proposed withdrawing for the time being the precise language employed in his proposal, preferring instead to state the general principle on which the Committee might be able to agree. Should this general principle meet with support, his delegation's proposal could then be sent to the Drafting Committee with a view to its being improved upon.

He stated that the general principle which Alternative II of his delegation's proposal was intended to embrace rested on the supposition that there had been a lessor intervention of the kind contemplated in Article 7(1)(a). The lessor would then be liable only to the extent, that is the amount, of the lessee's damages caused by that intervention and the lessee's reliance on the lessor's skill and judgment. The goal of this proposal was to establish the requirement of a direct causal relationship between the intervention and any damage and also to ensure that the amount of damages was properly related to the fact of the intervention and the reliance.

Mr ROLLAND (Federal Republic of Germany) indicated that his delegation supported the proposal of the United States delegation. He added that, if there should be agreement on the basic substantive point, that is the general principle of introducing the requirement of a causal relationship in this provision, everything else would simply be a question of drafting.

Mr DE PAIVA (Brazil) saw the point of the United States delegation's proposal to which he was therefore able to give the support of his delegation, although he still felt that the drafting of this proposal required further careful consideration. His delegation was, however, prepared to agree that this could be left to the Drafting Committee.

Ms ZHANG (China) indicated that her delegation remained unconvinced by the explanations given by the representative of the United States of America and would therefore prefer the retention of the basic text on this point.

Mr JACOBSSON (Sweden) explained that the United States delegation's proposal seemed a fair one to his delegation. His delegation could accordingly support it, subject to minor drafting amendments.

Mr KATO (Japan) announced that his delegation too supported the United States delegation's proposal, which it found to be very fair.

The CHAIRMAN indicated that he assumed the Committee was discussing the main principle embodied in the United States delegation's proposal for requiring a causal relationship to be established between the lessor's intervention and the damage sustained by the lessee. He added that the matter of how this principle should be drafted was one that could be left to the Drafting Committee.

Mr SAMSON (Canada) explained that his delegation preferred to keep the basic text of Article 7(1)(a) on this point because of what it saw as the scope for conflicts of interpretation between Alternative II of the United States delegation's proposal and Article 1(2)(a) characterising the type of lease contemplated by the Convention. This last provision delimited the sphere of application of the Convention by reference to a situation in which "the lessee specifies the equipment and selects the supplier without relying primarily on the skill and judgment of the lessor". He pointed out that under the United States delegation's proposed Alternative II the same criterion would be employed for the purpose of determining the lessor's liability under Article 7(1)(a) as that used in Article 1(2)(a) for the purpose of determining the application of the Convention. The United States delegation's proposal would make the lessor liable for any damage resulting primarily from
the lessee’s reliance on the lessor’s direct intervention in the selection of the supplier or the specifications of the equipment. He argued that the effect of this proposal would be for Article 7 to govern the lessor’s liability in transactions which would not be governed by the Convention. He suggested that a way should be found of differentiating the language employed in Alternative II from that used in Article 1(2)(a). As a solution he proposed deleting the words “and direct intervention” from Alternative II. This would leave the question of whether the damage sustained by the lessee resulted primarily from its reliance on the lessor’s skill and judgment as the sole criterion for determining whether or not the lessor should be liable. It would at the same time ensure a certain degree of parallelism between Articles 1(2)(a) and 7(1)(a) without, however, the same qualificatory criteria being used.

Mr GAVALDA (France) indicated that his delegation fully supported the point of view of the Canadian delegation.

Mr RONCORONI (Switzerland) indicated that his delegation too supported the Canadian delegation’s position.

Mr MOONEY (United States of America) suggested that the comments made by the representative of Canada indicated that the Committee of the Whole was not the ideal place to be doing the sort of redrafting exercise being proposed. He also suspected that these comments might arise from some problems in the French text, a suspicion that was perhaps reinforced by the delegations that had spoken in support of the Canadian delegation’s position. The only point which his delegation was trying to convey by its proposal in this connection was the need to establish a causal connection between the lessor’s act and the damage and the amount of the damage resulting therefrom. This was a principle which the basic English text of this provision failed to convey. He admitted, however, that some of the ambiguities highlighted by the Canadian representative’s intervention might affect the English text too.

The CHAIRMAN sought clarification from the representative of the United States of America as to whether he was proposing the setting up of a small working group to provide a redraft or rather whether, in the light of the objections registered to his delegation’s proposal, he would support a vote being taken on the principle embodied in that proposal, with the task of redrafting being left to the Drafting Committee.

Mr MOONEY (United States of America) replied that his delegation would prefer to see the principle embodied in his delegation’s proposal being put to the vote with any redrafting being left to the Drafting Committee.

The CHAIRMAN, after noting that considerable support had been registered for the idea of introducing a causal connection between the lessor’s act and the damage sustained by the lessee but that objections had been raised both in respect of the language employed in this connection in Alternative II of the United States delegation’s proposal and in respect of the idea itself, on the ground that the relationship between Alternative II and Article 1(2)(a) delimiting the sphere of application of the Convention would have first to be clarified, accordingly put to the vote the question whether the principle of a causal connection between the lessor’s act and the damage sustained by the lessee should be introduced in Article 7(1)(a). The question of the drafting of this principle could then be referred to the Drafting Committee.

The introduction of the principle embodied in the United States delegation’s proposal for Article 7(1)(a) was carried with twenty-four delegations voting in favour and no delegation either voting against or abstaining.

In the light of this decision, the CHAIRMAN enquired of the representative of Japan whether he was right in understanding that the Japanese Government’s proposal relating to the last part of Article 7(1)(a) thereby fell.
Mr KATO (Japan) confirmed the Chairman’s understanding, withdrawing his delegation’s proposal in this regard.

The CHAIRMAN noted that there were as a result no further proposals relating to Article 7(1)(a) pending.

After pointing out that in its written comments (CONF. 7/3 Add. 2) the Government of Pakistan had suggested that the words “use, operation or possession of” be added before the word “equipment” at the end of Article 7(1)(b), he enquired whether any delegation present wished to take up this proposal. No such support being forthcoming, he concluded that there were no further proposals relating to Article 7(1) pending. He considered that Article 7(1), with the amendment embodied in the principle of the United States delegation’s proposal, could therefore be considered to be adopted and be referred to the Drafting Committee.

It was so decided.

Paragraph 2

The CHAIRMAN, moving on to Article 7(2), noted that a number of delegations had in their preliminary comments indicated which of the alternatives forwarded to the Conference on this point by the committee of governmental experts they preferred. There was also a proposal by the Government of Spain (CONF. 7/3), which favoured Alternative II, for adding at the end of that alternative the words “or supplier”. In addition, the Government of the Federal Republic of Germany had a proposal (CONF. 7/C.1/W.P. 17) which had not at that time been distributed and he accordingly called upon the representative of the Federal Republic of Germany to explain this proposal.

Mr ROLLAND (Federal Republic of Germany) explained that the reason which had prompted his delegation to put forward its proposal was what it saw as the unsatisfactoriness of both alternative texts forwarded to the Conference. In explaining the reasons which had led his delegation to this conclusion, he recalled how in previous discussion of the provision Alternative I had been found to go too far in the direction of protecting the lessee and Alternative II to go too far in the direction of protecting the lessor. While this might seem contradictory, he submitted that there was truth in both arguments. This was a situation which to his delegation’s mind called for a compromise solution, an objective which his delegation’s proposal sought to provide.

The main features of this proposal were, first, that where the lessor was responsible for the lessee’s quiet possession being disturbed then it should itself be liable – he thought that this was a proposition which could command general acceptance – secondly, that where the lessee was responsible for such a disturbance of its quiet possession then it should itself be liable and, thirdly, that where neither the lessor nor the lessee was responsible for such a disturbance then liability should be divided between them according to their spheres of actual responsibility. In practice, the lessor’s chief duty would be to warrant that at the time of the conclusion of the leasing agreement and perhaps the delivery of the equipment there were no third party rights in such equipment. After the conclusion of the leasing agreement and the delivery of the equipment it would be very difficult for the lessor to assume responsibility for the equipment in so far as it was in the lessee’s possession with the result that anything that happened to it after that time would fall within the sphere of the lessee’s responsibility. The effect of this idea would be that, where either one or the other of the parties to the leasing agreement was responsible for the disturbance of the lessee’s quiet possession, then that party would be liable but that where neither of them was responsible then the lessee would be liable if the disturbance derived from third party rights acquired up to, and acts or omissions of third parties committed up until, the time of the conclusion of the leasing agreement or when the equipment was delivered, with the lessee being liable for third party rights acquired and acts or omissions of third parties committed thereafter. Responsibility would therefore be attributed according to whether the third party rights or the act or omission of a third party causing the disturbance had been acquired or committed respectively up to or after the time of the conclusion of
the leasing agreement or the delivery of the equipment, with responsibility being attributed to the lessor for such rights acquired and such acts or omissions committed up to that time and responsibility being attributed to the lessee for such rights acquired and such acts or omissions committed after that time.

The CHAIRMAN noted that there were as a result three options open to the Committee, the one contained in Alternative I, the one contained in Alternative II and the compromise solution presented by the representative of the Federal Republic of Germany. He proposed that the Committee should first have a general exchange of views as to which of these options it considered to be the most acceptable before looking at specific proposals for substantive amendments to the text.

Mr RÉCZEI (Hungary) enquired of the representative of the Federal Republic of Germany why under his delegation’s proposal he wished to limit the lessor’s responsibility only up until the time of delivery of the equipment.

Mr ROLLAND (Federal Republic of Germany) indicated that, if it were a matter of his delegation alone, then he would have no problem with the idea of the lessor remaining responsible for the entire duration of the leasing agreement. However, his delegation doubted, in the light of the previous discussions that had taken place on this issue, whether there was any chance of such a solution commanding broad support in the Committee, which was why his delegation had put forward its proposal as a compromise solution, on a line somewhere between Alternatives I and II, with a view to achieving acceptance by a majority of the Committee.

Mr GOODE (United Kingdom), while recognising that the proposal made by the delegation of the Federal Republic of Germany was a very interesting attempt to balance the competing interests of lessor and lessee, signalled that nevertheless his delegation would have a problem with it because in the transaction contemplated by the Convention the supplier was selected not by the lessor but by the lessee. It was the lessee who designated the person to be involved in selling the equipment, so that if this lessee chose to nominate as its supplier and to deal with a person who, for one reason or another, was so conducting its business as to supply equipment to which it lacked title, then he found it difficult to understand why the lessor should assume responsibility for such a situation. He added that his delegation had this problem both with Alternative I and with the compromise suggested by the delegation of the Federal Republic of Germany.

Mr WUJEK (Poland) suggested that, in discussing Article 7, the Committee should focus on two issues, one economic and the other legal in nature. He suggested that the observer representing the World Leasing Council had painted a rosy picture of lessors competing in offering lessees the most favourable terms whatsoever and with the lessee’s choice being usually based on the least expensive and, financially speaking, the most favourable offer on hand from its point of view. He believed that this picture was accurate as far as leasing transactions in developed countries and cross-border leasing transactions involving exclusively developed countries were concerned but he reminded the Committee that one of the objectives of the Convention was precisely to make leasing more available to developing countries and in such developing countries there was not the same wide range of methods of finance as was available in developed countries. In developing countries leasing, albeit expensive, was quite often the only method of finance available, which made it difficult when speaking of such countries to regard both parties to the leasing agreement as having equal bargaining power.

Legally speaking, he maintained that lessors could not be treated on exactly the same footing as banks or financial institutions, the lessor being legally owner of the leased asset and as such vested with certain rights. He pointed out that, with a view to balancing the interests of the different parties, the recognition of rights in favour of a party usually entailed recognition of certain duties incumbent on that same party. As a result he suggested that, if a lessor were to be vested with greater rights than a bank or a financial institution, it should also assume greater responsibilities. In the context of Article 7(2) the problem was which of the two, lessor or lessee, should assume liability for the case where the lessee’s quiet possession was disturbed as a result of third party
rights. He suggested that the Committee look at the general rules of law applicable in all jurisdictions. In doing so it would see that in cases where something happened to property which was not attributable to the fault of anyone it was the owner who bore the risk. He suggested that this approach be followed here too.

Mr ILLESCAS (Spain) suggested looking at the problem from the angle of the way in which the lessee’s right to enjoy quiet possession of the equipment throughout the duration of the leasing agreement was subject to the lessor’s dealings with the supplier. His delegation took the view that the problem at issue should not only be examined from the angle of lessor-lessee relations but also, in accordance with Article 1(2)(b) of the Convention, from that of lessor-supplier relations too. The terms of the supply agreement could have a direct impact on the conditions of the lessee’s quiet possession. His delegation, which would prefer Alternative II, would therefore propose that it be amended so as to provide that the lessor warrant the lessee’s quiet possession against any act or omission of the supplier too. Alternatively, he indicated that his delegation could accept the proposal made by the delegation of the Federal Republic of Germany in that this proposal was consistent with the achievement of the same objective.

The CHAIRMAN noted that the proposal of the Government of Spain (CONF. 7/3) to which he had referred earlier could thus be seen as an additional option open to the Committee.

Mr MOONEY (United States of America) indicated that his delegation supported Alternative II for a variety of reasons which, he suggested, merited the serious consideration of the Committee.

Responding first to the exposition made by the representative of Poland of the issues involved and the types of analysis that might be employed by the Committee in resolving the problem before it, he was willing to accept the economic argument that lessees might not necessarily find themselves on an equal economic footing with the lessor in the negotiation of absolutely all cross-border transactions, although in his experience of preparing negotiation papers for such transactions for lessees in such developing countries as the Philippines and Yugoslavia he had not himself observed any such disparity in bargaining power. However, even assuming equal bargaining power, the reality was that lessors virtually never gave such warranties, indeed such warranties being always excluded. It was, moreover, traditional in financial leasing transactions not only for the lessor not to give such warranties but also for the lessee to warrant to the lessor that the latter was giving good title and for the lessee to stand behind the supplier’s duties. He explained that the reason for this was that the proper paradigm for this type of transaction was the secured collateralised purchase money loan, whereby a prospective user, having found a supplier and equipment to its liking, would go to a financier and offer the equipment as collateral for a loan permitting it to pay the supplier. Such a financier would expect its customer to warrant to it that there was good title to the collateral. Many financial leasing transactions would be precisely the same in economic impact as such a secured loan. He imagined that no-one would be offended by the proposition that a borrower of money had to stand behind the quality of its collateral.

Some of the transactions addressed by the Convention would involve a meaningful residual for the lessor. This was relevant to what the representative of Poland had said about there being something peculiar about the lessor’s ownership. He reminded the Committee that the Convention was specifically designed to get away from that type of traditional association of ideas through the creation of a special legal regimen freeing the financial leasing transaction from the bondage of such historical stereotypes. In examining the nature of that ownership, he suggested an economic test. The stream of rentals under a finance lease was designed substantially to repay the cost of the equipment. This meant that, on an economic division, the bundle of rights vested in the lessee, in particular the right to use the asset, would be invariably more valuable than what would be left at the end of the lease for the lessor. It was the lessee who had the greatest economic interest in the transaction. It was the lessee that selected the supplier. He suggested that it should be the lessee that bore the risk.

Reality, however, was that there were no financial leasing transactions in which the lessee was expected to bear the risk. Perhaps his greatest concern was that a Convention designed to outline the
prototype financial lease would end up containing a rule that was precisely the opposite of the situation actually prevailing in such transactions. He suggested that so many billion dollars' worth of lessees could hardly be wrong. He was not aware of any lessee that had ever suggested paying the lessor to ensure its supplier's good title.

Mr KATO (Japan) explained that the comments he had wished to make somewhat overlapped with what had already been stated by the representative of the United States of America. Whilst impressed with the intervention made by the representative of Poland, he nevertheless wished to take issue with him on a few points. First, the representative of Poland had drawn attention to the fact that the lessor's ownership in a financial leasing transaction was ownership in name and for security purposes only. If the lessor's ownership was genuine in an economic sense, then the transaction would not be a financial lease but would be just a lease. He suggested that the problem therefore lay in the legal form that was given to the economic reality. Secondly, referring to the remarks made by the observer from the World Leasing Council that had been seized upon by the representative of Poland, he echoed the sentiments expressed by the representative of the United States of America in stressing that it was the lessee who selected the supplier and gave the specifications for the equipment so that it was the lessee that was better fitted to evaluate the risk than the lessor. He reminded the Committee that the financial world was very competitive and that, if it were to choose in the Convention to impose very strict, unfair rules on finance lessors, then he warned that there was a very real risk that leasing companies would cease writing their business in the form of leasing contracts and that such a Convention could therefore spell the end of the leasing industry. With a view to achieving a fair solution which would permit both parties properly to evaluate the risk, his delegation would prefer Alternative II.

Mr EL-KATTAN (Egypt) indicated his support for the view expressed by the representative of Poland.

Mr REBMANN (Federal Republic of Germany) recalled that, whilst his delegation's first choice would be Alternative I, which would accord with his country's domestic law, its proposal in this regard reflected its desire to achieve a compromise solution. He pointed out, first, that the lessor's fundamental duty according to Article 1(1)(b) was to grant the lessee the right to use the equipment. The Convention was not dealing with loans under which the fundamental duty of the lender would be to lend money with a view to being repaid in due course. Secondly, he insisted that the Convention had to be internally consistent. In Article 10, for instance, he pointed out that, where the equipment did not conform to the terms of the supply agreement, the lessee was given the right to reject the equipment and to terminate the leasing agreement. He had not heard anyone suggesting that the lessee should not have these rights because it had itself selected the supplier and given the specifications for the equipment. He failed to see any essential difference between, on the one hand, the situation where the equipment was burdened with rights of a third party at the time of delivery to the lessee and the latter's quiet possession was disturbed as a result and, on the other hand, the situation where the equipment did not conform to the terms of the supply agreement. Both situations revealed to his mind a breach of the fundamental duty of the lessor. The argument that it was the lessee that had selected the supplier and given the specifications for the equipment was not in his opinion a valid argument in the context of Article 7(2) as it would otherwise have justified the exclusion of any liability of the lessor in respect of conformity of the equipment to the terms of the supply agreement at the time of delivery under Article 10. Furthermore, he stressed that, under Article 9(2), the lessee had no power to terminate or rescind the supply agreement, that is even if the equipment upon delivery turned out to be burdened by rights of a third party.

His delegation's compromise solution proposed dividing the risks at the moment after delivery. Whilst it was logical that the lessor should be liable in so far as the third party's rights were derived from an act or omission of the lessor, it was even more logical that the lessor should warrant quiet possession up until the moment of delivery, independently of any act or omission on its part, because this corresponded to its fundamental duty under Article 1(1)(b).

Ms ZHANG (China) expressed her delegation's appreciation of the points made by the rep-
resentative of Poland and the efforts to achieve a compromise made by the delegation of the Federal Republic of Germany. In the opinion of her delegation, two important factors had to be borne in mind. First, as mentioned by the representative of Poland, she noted that many delegations had recognised that, from an economic point of view, the lessor and the lessee did not enjoy equal bargaining power in certain circumstances. Notwithstanding the lessee’s great interest in obtaining equipment on lease, she asked the Committee to bear in mind the real situation of many developing countries. Because of their indebtedness they did not have any real opportunity to select a particular supplier, being sometimes forced as a result to select a supplier indicated by the lessor. Secondly, in a legal sense, the lessor as owner should, in the opinion of her delegation, bear certain liabilities recognised as flowing from ownership in every legal system. For these reasons her delegation would prefer Alternative I.

Finally, she asked the Committee to remember that the purpose of its work was not to draw up a charter for the leasing industry but to remove certain legal impediments to cross-border leasing. She suggested that the existence of these impediments indicated that there were some real problems with international leasing transactions and that it would therefore hardly make sense simply to aim in the Convention to reproduce the existing situation. She pointed out that another purpose of the Convention was to ensure the maintenance of a fair balance of interests as between the different parties to international leasing transactions, so that it was not open to the Committee to seek to protect the interests of only lessors any more than it would be proper for it to seek to protect the interests of only lessees.

Mr RÉCZEI (Hungary) noted that the Committee was agreed on one point, namely that, where one of the parties to the leasing agreement was responsible for a disturbance of the lessee’s quiet possession, that party should also be liable for the damage resulting from the disturbance. The difficulty arose in deciding who should bear the risk of such a disturbance where neither of the parties was responsible therefor. It should be borne in mind that what was at issue was not damage in the physical sense but rather damage in the sense of a superior right acquired by a third party. To his mind this, however, raised another question, namely that of what, in the absence of an act or omission of either lessor or lessee, would be the nature of such a third party right. He wondered whether such a right would be in the nature of a right of ownership or rather be in the nature of a right to possession. He reminded the Committee that in financial leases ownership was separated from possession so that it would be impossible to know in advance whether the superior right acquired by the third party would relate to ownership or possession. If the superior right related to ownership of the equipment, he failed to see why the consequences should be visited upon the lessee who was only entitled to possession. Alternative I gave the correct solution for these reasons but he suggested that it could always be redrafted in such a way as to indicate that, if the superior right did not derive from ownership, then the lessor was not liable for any disturbance resulting from such a superior right but that in any other case it would be liable.

Whilst inclined to support the compromise solution advocated by the delegation of the Federal Republic of Germany, he failed to understand why under this proposal the lessee would be protected only up until the moment of delivery. The lessee’s user of the equipment would only commence once delivery had been tendered, which meant that the compromise solution would leave the lessee unprotected from the moment of delivery right up until the expiry of the term of the leasing agreement. He argued that the lessee must be guaranteed some protection during this time too.

He therefore suggested that, with a view to dividing the risk properly between the lessor and the lessee, an attempt should be made to see whether a distinction could not be drawn between superior rights derived from ownership and superior rights derived from possession.

The CHAIRMAN sought clarification from the delegation of the Federal Republic of Germany as to whether he was reading its proposal aright in believing that, if the lessee’s quiet possession was disturbed by the fact that the equipment was owned by a third party and that this third party’s ownership was established prior to delivery by the supplier, then the lessor would be liable for such a disturbance and that only if the third party’s ownership was established subsequently and without any default on the lessor’s part would the risk be borne by the lessee.
Mr ROLLAND (Federal Republic of Germany) intimated that the Chairman had understood his delegation's proposal aright, although he pointed out that he would not like third party rights in this context to be understood only in terms of ownership rights but to extend also to some of the rights to possession.

The CHAIRMAN indicated that he agreed with the representative of the Federal Republic of Germany on this point, having sought only to give one example of how he had understood that delegation's proposal.

Mr GAVALDA (France) explained that his delegation had listened with great interest to the remarks made by the representative of Poland. It shared its point of view, as also that expressed by the representatives of Egypt and China and as developed by the delegation of the Federal Republic of Germany. It accordingly supported Alternative I, subject to the reservations expressed by the representative of Hungary, as the best means of securing a fair balance, both legally and economically speaking, between the interests of lessor and lessee on this matter and of ensuring the future development of leasing in the interests of both parties. He did not believe that it would serve the interests of leasing in general to put leasing companies in an excessively and abnormally dominant position.

Mr GOODE (United Kingdom) suggested that there were three points that should be borne in mind. First, it was the particular hallmark of financial leasing that it distinguished legal ownership from economic ownership. This was reflected in legislation in many parts of the world. This was particularly true of fiscal legislation according to which revenue authorities did not look at the legal form, but rather at the substance of the transaction. The substance of the transaction was that, although the bare legal title was vested as a matter of form in the lessor, the economic owner was the lessee, and financial leasing was regulated accordingly for fiscal purposes. This was also increasingly true all over the world of the accounting treatment of financial leasing. International accounting standards increasingly required the lessee to be shown as the owner of the leased asset. He therefore suggested that it was not appropriate to refer to Roman law maxims like res perit dominos in respect of a situation that was entirely different from the one to which such maxims referred.

Secondly, he suggested that it was important to remember that many lessees would be Governments or governmental entities who were perfectly well able to look after themselves.

Thirdly, he echoed the point made by the representative of the United States of America to the effect that in fact it was almost invariably the lessee that was required to give this warranty to the lessor and not the other way round. He suggested that it would be most unfortunate if the support that the draft Convention had begun to generate across the world were to be lost through it being perceived by those using leasing, both lessees and lessors, as bearing absolutely no relation to what was being done in the market place. He concluded, in the light of all these considerations, that Alternative II ensured a fair balance as between the interests of lessor and lessee, giving the lessee in fact significantly greater protection than it enjoyed under the typical financial lease.

Mr SANTOS (Philippines) agreed that it was perhaps difficult to deny the situation contemplated by the representative of the United States of America, namely that where the lessee negotiated with the supplier and later convinced the lessor to acquire the equipment, but it was equally possible that during the lessee's negotiations with the supplier the latter might suggest the name of a lessor to finance the transaction. He suggested that this could be especially true in transactions where the prospective lessor was affiliated to, or a subsidiary, of the supplier. The concerns voiced by the representatives of Poland and China would become especially relevant in such cases. For this reason his delegation supported Alternative I.

Mr KOMAROV (Union of Soviet Socialist Republics) noted that Alternative II, in the words of its proponents, served the purpose of establishing a special legal framework for the specific type of leasing transaction denominated financial leasing. Whilst he would dispute that the concept of limited liability provided for under Alternative II was consistent with the nature of the triangular
leasing transaction, his delegation nevertheless thought it went too far in this direction and that the extremely limited liability laid on the lessor under this alternative would have the effect of disturbing the balance of interests as between the parties under the Convention. The lessor’s liability had already, in view of its technical neutrality, been greatly limited under Article 7(1). His delegation for these reasons gave its support to Alternative I as being in line with the goals of the draft Convention.

Mr CUMING (Canada), while suggesting that discussion of this provision had perhaps shown that nothing new remained to be said in this regard, sought to amplify what had been stated by the representative of the Federal Republic of Germany regarding the relationship between the remedies under this provision and those under Article 10. He suspected that there might be a logical confusion in this regard. Article 7(2) addressed the question of the lessor’s warranty of quiet possession and its liability in damages for disturbances thereof. He suggested working in the proposal of the delegation of the Federal Republic of Germany in such a way as to retain Alternative II of Article 7(2), with the lessor being liable for damages only for those defects in title that were a product of its own conduct, and include in Article 10 a right of rejection for a defect in title. The logic of this was, as had been pointed out by the representative of the Federal Republic of Germany, that Article 10 addressed the remedy of rejection in connection with other defects such as the equipment being delivered late or otherwise not in conformity with the terms of the supply agreement and that there seemed to be no special reason for treating lack of clear title differently from these other defects. He added that the parties could be left free to adjust these remedies as they saw fit.

Mr PÉREZ-AGUILAR (Mexico) indicated that his delegation supported Alternative I.

Mr RICHARDS (Antigua and Barbuda), after listening to the distinction drawn by the representative of the United Kingdom between the economic and legal ownership of the equipment, intimated that he tended to think that the position of a lessee in this situation was analogous to that of a purchaser of real property, where it would be incumbent upon the purchaser to investigate the title to the property. The lessor’s position was that of a financier/banker and, failing an act or omission on the part of the lessor which had directly contributed to the disturbance of the lessee’s quiet possession, he thought that responsibility for disturbances of the lessee’s quiet possession should accordingly lie with the lessee. For these reasons his delegation supported Alternative II.

Mr MOONEY (United States of America) asked first why the lessee’s right to quiet possession as against the lessor was considered to be so fundamental when virtually all lessees gave up this right, even where they were negotiating on an equal economic footing with the lessor.

Secondly, he saw some very real differences between the remedies being contemplated under this provision and the right of rejection provided for in Article 10, which would become apparent when the Committee came to that article. General practice was that the lessor would not expend funds and would not therefore be out-of-pocket until such time as the lessee had intimated that it was satisfied with the equipment. Therefore, unless the lessee exercised its right to reject before the leasing agreement really went into effect, he argued that Article 10 had very little to do with the issue addressed in Article 7(2).

Thirdly, referring to the remarks made by the representative of the Philippines, he indicated that he would hope that the problem of the case where there was a close connection between the lessor and the supplier would be caught by the sphere of application provisions of the Convention, which had been designed to exclude such transactions. Should there be a problem in this regard, he suggested that it was more appropriate to take another look at the sphere of application provisions rather than trying to treat it in this context.

Finally, he asked delegates when considering their preferences for one or other of the two alternatives to bear in mind two factors. First, he asked those who had indicated their preference for Alternative I to consider the strength of the views of those who saw Alternative I as very disruptive to the leasing industry and potentially chilling to the supply of lease financing and to ask themselves whether they could not live with Alternative II, as he suspected that the views of those supplying
lease financing were even more strongly opposed to Alternative I than those preferring Alternative II. He warned the Committee that the views of the leasing industry on this issue could have a very important impact on the question of whether the Convention proved ultimately to be a success or a failure. The second factor which he asked the Committee to bear in mind in deciding which of the alternatives to support was not only the extent to which its decision in this regard might jeopardise the success of the Convention but also the fact that this provision might not have any effect on leasing transactions as they were done in practice in so far as the warranty it sought to incorporate was virtually universally dispensed with by the contractual documentation.

In conclusion, he urged delegates in making their choice to weigh carefully the merits of making what in effect would be no more than a symbolic statement, in that it would be very rarely applied, against the risk of jeopardising the success of the whole Convention.

Mr ADENSAMER (Austria) confessed that he had still not made up his mind on this issue. Neither alternative fully convinced him. Whilst it was very easy to reason that Alternative I was to be preferred, for the reason indicated by the representative of the Federal Republic of Germany, namely that the lessor under the Convention had a duty to grant the lessee the undisturbed use of the equipment, on the other hand he suggested that the choice as between the two alternatives was not so clear from the point of view of the balance of interests of the parties. Looking at the issue from the angle of the lessee first, he pointed out that the effect of Alternative I would be that the lessor would have to insure against the risk of liability thereunder and, as the risk was an unknown factor, the premium would be quite high, which would be passed on to the lessee in the form of higher rentals. The lessee, on the other hand, really knew or ought to know what the risk was, as it had selected the supplier, and if the lessee wished to insure itself against the risk of title such insurance would cost much less than if it was the lessor that had to take out the policy. As a result he was not sure whether Alternative I could be considered to be in the best interests of the lessee. The answer, he suggested, would depend on the special circumstances of the particular case, for instance whether the lessee chose the supplier on its own or whether there was a connection between the lessor and the supplier.

Mr NISHIKAWA (World Leasing Council) wished to endorse fully the situation as it had been depicted by the representative of the United States of America. He reiterated the need for the Committee in considering this question to be aware of reality. He took as an example a leased aircraft which, flying from country A to country B, stopped over in country C, where it was confiscated by the local Government. He asked where, in the context of Article 7(2), responsibility for this act should be attributed, with the lessor or with the lessee. Under Alternative I, he understood that, although the lessor had nothing to do with the confiscation of the aircraft by the Government of country C, it would still be saddled with liability. As another example, he cited equipment leased to country B where a strike was declared as a result of which the equipment could not be used by the lessee. He asked whether such a situation should not be considered to constitute an act or omission of the lessee. Under Alternative I, he pointed out that the lessor would again be liable. He submitted that it would be wholly unfair for the lessor to be required to warrant the lessee's quiet possession against disturbances of the kind envisaged in the two examples he had cited; the lessor had, he pointed out, nothing to do either with the decision of the Government in the one case to confiscate the aircraft or with the strike that in the other case precluded the lessee from using the equipment.

Mr JACOBSSON (Sweden), recalling that reference had already been made to the interplay between the substantive provisions and Article 14 of the draft Convention, suggested that nowhere else in the Convention was this interplay as important as it was in Article 7(2). He believed that some delegations might consider it important to know whether this provision was intended to be a mandatory rule before deciding which alternative to vote for. He could well imagine that it might make it easier for some delegations to accept Alternative I if they knew that it was to be a non-mandatory rule, just as it might make it easier for other delegations to accept Alternative II if they knew that it would be a mandatory rule. He asked that this interplay be borne in mind at such time
as the matter was put to a vote so as to ensure that all the possible alternatives were adequately considered.

_The meeting was adjourned at 4.05 p.m. and resumed at 4.30 p.m._

Mr THIAM (Guinea) saw the Committee as being agreed that the purpose of the Convention was to establish a balance, on the one hand, as between the different legal systems of the world and, on the other hand, as between the interests of the different parties involved in the transaction, to wit in the issue under discussion the lessor and the lessee. His delegation supported Alternative I, although believing it to be imperfect in certain respects from the point of view of the lessee’s interests, on the ground that it was better fitted to fulfil this dual purpose.

Mr SAMSON (Canada) recalled that his delegation preferred Alternative II, with the additional clarification proposed by his colleague Mr Cuming. He nevertheless wished to draw the attention of the Committee to a serious problem concerning the burden of proof that would be imposed on the lessee if Alternative I were to be adopted. This problem arose from the negative formulation of Alternative I _in fine_. Under this alternative the burden of proof would be on the lessee to show that the title, right or claim of the third party was not derived from its own act or omission.

Mr RÉCZEI (Hungary) considered Alternative I to be basically acceptable in so far as the only person who had to warrant the lessee’s quiet possession thereunder was the lessor. However, as had been explained by the representative of the Federal Republic of Germany, the liability rule that would result therefrom was rather harsh. He nevertheless wished to draw attention to two ways in which this harshness would be mitigated. First, if the event causing the disturbance of the lessee’s quiet possession was an Act of God or _vis major_ the lessor would not be liable for the consequences thereof. Secondly, if the event causing the disturbance of the lessee’s quiet possession was unconnected to the lessor’s title, the lessor would not be liable for the consequences thereof either. Suitably redrafted to reflect these clarifications, he stated that his delegation could support Alternative I.

Mr TAYLOR (World Leasing Council) pointed out that his organisation, which represented both national leasing company associations and regional federations of such national leasing company associations and as such the vast majority of all leasing companies, had since the last session of governmental experts spent a year canvassing its members and analysing the effect of not only this but also other provisions of the Convention. The unanimous verdict of lessors operating at the cross-border level was that they would find it difficult to abide by the Convention if Alternative I of Article 7(2) were adopted or, if it were made mandatory, would not be able to engage in international leasing under the Convention but would instead turn to other means of extending medium-term credit. He submitted that, if the Convention was designed to encourage the free flow of capital to those parts of the world where it was needed, the Committee would be doing both lessors and lessees a great disservice by adopting Alternative I. He suggested that the Committee seek a compromise solution or, alternatively, if Alternative I were to be adopted, to make it non-mandatory under Article 14.

Ms PERT (Australia) indicated that her delegation strongly supported Alternative II as being both fairer and more reasonable than Alternative I which it considered to be unrealistic. She, moreover, drew the attention of the Committee to paragraph 3 in Alternative II which preserved the effect of any warranty of quiet possession under the applicable law.

However, in the event of deadlock being reached on this issue, her delegation would propose a compromise. She recalled that the original purpose of Article 7(2) was to exclude liability for breach of the warranty of quiet possession from the general immunity from liability granted under Article 7(1). It seemed to her delegation that this purpose could be adequately achieved without becoming embroiled in the problem of defining that warranty simply by saying in Article 7(2) that Article 7(1) did not affect any warranty of quiet possession under the applicable law.
Ms ZHANG (China) sought to allay the concerns voiced by the observer representing the World Leasing Council regarding the operation of the liability regimen of Article 7(2) in situations where the disturbance of the lessee's quiet possession was caused by *vis major*. She pointed out that neither the Common law nor the Civil law systems would impose excessive liability on lessors in such a situation. Article 7(2), moreover, was concerned with the question of superior title and not with the question of liability for damage. Her delegation therefore believed that any liability of the lessor would be excluded under Alternative I in the event of the disturbance of the lessee's quiet possession being caused by *vis major*. She added that her delegation would have no objection to the proposal made by the representative of Hungary for spelling out this exclusion of liability expressly.

Mr DE PAIVA (Brazil) sensed that the Committee's discussion of this matter had reached a point where there was nothing of substance to be added. His delegation, however sensitive it was to the amount of realism expressed in Alternative II, was loath to admit that the acceptance of one or other of the alternatives could by itself jeopardise the whole Convention. He believed that the positions of the great majority of delegations were known and, if there was indeed nothing more to be said about the substance of the question, he suggested that it was time to consider the best means from a procedural point of view to take this matter forward. He expressed his reluctance to contemplate a vote at this stage, not because of the position of lessors, on the one hand, and lessees, on the other, but because delegations had indicated such strong attachment to one or other of the proposed alternatives. He noted that a great deal still remained to be done in connection with this question, in particular the question of whether this provision was to be a mandatory or a non-mandatory rule of the Convention. He accordingly took the view that it would not be wise for the Committee to take a decision on this issue at this time because it was a matter of such crucial importance that it was essential for all possibilities of reaching agreement to be explored before the Committee went any further. He suggested that the Chairman place a proposal before the Committee on how best to proceed with this matter. He felt that there should be more time for delegations, both those that had been participants in this work for a long time and those participating in it for the first time, to reflect, in an informal fashion, on the issue with a view to finding a means of bridging the different positions.

Mr GOODE (United Kingdom), referring to the remark made by the representative of Sweden regarding the significance of Article 14 in the context of this provision, noted that the law of most countries embodied a warranty of quiet possession. He accordingly found it understandable that such countries should be reluctant to see included in an international Convention a rule which appeared to run entirely counter to their own law, especially since it might make it difficult to sell such a Convention to their own nationals. On the other hand, he imagined that it was also true of virtually every country represented at the Conference that in an international commercial transaction no country's law would make that warranty mandatory. Therefore he submitted that it would be very strange indeed if in this international Convention it were to be decided to override the rules of virtually every country represented by making mandatory that which had not previously been mandatory. He suspected that the anxieties of lessors concerning Alternative I might well be alleviated if the Committee were prepared to say that it was not proposing to change the rules of almost every country represented by making mandatory that which had not previously been mandatory and to adopt Alternative I, which reflected the current state of the law in most countries represented, but, so as also to reflect the current state of the law in those countries, to make this provision subject to the terms of the leasing agreement.

Mr MOONEY (United States of America) supported the proposal made by the representative of the United Kingdom which he found to be very wise. He suggested that an exact model for this proposal was to be found in Article 7(1): Article 7(2) would therefore simply need to be prefaced by words like "[e]xcept as otherwise stated in the leasing agreement". Such a rule, whilst it would in practice be varied in most leasing agreements, would ensure that the lessee was fully aware of such variance in so far as it would have to be written in the leasing agreement. It might be that some people in the leasing industry could live with such a rule because they would understand that one
function of the rule thus stated would not be to impose on every transaction the same rule which was contrary to practice but rather to protect another right of the lessee, that is to ensure that it was made aware of where it should look for its warranty of title, if indeed the provision was varied.

Mr KATO (Japan) sensed that the Committee had reached deadlock on this issue. He feared lest any result it might therefore achieve might be less than productive. He accordingly proposed a solution that would combine the procedural proposal already put forward with a substantive proposal. His delegation believed that it was time both for those supporting Alternative I and for those supporting Alternative II to move away from their former positions and to this end he proposed the setting up of a small working group with the task of achieving a compromise solution. He noted that such a compromise could take one of two forms. One of these could be the proposal made by the representative of the United Kingdom for a combination of Alternative I as a non-mandatory rule and Alternative II as a mandatory rule. Another basis for a compromise could be found in the proposals made by the delegations of the Federal Republic of Germany and Hungary. The working group's brief would be to find a compromise solution lying somewhere between the two extreme positions represented by Alternative I and Alternative II.

The CHAIRMAN pointed out that the Committee of the Whole could not authorise anyone to prepare a compromise to be adopted on behalf of the Committee: any compromise prepared by a working group would have to be submitted for decision to the Committee. He nevertheless saw some merit in the proposal initially put forward by the representative of Brazil and subsequently taken up, with some variations, by the representative of Japan. He accordingly proposed concluding the Committee's discussion of Article 7(2) and (3) and setting up a small working group instructed, in the light of the Committee's deliberations, to take Alternative I as a starting point but to seek to modify it, taking account of the proposals made by the delegations of the Federal Republic of Germany, Hungary, Australia and such other ideas as the working group might develop itself. In addition the working group was invited to consider whether its proposal should be mandatory, noting that this could well determine the acceptability or otherwise of any proposal. He suggested, subject to any counter-proposals by the Committee, that the small informal working group be drawn from the delegations of Australia, Austria, Brazil, Canada, China, Egypt, the Federal Republic of Germany and the United States of America. He believed that this composition would correspond to a certain extent to the views expressed in the debate, containing proponents of both Alternative I and Alternative II but especially those delegations that had proposed modifications, which seemed to him particularly essential. He asked the Committee whether his proposal was acceptable to it.

Mr MOONEY (United States of America) indicated that his delegation's views on this issue were well known, even more so as it had submitted written comments (CONF. 7/3), so that it would be happy to see another delegation take its place on the informal working group.

The CHAIRMAN asked whether the delegation of Japan would be prepared to take the place of the United States delegation on the working group.

Mr KATO (Japan) accepted the Chairman's invitation.

The CHAIRMAN asked the informal working group to report back to the Committee early on 16 May. He did not believe the Committee would manage to conclude its discussion of the substantive provisions of the Convention any earlier. He asked the representative of Hungary to convene the working group.

Mr RÉCZEI (Hungary) agreed to the Chairman's request.

The CHAIRMAN accordingly proposed that the Committee leave Article 7 for the time being and proceed to Article 8.
Paragraph 1

The CHAIRMAN indicated that he was not aware of any proposals relating to Article 8(1).

Mr CASTILLO (Colombia) found the term "normal user" a very abstract concept. There were many different ways in which a leased asset could be used. For instance, a company car used by the general manager would not be subject to the same wear and tear as a car used to distribute that company's products. As had been proposed by the Colombian Leasing Federation at the last session of governmental experts (Study LIX – Doc. 38), his delegation would accordingly propose that slanguage be introduced into Article 8(1) indicating that the "normal user" contemplated by that provision was that "relative to the industry where the lessee is working."

The CHAIRMAN pointed out that proposals submitted to the Unidroit committee of governmental experts were not part of this Committee's working materials. He invited delegates to express their opinion on the Colombian delegation's proposal, even if they had not seen it in writing.

Mr JACOBSSON (Sweden) indicated that, whilst he would not be prepared to support this particular proposal, he could nevertheless feel sympathy for the idea that lay behind it, that is the need for clarification. He feared, however, lest such a proposal might arouse the opposition of lessors, on the ground that they would not know where the equipment was being used, in the case, for instance, where it was moved.

The CHAIRMAN pointed out that he had understood the Colombian delegation's proposal to have originated with the Colombian Leasing Federation as a result of which he doubted that there would be much opposition from those quarters. He suggested, however, that the Committee might ponder the question of which party would be likely to derive the greater advantage from such an amendment. He asked the Committee to indicate whether there were any objections to the proposal of the Colombian delegation.

Mr GOODE (United Kingdom) indicated that his delegation would be unhappy to see anything introduced into Article 8(1) in quite the form proposed by the representative of Colombia, that is incorporating a reference to a particular industry. He suspected, however, that the problem might merely be one of language and suggested that it might, for instance, be dealt with by substituting the word "reasonable" for "normal". He pointed out that this would carry the idea of a user that was reasonable for a particular type of transaction. He suggested that the matter could then simply be referred to the Drafting Committee.

Mr ADENSAMER (Austria) took the view that this problem should be covered by Article 15(1) where it was provided that in the interpretation of the Convention regard was to be had to its object, which he took to mean the object of the leasing transaction.

The CHAIRMAN asked the Committee whether it could agree to the Drafting Committee being entrusted with the task of clarifying the words "normal user" in the light of the proposal of the delegation of Colombia which he had understood to be one of drafting.

It was so decided.

Paragraph 2

There being no further comments on Article 8(1), the CHAIRMAN proposed moving on to Article 8(2). He recalled that, in its written comments, the Government of Pakistan (CONF. 7/3 Add. 2), the Asian Leasing Association (CONF. 7/4) and the World Leasing Council (CONF. 7/4 Add. 1) had proposed that it be clarified that the cost of returning leased equipment to the lessor should be borne by the lessee. He asked whether any delegation was prepared to take up this
proposal. No delegation being prepared to do so, he noted that the Swedish delegation had proposed in CONF. 7/C.1/W.P. 15 that the words "its right to buy" should be replaced by the words "a right to buy". He understood the reason for this proposal to be that it might otherwise be understood that there was always a right to buy the equipment or renew the lease, which was not the intention. He was unsure whether this proposal was merely one of drafting, although he assumed that it was. He invited the representative of Sweden to explain the nature of his delegation's proposal.

Mr JACOBSSON (Sweden) confirmed that his delegation's proposal was only in the nature of a drafting proposal.

The CHAIRMAN asked whether the Committee agreed that the proposal by the Swedish delegation was purely one of drafting and, if so, he proposed that Article 8 as a whole be referred to the Drafting Committee with a view to that body taking account of the proposals made.

*It was so decided.*

Mr SANTOS (Philippines) stated that he did not wish to make a proposal but simply wanted to point out that Article 8, in so far as Article 8(1) required the lessee to keep the leased equipment in the condition in which it was delivered and Article 8(2) required it to return the equipment "in the condition specified in the previous paragraph", that is in the condition in which it was delivered, did not seem to contemplate the situation where the equipment might have been modified in the meantime, even if this was contemplated in the agreement of the parties. For this reason he asked whether the chairman of the drafting committee of the Unidroit committee of governmental experts might care to indicate whether this situation had been contemplated by the draftsmen of this article.

Mr GOODE (United Kingdom), who had chaired the drafting committee of the Unidroit committee of governmental experts, replied that he did not recall that committee having discussed the question of modifications, the general notion being that the equipment should be returned in what might be called a "proper" condition, making due allowance for fair wear and tear.

Mr MOONEY (United States of America) indicated that his recollection of the purpose of Article 8 was that it was simply designed to provide a fall-back rule regarding the condition of the equipment both during the term of the leasing agreement and at such time as that agreement came to an end. Regardless of whether or not the question had been specifically addressed by the committee of governmental experts, he believed that its thinking regarding modifications and specific maintenance requirements was that these were matters of detail to be left to the agreement of the parties and not appropriate to be addressed in such a general fall-back rule of the Convention.

The CHAIRMAN noted that, while the question of information raised by the representative of the Philippines as regards whether the matter of modifications had been contemplated by the committee of governmental experts had been answered adequately, he was not sure whether the same could be said of the substance of the point raised by that representative.

Mr SANTOS (Philippines) suggested that the matter be discussed further by the Committee.

The CHAIRMAN indicated that this was possible but that first the representative of the Philippines needed either to table a proposal for the amendment of the text of Article 8 on this point or else to indicate a statement that he would wish to be reflected in the summary records.

Mr SANTOS (Philippines) accordingly proposed that Article 8(1) be amended so as to state that, in the case of a modification of the equipment, it be kept in the condition in which it was delivered as modified.

The CHAIRMAN, before seeking the reactions of the Committee to that proposal, suggested that, if the lessor was party to an agreement pursuant to which the equipment was modified, then the result desired by the representative of the Philippines might be considered to follow from the Convention as it stood, in which case the question might be purely one of drafting. If not, he thought
that it would be appropriate for the text to be amended on this point. He understood that the concern of the Philippines delegation was to ensure that the point be covered, whether or not expressly in the text.

Mr GOODE (United Kingdom) indicated that he agreed with the interpretation given by the Chairman, namely that the condition in which the equipment was delivered must include the “delivery”, if he could put it that way, of any modifications. He did not believe that this was a problem of sufficient significance to warrant encumbering the language of the article and suggested that perhaps it was sufficient that the point made by the representative of the Philippines be duly recorded, as it had indeed already been, in the summary records.

The CHAIRMAN reiterated that the question was whether the Committee was agreed that, on a proper interpretation of this provision as it stood, it could be read as meaning that, in the event of modifications to the equipment, it would follow from the text that the equipment would have to be returned as modified, of course subject to fair wear and tear.

Mr REBMANN (Federal Republic of Germany) wondered whether the problem could not be solved by the introduction of an expression like “in conformity with the contract”.

The CHAIRMAN was reluctant to see the Committee embark on drafting. He asked whether, if it agreed in substance with the point raised by the representative of the Philippines, it would be sufficient to request the Drafting Committee to consider whether the text of Article 8 reflected the substance of this point or whether it rather required clarification to ensure that this point be covered.

Mr JACOBSSON (Sweden) suggested that the question could also be looked at in another way, namely that Article 8 was not intended to be mandatory and if the lessor had accepted that the equipment could be modified during the lease term it could also be considered, unless otherwise agreed, to have accepted that the equipment would be returned as modified.

The CHAIRMAN invited the representative of the Philippines to indicate whether, in the light of the Committee’s deliberations on this point, he could agree to the matter being handled in the manner he had just suggested.

Mr SANTOS (Philippines) accepted the Chairman’s suggestion.

The CHAIRMAN accordingly proposed that the matter be referred to the Drafting Committee for consideration.

It was so decided.

There being no further proposals for the amendment of Article 8, the CHAIRMAN proposed that Article 8 be referred as a whole to the Drafting Committee.

It was so decided.

Article 9

The CHAIRMAN proposed that the Committee proceed to Article 9. He noted that there was a proposal by the Government of Pakistan in its written comments (CONF. 7/3 Add. 2) for transferring to the lessor the warranty given by the supplier to the lessee if the period of the warranty was longer than the initial lease period and the lessee did not either purchase the equipment or take out a new lease on the equipment. He asked whether any delegation was prepared to take up this proposal. That not being the case, he referred to the proposal submitted by the Government of Switzerland in its written comments (CONF. 7/3 Add. 1). The point raised by the Swiss Government was that, whilst Article 9 did not expressly recognise the lessee’s right to sue the supplier for a reduction in the price of the equipment, it would seem that this right was meant to be included in Article 9 and, if
so, then it would be sufficient for this view to be reflected in the summary records. He asked the Committee to indicate whether it was a proper interpretation of the text of Article 9 to consider that the lessee would be entitled to sue the supplier thereunder for a reduction in the price.

Mr REBMANN (Federal Republic of Germany) agreed in substance with the proposal made by the delegation of Switzerland. He feared lest its proposal might, however, open up the question of certain other rights that might be exercisable by the lessee against the supplier which were, however, not specifically mentioned in Article 9. He feared lest to single out for mention just one such right might immediately raise the question of whether this was the only right which the lessee could exercise against the supplier and, if not, which other rights could be exercised by the lessee against the supplier. If one such right were mentioned, then he did not see how the Committee could avoid having to enumerate all the rights exercisable by the lessee against the supplier.

The CHAIRMAN specified that the Swiss delegation was not proposing any amendment to the text of Article 9. It was simply raising the question as to whether the lessee's right to sue the supplier for a reduction in price was intended to be included in Article 9 and, if so, then it had signalled that it would be satisfied with this understanding being reflected in the summary records. He pointed out that, this having in effect been done, it simply remained for the Committee to decide whether it wished to discuss which other rights might be exercisable under Article 9 by the lessee against the supplier with a view to these being specifically mentioned in the summary records too.

Mr FERRARINI (Italy) indicated that he did not share the interpretation given to this provision by the Swiss delegation. He would give the opposite interpretation, recalling that the question had been asked in his country why the right to sue for a reduction in price was not rather included in Article 9(2). He pointed out that an action for a reduction of price normally went in tandem with an action for termination or rescission.

The CHAIRMAN believed that it would be extremely difficult for the lessee's rights under Article 9 to be enumerated in the Convention. He pointed out that the provision as drafted did not deal with this question, specifying only that the supplier's duties were also owed to the lessee. He suggested that the Committee would run into difficulties if it sought to go into greater detail, especially if it tried to look at the question the other way round, that is by asking what were the lessee's rights as against the supplier.

Mr CASTILLO (Colombia) indicated that it was the understanding of his delegation that the lessee's right to sue the supplier for a reduction in price was already included in Article 9(1). He moreover shared the view expressed by the Italian delegation, namely that the actio quanti minoris and the action to terminate the supply agreement were derived from the same situation, that is the fact that the equipment was defective.

One doubt he had in respect of Article 9(2) concerned why the lessee should not have the right to terminate or rescind the supply agreement if the defects which affected the equipment were substantial in nature.

The CHAIRMAN noted that the Committee's discussion of the point raised by the Swiss delegation had revealed differences of opinion. However, in the absence of a specific proposal, he assumed that there was nothing further to be discussed in this connection.

*It was so decided.*

_The Committee rose at 5.25 p.m._
EIGHTH MEETING

Friday, 13 May 1988, at 9.35 a.m.

Chairman: Mr Sevón (Finland)

AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING (Study LIX - Doc. 48; CONF. 7/3 and Add. 2; CONF. 7/C.1/W.P. 6; W.P. 10 and Add. 1; W.P. 11)

Article 9 (continued)

Following a proposal by the Chairman that the Committee proceed to consideration of Article 10, Mr SANTOS (Philippines) requested that he be permitted to revert to Article 9 since time had not allowed him to submit his proposals regarding that article at the 7th meeting of the Committee. There was, he suggested, a connection between Articles 9 and 10 and he recalled that the Secretariat's explanatory report on the draft Convention had indicated that the supplier's duties to the lessor under the supply agreement would be extended to the lessee with the consequence that the supplier might at the same time be held liable both to the lessor and to the lessee. It was his understanding that it was not the intention of the draft Convention to impose this dual liability on the supplier and he therefore proposed that Article 9(1) be amended so as to introduce an express proviso to the effect that in the event of a breach by the supplier of an obligation under the supply agreement it should not be accountable both to the lessor and to the lessee for the same damage or loss.

Since, moreover, Article 9(1) extended the obligations of the supplier to the lessee, the lessee should be entitled to all the rights which devolved upon the lessor under the supply agreement. However, the existing wording of Article 9(2) did not permit this as it provided that "[n]otwithstanding the provisions of paragraph 1, the lessee shall have the power to terminate or rescind the contract upon the occurrence of any of the events described in paragraph 1". What he had in mind were cases where the lessee would be unable to reject equipment under Article 10 because it had, for example, failed to discover a defect or establish the breach of an express or implied warranty under the agreement in time. In such circumstances it would be stuck with the equipment, unable to terminate the agreement and in consequence possibly suffer unnecessary loss. The language of Article 9(2) had been justified on the ground that the equipment represented the collateral for the lessor's security as against the lessee but if the supply agreement were terminated and the equipment returned to the supplier, the latter would be supposed to return the consideration to the lessee or perhaps to the lessee.

He therefore proposed the deletion of Article 9(2) so as to grant the lessee a cause of action against the supplier consistent with the extension of the supplier's obligation to the lessee as if the lessee were a party to the supply agreement, and as if the equipment were to be supplied directly to it.

The CHAIRMAN recalled that under the Rules of Procedure reconsideration of an article must be supported by two-thirds of the delegations and he enquired whether any delegation objected to the proposal which had been made by the representative of the Philippines to reopen the question.

Having found that there were no objections to resumption of discussion on Article 9, the Chairman called for comments on the proposals submitted by the delegation of the Philippines.

Mr MOONEY (United States of America) considered the points raised by the representative of the Philippines to be of the utmost importance. Concentrating on the proposal to delete paragraph 2 of Article 9, he recalled that the provision sought to strike a balance of interests among the parties
while at the same time treating simply a difficult issue which was usually the subject of careful negotiation between the lessor and the lessee. It was then necessary, when assessing the position of the lessee, to compare it not with a buyer of goods for cash who could do what he liked with those goods, but rather with a person who needed financing to purchase them, borrowed money and gave a mortgage on those goods to the lender. This was the proper comparison which had led the Unidroit committee of governmental experts to the conclusion that the lessee should not be entitled unilaterally to terminate the supply agreement, an agreement in which the lessor had a very substantial interest.

A second problem which should not be ignored when considering the proposal to delete Article 9(2) was that of so-called “true leases” where the lessor expected at the end of the leasing agreement to have a valuable asset and in such cases it was evident that the lessor had an interest in maintaining the existence of the supply agreement together with the warranties and remedies associated with it, a matter of importance not only to the lessor but also to the lessee. In his view, the existing text of Article 9 provided the maximum possible rights to the lessee without going so far as to allow it to terminate the supply agreement with the possible loss of goods for the lessor. Moreover the language of the article alerted the lessee to the issue of the right to terminate the supply agreement and, if it felt that in particular circumstances, for example the peculiar nature of the equipment, it would find the lack of the right to terminate the supply agreement to be particularly disadvantageous to it, then it was put on notice of the need to negotiate the matter with the lessor in the framework of the leasing agreement.

Finally, in support of the retention of paragraph 2, he stressed that it was important for both parties that some balance be maintained by allowing the lessor to have at least one right to keep alive its basic, underlying agreement.

Mr GOODE (United Kingdom) recalled there had been much discussion within the committee of governmental experts in Rome on the question of the possible dual liability of the supplier towards the lessor and the lessee and that the idea had been mooted of introducing a provision to the effect that in the event of a claim against the supplier by either the lessor or the lessee, the other should be joined as a party in the proceedings. This had however been seen as an interference with the procedural rules of the various States and the idea had been abandoned, although each Contracting State would of course be free to arrange under its own procedural law for all parties to be joined in the proceedings before the court. His delegation had however no objection to the addition of a proviso against dual liability under the Convention as proposed by the delegation of the Philippines.

He had to agree with the representative of the United States of America that it was important for the lessor’s security not to be lost because although it was true that it had rights against the supplier under the supply agreement, those rights would be of little value to the lessor if the supplier were insolvent. If one were to disregard the legitimate interest of the lessor and focus attention on the position of the lessee then in his view Article 9(2) was unnecessary to protect the lessee. The lessee, it should be recalled, was not a party to the supply agreement and was therefore under no liability to the supplier to pay the price of the equipment. It had therefore no need to be entitled to reject as against the supplier so as to avoid liability to pay the purchase price. The lessee enjoyed a right of rejection against the lessor under the article and under the new United Kingdom proposal for Article 10 the content of that right would be governed as if the leasing agreement were a supply agreement but geared to the terms of the supply agreement. The lessee would then have all the necessary rights of rejection against the lessor and the fact that it could not terminate the supply agreement did not impair its ability to reject the equipment and thus safeguard its position.

The CHAIRMAN suggested that it would be helpful if the Committee were to consider Article 9 in the light of Article 10 as together they constituted a whole.

Mr REBMANN (Federal Republic of Germany) saw no problem in deleting paragraph 2 of Article 9 as, under the law of his country, it was common for the lessor to assign to the lessee all its rights deriving from the supply agreement including the right to terminate that agreement. This
posed no danger to the lessor because the terms of that agreement would usually restrict the right of unilateral termination to those cases where the defect in the equipment could not be cured and no other equipment was available to replace the non-conforming equipment. It was, in other words, a remedy of last resort and the exercise in the Federal Republic for twenty years by the lessee of the right to terminate the supply agreement had given rise to no difficulties.

Mr ILLESCAS (Spain) agreed with the representative of the Philippines that paragraph 1 of Article 9 should provide expressly that the supplier ought not to have to satisfy the same obligation twice. He recalled that until now the Conference had shown especial concern in attempting to secure a fair balance of interests between the lessor and the lessee but it should not overlook the need to balance the interests of the supplier, on the one hand, against those of the lessor and the lessee on the other. The amendment to paragraph 1 proposed by the Philippines should therefore be referred to the Drafting Committee.

Mr CASTILLO (Colombia) suggested a compromise formula which would consist in adding at the end of paragraph 2 the words "... without the express consent and participation of the lessor". An impression seemed to have gained ground that if the lessee were to be entitled to certain rights under the supply agreement it should be entitled to exercise two actions, the first under paragraph 1 and the second, to rescind the supply agreement, under paragraph 2. If this were so then it would seem permissible to allow the lessee to terminate that agreement but only with the express consent and participation of the lessor. In his view such a solution would not interfere with the procedural law of States. It was quite clear that the lessor was, in accordance with Article 1(1)(a), acting "on the specifications of, and on terms approved by" the lessee and that to this extent the lessor was acting as the delegate of the lessee in the supply agreement. The lessor must therefore be entitled to participate in the termination of the supply agreement and it was for this reason that he proposed the addition of new language to paragraph 2 of Article 9 rather than its deletion which, he feared, could give rise to confusion.

The CHAIRMAN suggested that the Colombian proposal was more in the nature of a drafting amendment than one of substance and that it could provide useful clarification.

Mr BRENAN (Australia) stated that although the Colombian proposal constituted only a drafting amendment, his delegation would prefer the retention of paragraph 2 in its existing form. On the other hand, he supported the proposal of the Philippines in relation to paragraph 1 to state expressly that the supplier should not be held liable to two parties for the same loss or damage, a proposition which found support in paragraph 122 of the Secretariat's Explanatory Report.

The CHAIRMAN counselled against relying too much on the text of an explanatory report. The point made by the representative of Australia was however a valid one and if there was general agreement on the question of interpretation, then it might be preferable to amend the text of the provision.

Mr NISHIKAWA (World Leasing Council) concurred with the suggestion that, from the lessor's point of view, Articles 9 and 10 should be read together. If one were to look at what happened in practice, the lessee would discover the defect after the lessor had paid the whole of the purchase price to the supplier and had incurred other substantial costs. If the lessee were to be permitted, as a result of the deletion of Article 9(2), to terminate the supply agreement, then he wondered what remedy would be left open to the lessor which might in consequence stand to suffer a substantial loss.

Mr KATO (Japan) supported the content of the amendment proposed by the delegation of Colombia, although he agreed that it could best be left to the Drafting Committee for consideration.

Mr RICHARDS (Antigua and Barbuda) stated that he could accept the explanations offered by the representatives of the United States of America and of the United Kingdom which led him to the conclusion that Article 9 should remain intact. As he saw it, one could not overlook the application
of the doctrine of privity of contract to the relations between the lessor and the supplier and, although the contract was concluded for the benefit of the lessee, it was not made only for his benefit. Contractual obligations subsisted between the lessor and the supplier and it would therefore be unfair to permit the lessee unilaterally to rescind the contract. In most Common Law jurisdictions, joinder of parties was possible and since the lessee would have a remedy against the supplier for breach of its obligations by way of joinder of parties, he saw no genuine problem.

The CHAIRMAN noted that he had hitherto heard support for, and no objections to, the proposal of the delegation of the Philippines to state expressly in paragraph 1 of Article 9 that the supplier should not be held responsible for the same damage or loss both to the lessor and to the lessee and he enquired whether the Committee was of the view that the proposal should be transmitted to the Drafting Committee for more precise formulation.

Mr RÉCZEI (Hungary) stated that he could not support the proposal of the Philippines. It was a maxim of Roman law that no one should be liable twice on the same cause of action but if somebody did cause damage to two people, he should be liable to both of them. Here, however, the case was different for if delivery of the equipment was not in conformity with the supply agreement or if there were delay in delivery, then the damage was exclusively caused to the lessee and was of no interest to the lessor. The lessor's interests would only be affected if the lessee were to terminate the leasing agreement on account of the alleged non-conformity or delay in delivery. As he saw it, paragraph 1 of Article 9 exactly expressed the position. The idea put forward by the delegation of the Philippines could of course be included in paragraph 1 but it was unnecessary. The same was true of the Colombian proposal to add language at the end of paragraph 2 requiring the consent of the lessor for the lessee to terminate the supply agreement since it was obvious that the lessor could always assign that right to the lessee if it so wished.

The CHAIRMAN expressed the opinion that problems could arise which might not be solved by the existing text. If the United Nations Sale Convention or national legislation to a similar effect were to be applicable to the supply agreement, what had been said by the representative of Hungary would probably be accurate in relation to a claim for damages but if the lessor were to claim a price reduction under the supply agreement he was not sure that such an action would subsume an action by the lessee for damages and such a situation was not necessarily regulated by the language of Article 9(1).

Mr EL-KATTAN (Egypt) saw some inconsistency between paragraphs 1 and 2 of Article 9 since paragraph 1 treated the lessee as a party to the supply agreement while paragraph 2 deprived it of the remedy of termination of the supply agreement in the event, for example, of non-conformity of the equipment.

Mr KATO (Japan) recalled the statement of the representative of Hungary to the effect that in the case of non-conformity of the equipment only the lessee would suffer damage so that it would be unnecessary to adopt the proposal of the delegation of the Philippines in connection with paragraph 1. Theoretically this was perhaps true but in practice the lessee might cease paying rentals with consequent loss to the lessor. The lessor might then claim against the supplier, which latter could at the same time be exposed to a claim by the lessee under Article 9(1). Such dual liability should be avoided and his delegation was therefore prepared to support the proposal of the delegation of the Philippines. It was, on the other hand, opposed to the suggestion that paragraph 2 be deleted.

Mr FERRARINI (Italy) suggested that no decision be taken on the article until such time as a new text had been remitted by the Drafting Committee. The position was still not entirely clear as it seemed that there might be situations in which both the lessor and the lessee should be entitled to claim against the supplier and others in which that would be unfair.

Mr SANTOS (Philippines) stated that he would submit his proposals in written form.

The CHAIRMAN enquired whether in these circumstances the Committee would agree to
defer further consideration of Article 9 until a written proposal had been tabled by the delegation of the Philippines, by which time also the Committee would probably have had the benefit of discussing Article 10.

*It was so decided.*

**Article 10**

The CHAIRMAN noted that a number of proposals had been made which were directed to limited issues. These would be treated in the normal order but there was in addition a United Kingdom proposal going to the substance of the article which involved an extensive redraft of its provisions. He enquired therefore whether it would be acceptable first to invite the United Kingdom delegation to present its proposal as a whole, after which the Committee might proceed to a general exchange of views on that proposal. It would then be for the Committee to decide whether it wished to pursue its discussions on Article 10 on the basis of the original text or of that proposed by the United Kingdom in CONF. 7/C.1/W.P. 10 and Add. 1.

The CHAIRMAN found this procedure to be acceptable to the Committee.

Mr GOODE (United Kingdom) requested the members of the Committee to correct an error in line 1 of paragraph 3 of his delegation’s proposal, substituting the word “lessor” for “supplier”.

What had prompted the substantial revision of Article 10 proposed by his delegation had been a realisation of the fact that the original text had failed to deal with certain matters, in particular non-delivery, in which connection it was inappropriate to speak of rejection. There was, moreover, a notable difference in approach between the existing structure of Article 10 and that of the corresponding provisions of the United Nations Sale Convention which was undesirable. Equally there was no desire to reproduce *in extenso* all the relevant rules set out in the Sale Convention and it was therefore proposed that Article 10 should provide that the rights and remedies and the conditions for the exercise of such rights and remedies should apply as if the lessee had agreed to buy the equipment from the lessor under the terms of the supply agreement. The result would be to transplant the rules laid down in sales law and especially those of the United Nations Sale Convention so as to make them applicable to the Leasing Convention without encumbering the latter with too much detail. It was his delegation’s belief that a further incidental effect would be to make the text more precise and to avoid a number of problems which might be perceived as existing under the text adopted in Rome by the committee of governmental experts.

The CHAIRMAN enquired whether the Committee wished to take the United Kingdom proposal as a basis for its discussions rather than the original text, on the understanding however that this would in no way preclude consideration of the substantive amendments proposed to that text.

Mr KATO (Japan) supported the United Kingdom proposal as the basis for discussion of Article 10 as it was much clearer than the original text.

Mr ROLLAND (Federal Republic of Germany) drew attention to the fact that whereas paragraph 3 of the basic text stated that the lessee would lose its right to reject the equipment where it would have lost the right to reject “if the equipment had been supplied to it by buyer”, paragraph 2 of the United Kingdom proposal employed the language “if the lessee had agreed to buy the equipment from the lessor under the terms of the supply agreement”. This was a much less abstract formulation and he wondered whether it was intended to introduce a change of substance.

Mr GOODE (United Kingdom) stated that his delegation’s proposal was intended not to alter the substance of Article 10 but to clarify the original text in respect of which was the agreement whose contents defined the rights and obligations of the parties. It was his understanding that the whole Convention presupposed that the lessee’s rights vis-à-vis the supplier, for example, were determined by the supply agreement and it was therefore advisable to make it clear that when
determining the circumstances in which the right to reject existed or was lost the authors of the Convention were presupposing an agreement between the lessor and the lessee under the terms of the supply agreement.

The CHAIRMAN noted that the representative of the United Kingdom was suggesting that although the starting point of the exercise was that the supply agreement was negotiated primarily between the lessee and the supplier, paragraph 3 of Article 10 of the basic text could be understood as referring not to the specific supply agreement but rather to a contract of sale under the general rules of contract which could of course have totally different contents. If the general feeling in the Committee was that the United Kingdom proposal would add to clarity then it might be useful to discuss Article 10 on the basis of that proposal without however taking a decision at this stage of whether to adopt it as such.

Mr BERAUDO (France) found difficulty in accepting the United Kingdom proposal as a basis for discussion. The suggested approach represented a complete change from that which had led to the adoption of the text of Article 10 by the committee of governmental experts in Rome. Under the United Kingdom proposal the relations between the lessor and the lessee would be identical to those existing between the supplier and the lessee and the effect would be that the lessor who, under the original text, had certain obligations in its capacity as lessor, would disappear. In other words the consequence of the amendment proposed to Article 10 in regard to the relations between the lessor and the lessee would be to adopt the same philosophy as that underlying Alternative II of Article 7(2), in that the lessor would assume no warranty of quiet possession and no obligations in its capacity as lessor, its only duties being those of a buyer under the supply agreement. This would represent a significant shift in the general philosophy of the draft Convention which, as conceived in Rome, had not cast the lessor in the role of a simple agent of the lessee but had imposed upon it certain obligations deriving from its capacity as lessor in addition to those incumbent upon it under the supply agreement.

The CHAIRMAN stated that he had assumed that the United Kingdom proposal provided in essence that the lessee could always invoke against the lessor the rights which the lessor could invoke against the supplier in conformity with the supply agreement initially negotiated by the lessee and the supplier. This would give broader rights to the lessee than would necessarily be the case under the existing text. He recognised however that other interpretations might be possible and he called upon the United Kingdom delegation for clarification.

Mr GOODE (United Kingdom) confirmed the Chairman’s interpretation of his delegation’s proposal. What it sought to do was to tailor the lessee’s position to that of the buyer under a contract of sale but on the terms of the supply agreement. One of the essential points in the original text had been the lessee’s right to terminate the leasing agreement when that right was granted in the conditions laid down and to recover rentals and other sums paid in advance and this was expressly retained in paragraph 3 of the revised text whose wording in this regard closely matched that of the original text. In these circumstances he believed that his delegation’s proposal, far from undermining the lessee’s position, actually reinforced it.

Mr CASTILLO (Colombia) recalled the principle nemo ex alteria culpa praegravari debet, a principle which was in his view infringed by the original text of Article 10. It was for this reason that his delegation had been opposed to it in the Unidroit committee of governmental experts and could support the proposal of the United Kingdom contained in CONF. 7/C.1/W.P. 10.

Mr FERRARINI (Italy) also supported the United Kingdom proposal which overcame the criticism of the original text that it failed to conform sufficiently to the rules set out in the United Nations Sale Convention. On a point of clarification however he enquired whether the reference to the “terms of the supply agreement” in the proposal included a reference to the law applicable to the supply agreement.

Mr GOODE (United Kingdom) stated that he was unsure whether the question raised an issue
of substance or of drafting but in any event it was one which required consideration by the Committee.

The CHAIRMAN suggested that since a number of delegations had expressed support for taking the United Kingdom proposal as the basis for discussion of Article 10 and only one delegation had objected to that course of action, the Committee proceed accordingly, on the clear understanding that all proposals for amendment of the original text remained on the table, together with any which might be made in respect of the United Kingdom proposal.

*It was so agreed.*

**Paragraph 1**

As to the substance of the article, the CHAIRMAN called for indications of support for the proposal by Pakistan in CONF. 7/3 Add. 2 that the lessee ought not to have the right to reject the equipment as against the lessor or to terminate the contract. Having found that there were none he called upon the representative of China to introduce the proposals contained in CONF. 7/C.1/W.P. 6.

Mr YUAN (China) stated that in the view of his delegation Article 10 was one of the most important provisions of the draft Convention and it appreciated the attempt made in the original text to secure a fair balance of interests among all the parties to international leasing transactions. It was to this end that the Chinese delegation had submitted its proposals in CONF. 7/C.1/W.P. 6 and he suggested that those proposals be considered in relation to the United Kingdom proposal which his delegation could support.

The CHAIRMAN drew attention to a proposal by the Japanese delegation relating to Article 10(1)(b) in CONF. 7/3 and he enquired whether the representative of Japan considered his delegation’s concerns to have been met by the United Kingdom proposal.

Mr KATO (JAPAN) replied that his delegation had raised three questions in its working paper regarding the original text, two of which had been answered by the United Kingdom proposal. He noted however that paragraph 3 of the original text did not appear clearly in the United Kingdom version and he suggested that that matter be addressed by the Committee at some time in the context of its discussion of Article 10.

Mr RÉCZEI (Hungary) noted that paragraph 1 of the United Kingdom proposal for Article 10 contained a legal fiction which was expressed in very complicated language. He considered that it would be much simpler, after sub-paragraphs (a) and (b), to employ some such language as “in conformity with the supply agreement as if the lessee were the buyer and the lessor the seller under the terms of the supply agreement”. Such a formulation would moreover permit the deletion of paragraph 2 as it also expressed the principle that all rules governing the relations of the buyer and the seller were applicable to such cases. Apart from this drafting amendment he could accept the United Kingdom proposal.

*The meeting was adjourned at 10.50 a.m. and resumed at 11.25 a.m.*

The CHAIRMAN enquired whether there were any further proposals to amend Article 10(1) as proposed by the United Kingdom delegation.

Mr BERAUDO (France) suggested that the words “against the lessor” be added in paragraph 1(a) after the words “the lessee may exercise” so as to make it clear that the article did not apply to any rights exercisable by the lessee against the supplier.

The CHAIRMAN noted that this proposal had the effect of retaining the rule formerly contained in the *chapeau* of Article 10(1) of the basic text and that it did not affect the scope of the
Ms DEBOYSER (Belgium) supported the French proposal as it clarified the text without altering its substance.

Mr MOONEY (United States of America) stated that his delegation had one problem which it viewed as being of considerable importance in connection with Article 10. Given the decision to proceed on a paragraph by paragraph basis it was not perhaps appropriate to raise the question at this time although if the difficulty could be resolved then he had no complaint to make with the basic structure of the United Kingdom proposal. This being said he was struck by one aspect of that proposal in relation to the draft preambular provisions which laid stress on the need to adapt the law to the peculiar triangular relationships of financial leasing as an important purpose of the Convention. Perhaps the most important reason for embarking upon the preparation of the Convention was the realisation that a financial lessor was a special and different kind of entity and it would indeed be ironic if the Convention were to use the technique of deeming the financial lessor to be in all respects a supplier under a supply agreement.

On the other hand, if Article 10 did no harm to financial leasing in the sense that it did not impede or restrict lessees in their ability to obtain capital then his delegation could accept the formulation either in the United Kingdom proposal or in the basic text of the committee of governmental experts, notwithstanding the fact that the goal of identifying and adapting the special aspects of financial leasing had been abandoned.

The CHAIRMAN reaffirmed his intention to proceed with the discussion of Article 10 paragraph by paragraph although all delegations remained free to speak to issues related either to the United Kingdom proposal or to the basic text. Furthermore he recalled that the preambular provisions had yet to be considered by the Conference and that their language would be dependent on the content of the Convention rather than vice versa.

Mr SANTOS (Philippines) supported the proposal of the French delegation.

The CHAIRMAN expressed the opinion that the French proposal was of a drafting nature and that it could be referred to the Drafting Committee without further discussion.

It was so agreed.

Mr CASTILLO (Colombia) stressed that the future Convention should achieve two principal goals, the first the security of financial leasing transactions and the second the striking of a fair balance of interests among the three parties involved in such transactions. This latter concern underlay the views expressed by the representatives of France, Belgium and the Philippines and was worthy of respect. He had however to recall that even though the preamble to the draft Convention had not yet been discussed by the Conference, it affirmed the need for financial leasing to be made more available to developing countries through the adoption of the rules set out in the Convention. The experience of Latin American countries had been that some new forms of equipment financing were essential to avoid increasing problems for third world countries in financing their development and growth. In his opinion what was important was for the uniform rules to focus on the security involved in international financial leasing transactions since at the present time all the transactions concluded presupposed that the lessee had no direct right to reject the equipment as against the lessor but rather a right to reject against the supplier with the consent of the lessor. He recalled the comment of the observer from the World Leasing Council that once the lessor had made its investment the lessee’s decision to return the equipment could imperil the balance of interests which the Convention was intended to secure. For these reasons his delegation fully supported the United Kingdom proposal.

The CHAIRMAN believed that the United Kingdom redraft of Article 10 was not intended to alter the fact that the article was addressed only to relations between the lessor and the lessee and for that reason he had understood the French proposal as supported by Belgium and the Philippines.
to be one of a drafting nature only.

Mr GOODE (United Kingdom) stated that he too had thought the French proposal only to be one of drafting. The right to reject was given against the lessor although the content of the obligation was determined by the supply agreement.

The CHAIRMAN reiterated his opinion that the French proposal raised a matter of drafting and, in the absence of further comment, he suggested that it be remitted to the Drafting Committee. In these circumstances he called for any further observations on Article 10(1).

Mr CUMING (Canada) drew attention to the fact that the United Kingdom proposal for Article 10(1)(b) in CONF. 7/C.1/W.P. 10 contained the language “right to make a fresh tender” which might preclude the possibility that under the applicable sales law there would be a right to cure defective performance by paying some form of compensation, which was not uncommon. Reference might be made in the text to that possibility.

Mr REBMANN (Federal Republic of Germany) recalled that under paragraph 1(a) of the United Kingdom proposal the lessee had a right to reject or to terminate but that no provision was made for the consequences of termination of the leasing agreement which could suggest that those consequences would be regulated by the applicable sales law. Paragraph 3 of the proposal however laid down more detailed rules relating to the consequences of termination but only in relation to cases where termination was preceded by rejection. He wondered whether the consequences of immediate rejection might not be governed by the same rules but the question could be considered in the context of the discussions on paragraph 3.

The CHAIRMAN agreed that the appropriate time to discuss the point raised by the representative of the Federal Republic of Germany could be in connection with paragraph 3.

Mr FERRARINI (Italy) recalled his previous intervention regarding the question of whether the reference in paragraph 1 of the United Kingdom proposal to “the terms of the supply agreement” also covered the applicable law, a question which he believed to be one of substance rather than drafting. He also suggested that the contents of Articles 9 and 10 should be coordinated. According to Article 9, the duties of the supplier were owed to the lessee under the law applicable to the supply agreement so it should probably be made clear in Article 10 that the same law applied so as to avoid the possibility of remedies owed to the lessee being governed by two different laws.

Mr GOODE (United Kingdom) agreed with the suggestion of the representative of Italy. The matter should be clarified and it seemed that the appropriate law to be applied should be that governing the supply agreement and not the leasing agreement.

The CHAIRMAN considered that the question raised by the representative of Italy was indeed one of substance and he enquired whether it was acceptable to the Committee that the law governing the relations between the lessor and the lessee in terms of the fiction of a supply agreement between them ought to be the same law as that governing the supply agreement between the supplier and the lessee.

Mr NISHIKAWA (World Leasing Council) recalled that the description of a financial lease in Article 1 included supply agreement assignment contracts, that was to say situations where the supply agreement was concluded by the supplier and the lessee, after which a supply agreement assignment contract was concluded between the lessor and the lessee. Under that agreement the lessor would acquire from the lessee the right to obtain title to the equipment from the supplier and normally the governing law would be stipulated. Likewise the governing law would be stipulated in the supply agreement but when the lessor purchased the equipment from the supplier under the supply agreement assignment contract the governing law would not usually be specified and he wondered what law would be applied in such cases.

The CHAIRMAN expressed the opinion that the future Convention did not deal with the
question of which law should be applicable to a supply agreement assignment contract. He assumed
that there was no necessity for the assignment agreement to be subject to the same law as the supply
agreement and that such a conclusion would not flow from anything in the text. All that needed to
be agreed was that the fact that the lessee might transfer the supply agreement to the lessor had no
impact on the law applicable to the supply agreement and if the supply agreement were initially
entered into by the lessor and the supplier then an assignment of any rights under that agreement to
the lessee would have no effect on the law applicable to the supply agreement.

Mr BERAUDO (France) stated that it was not his wish to see a provision concerning the
applicable law included in the Convention but nevertheless the point raised by the observer from the
World Leasing Council was well taken. From a legal standpoint, if the supply agreement were
concluded by a purchaser and then assigned to a lessor, the applicable law could be different from
that governing a situation in which the lessor itself entered into the supply agreement. It was
therefore for lessors to take the necessary precautions in connection with the law applicable to their
relations with lessees and with suppliers.

The CHAIRMAN believed that although the points addressed by the representative of France
and by himself had been somewhat different, there was no disagreement between their respective
points of view.

Mr REBMANN (Federal Republic of Germany) recalled his earlier intervention concerning
the consequences of termination. Article 10(1) accorded the lessee a right to terminate the leasing
agreement as if it were a supply agreement. It had however to be borne in mind that termination of a
supply agreement entailed repayment by the supplier of the purchase price and return of the goods
by the buyer. In the event of termination of a leasing agreement on the other hand the lessor
returned the amount of the rentals already paid in exchange for the return of the equipment. He
wondered therefore whether it might not be preferable to make it clear in paragraph 1 that only the
right to terminate was dealt with and not the consequences of termination which must be governed
by the leasing agreement and not by the supply agreement.

Mr GOODE (United Kingdom) believed that the point raised by the representative of the
Federal Republic of Germany was connected with the relationship between the right of termination
under paragraph 1 and the right of termination under paragraph 3 which expressly mentioned the
recovery of rentals to which that representative had already referred. This was in a sense a drafting
point which called for integration of the two provisions in so far as they affected termination.

The CHAIRMAN suggested that this matter could also be dealt with in the context of
paragraph 3 but that if it could not be settled adequately then the delegation of the Federal Republic
of Germany might wish to revert to paragraph 1.

He noted that no further comments were forthcoming on paragraph 1.

Paragraph 2

The CHAIRMAN recalled that no changes had been proposed to paragraph 2 of the basic text.
Since, however, the United Kingdom's proposed text of the paragraph did involve changes of
substance it would be helpful if the representative of that delegation could expand upon its proposal
as contained in CONF. 7/C.1/W.P. 10.

Mr GOODE (United Kingdom) stated that the effect of his delegation's proposal for paragraph
2 was that instead of setting out the manner of exercise of the right to reject the equipment and the
circumstances in which that right was lost, as had been done in the basic text and which had
produced a divergence between the provisions of the draft Leasing Convention and those of the
United Nations Sale Convention, there would be an equation of the two so as to make the rights of
termination exercisable and their loss the same as in the case of a contract of sale.

The CHAIRMAN reminded the Committee that the representative of Hungary had already
raised the question of the formulation of paragraph 2 which he had assumed to be in the nature of a drafting matter capable of resolution by the Drafting Committee.

Mr RÉČZEI (Hungary) saw no objection to the matter being referred to the Drafting Committee although in his opinion if the last two lines of paragraph 1 were to be simplified, for example by such language as "as if the lessee were a buyer and the lessor under the terms of the supply agreement a seller" then paragraph 2 could be deleted.

The CHAIRMAN considered this proposal to be one of drafting which could be referred to the Drafting Committee.

Mr MOONEY (United States of America) stated that the proposal of his delegation in CONF. 7/C.1/W.P. 11 concerning Article 10(3) related to the substance of what was now to be found in the United Kingdom proposal for paragraph 2 and that his delegation had decided to withdraw its proposal.

Mr KATO (Japan) stated that since his delegation's proposal in CONF. 7/3 was similar to that put forward by the United States delegation and that it too was substantially reflected in the United Kingdom proposal, he could withdraw it.

Mr KOMAROV (Union of Soviet Socialist Republics) supported the United Kingdom proposal in view of the correspondence it achieved with the United Nations Sale Convention.

Mr BRENNAN (Australia) also supported the United Kingdom proposal for paragraph 2. He was however not sure whether the Hungarian drafting proposal in relation to paragraph 1 would render paragraph 2 redundant as the United Kingdom proposal for paragraph 2 dealt with situations not only where rights would be exercisable but also those where they would be lost.

The CHAIRMAN saw the Hungarian proposal as being addressed to a matter of drafting with a view to considering whether the substance of paragraph 2 of the United Kingdom proposal could be reflected in similar language in paragraph 1. This was in his view a question which should be examined by the Drafting Committee.

After enquiring as to whether there were any objections to the United Kingdom proposal for paragraph 2 and establishing that there were none the CHAIRMAN referred the provision to the Drafting Committee.

Paragraph 3

Mr GOODE (United Kingdom) stated that his delegation's proposed paragraph 3 of Article 10 was in line with the original text with the substitution of the word "lessor" for "supplier" in the first line which was more accurate and had been suggested by the representative of Sweden. There was, in his view, no change of substance.

The CHAIRMAN suggested that the Committee focus its attention on the United Kingdom proposal and take up paragraph 3 of the basic text subsequently.

Mr BERAUDO (France) sought clarification of paragraph 3 of the United Kingdom proposal for Article 10. In this connection he recalled that the proposal was identical to paragraph 4 of the original text, but whereas the original text had used the term "supplier", the representative of the United Kingdom had asked that the term "supplier" in his proposal be replaced by the word "lessor". This change was significant and made the article as a whole difficult to understand.

It could be seen from a reading of paragraph 1(a) of Article 10 that the lessee could exercise any right to reject the equipment or to terminate the leasing agreement. Moreover, paragraphs 1 and 2 together indicated that the lessor was in the legal position of the seller, while the lessee was in the legal position of the buyer.

If one bore in mind the United Nations Sale Convention, this transposition had a certain undeniable legal logic. For example, it made sense that the lessee could reject the equipment in the
event of a fundamental breach by the seller, for which the lessor, itself acting *qua* seller, assumed responsibility. There was a kind of change in the legal situation whereby the lessee, as a buyer, could raise fundamental breaches by the seller against the lessor. Paragraphs 1 and 2 thus constituted a complete legal rule.

If however one were to speak of the lessor instead of the supplier in paragraph 3, then paragraph 3 would give another meaning to paragraph 1. It seemed that the lessee would only be able to exercise the right to reject the equipment if the lessor had not exercised its right to make a fresh tender. This was not the case with the United Nations Sale Convention where the buyer could allow the seller a certain period of time but the seller did not have the right to make a fresh tender in all cases in order to avoid termination of the contract of sale.

The second problem, raised by the representative of Colombia, dealt with practical realities. It was true that through a legal fiction the lessor could be treated as a seller, but it was the supplier that had the goods and would replace them. The wording of the original Article 10(4), which provided for the possibility of terminating the leasing agreement when the supplier had not made a fresh delivery of the equipment, was justifiable. If the term "supplier", rather than the term "lessor", were reintroduced in Article 10(3) in the United Kingdom proposal, Article 10 would again constitute a coherent whole.

Paragraphs 1 and 2 allowed the lessee to reject the equipment as against the lessor acting as a seller, and paragraph 3 permitted it to terminate the leasing agreement where the supplier had not made a fresh tender. In a certain sense the lessee had an action against the lessor *qua* seller, and another against the supplier. From a formal point of view, paragraph 3 of Article 10 could be included in Article 9. To the extent that the sanction in Article 10(3) concerned the leasing agreement, however, it was preferable for it to be retained in Article 10.

It was a matter of interpretation for the Chairman as to whether his intervention raised issues of substance or of drafting but to the extent that the representative of the United Kingdom had suggested that the substitution of the word "supplier" by "lessor" was a simple question of form he had made his statement as one relating to form while being fully conscious that it had substantive connotations.

The CHAIRMAN expressed the view that whether reference was made to the "supplier" or to the "lessor" in paragraph 3 was clearly a question of substance.

Mr GOODE (United Kingdom) stated that the reason for the proposed substitution was to reflect logically the legal relationships between the parties. What were under discussion were the rights of the lessee against the lessor under the leasing agreement. It was therefore inaccurate to speak of a right of rejection against the supplier with whom the lessee had no contractual relations. It was the representative of France who had quite rightly suggested the insertion in Article 10(1)(a) of the words "against the lessor". It followed then that if the right to reject were to be expressed as being exercisable against the lessor it must equally be the lessor which had the right to make the fresh tender as was stated in a provision that had already been agreed and that it was the lessor which must be referred to in paragraph 3 in order to maintain consistency with paragraph 1, for otherwise the extraordinary situation would be produced in which the lessor would be accorded the right to make a fresh tender under paragraph 1(b) whereas in paragraph 3 reference would be made to the supplier's failure to make a fresh tender when in fact the right to do so had been given to the lessor.

Mr MOONEY (United States of America) stated that his delegation supported the explanation given by the representative of the United Kingdom in connection with the use of the word "lessor" rather than "supplier". Even though it was the supplier who would actually deliver the equipment what was contemplated here was the exercise of a right rather than physical delivery. A second advantage of using the term "lessor" was that it achieved the coherence of the entire paragraph.

Mr PHILIP (Comité Maritime International) expressed a strong preference for the United Kingdom proposal as against the original text in that paragraph 1 left it to the parties to agree on their respective rights and duties in their contract rather than determining them directly in the
Convention, a point of considerable importance in relation to agreements for the lease of ships. He noted however that paragraph 3 of the United Kingdom proposal accorded the lessee a right to terminate the leasing agreement independent of the agreement and of the applicable law and he suggested that if the intention were to align paragraph 3 on paragraph 1 it would be necessary to refer to any rights which the lessee might have to terminate the agreement under paragraph 1. He enquired therefore whether it had been the intention in paragraph 3 to establish a substantive rule rather than simply to refer to the contract and to the applicable law.

Mr FERRARINI (Italy) stated that he had some difficulty with the words “the lessee shall be obliged to pay the lessor a reasonable sum for the benefit the lessee has derived from the equipment” in paragraph 3 of the United Kingdom proposal in the light of the decision to adopt an article much more in conformity with the rules concerning the sale of goods and more particularly the United Nations Sale Convention. It would therefore be somewhat odd to maintain that rule in the context of the new Article 10. In addition, he recalled that the Convention never spoke of damages or the measure of damages but here what was referred to was a kind of damages which the lessee was not entitled to recover but obliged to pay.

The CHAIRMAN suggested that the points raised by the observer from the Comité Maritime International and the representative of Italy be considered once a decision had been taken on the question of whether reference should be made in paragraph 3 to the lessor or to the supplier.

Mr BERAUDO (France) stated that he still had some doubts notwithstanding the explanation offered by the representative of the United Kingdom. He drew attention to a contradiction between paragraph 1(a) and paragraph 3. The former provided that the lessee might exercise any right to reject the equipment or to terminate the leasing agreement and he had thought that this right was to be exercised in the context of the legal rules governing contracts of sale and more specifically that the provision was to be understood in the light of the rules on termination laid down in the United Nations Sale Convention. If, however, paragraph 3 were to be construed in the sense suggested by the United Kingdom delegation, the rights conferred by paragraph 1(a) would disappear as they could be defeated by the lessor’s making a fresh tender of equipment, a rule which was not to be found in the United Nations Convention with which the Conference was supposed to be seeking consistency.

In his opinion it made perfectly good sense to add the words “against the lessor” in paragraph 1(a) while retaining the reference to the supplier in paragraph 3. It had moreover to be borne in mind that paragraphs 1 and 2 were concerned with a dispute between the lessor and the lessee in their capacities of seller and buyer while paragraph 3 dealt with the separate question of the situation where the supplier had not made a fresh tender. It might perhaps be preferable to combine paragraphs 1 and 2 in a single provision so as clearly to demonstrate that they were independent of paragraph 3 where the lessee was no longer confronted by the lessor but rather by the supplier who had failed to make a tender.

Mr GOODE (United Kingdom) considered that the problem perceived by the representative of France was not a problem. The purpose of substituting a reference to the lessor as opposed to the supplier in paragraph 3 was not to weaken but rather to reinforce the position under paragraph 1 that the claims were exercisable by the lessee against the lessor. What the proposal amounted to was that the rights of rejection under the leasing agreement were exercisable against the lessor but that the content of those rights was determined by the supply agreement.

The CHAIRMAN noted that it would be necessary to continue the discussion on Article 10(3) at the Committee’s next meeting.

*The meeting rose at 1.35 p.m.*
NINTH MEETING
Friday, 13 May 1988 at 2.50 p.m.

Chairman: Mr Sevón (Finland)


Article 10 (continued)

Paragraph 3 (continued)

The CHAIRMAN recalled that there had been considerable discussion as to whether it would be appropriate to replace the word “supplier” by “lessor” in paragraph 3 as proposed by the United Kingdom delegation in CONF. 7/C.1/W.P. 10. The question was still outstanding as to whether paragraph 3 should deal with termination so as to achieve consistency with paragraph 1 as also was that of the advisability of retaining the closing language of paragraph 3.

Ms DEBOYSER (Belgium) supported the text of Article 10 as proposed by the United Kingdom delegation. The substitution of the term “lessor” for “supplier” was logical as it confirmed the distinction between the subject-matter of Article 9, dealing with the relations between the lessee and the supplier, and Article 10, which was concerned with those between the lessee and the lessor. In addition, the revised text of Article 10 would remove the contradiction of giving the supplier the right to make a fresh tender when that right was given to the lessor by paragraph 1. The French delegation had referred in this context to the United Nations Sale Convention and it was true that there was a certain legal fiction in Article 10 whereby the lessee was placed in the position of the purchaser of the equipment but such fictions had their limits. The real seller was the supplier against whom the lessee enjoyed protection under Article 9.

Mr KOMAROV (Union of Soviet Socialist Republics) found the arguments underlying the United Kingdom proposal to be convincing. It reflected the realities of financial leasing transactions and the concept of Article 10, especially paragraph 1. The lessor did indeed take the place of the supplier as far as the lessee was concerned but this did not signify that they were one and the same person and the Convention should take account of that fact.

Mr JACOBSSON (Sweden) considered that the lessee’s right to terminate the leasing agreement as well as its duty to accept a fresh tender were sufficiently described in paragraph 1 of Article 10. He wondered therefore whether the difficulty could not be overcome by his delegation’s proposal in CONF. 7/C.1/W.P. 24 to delete a substantial part of paragraph 3. A new paragraph 4 would begin: “Where the lessee has exercised a right to terminate the leasing agreement the lessee shall be entitled to recover” after which the text would remain unchanged.

Mr ILLESCAS (Spain) supported the proposal of the representative of Sweden which would make it possible to reconcile the differing viewpoints. It did not clarify any further the meaning of the terms “fresh tender” and “nouvelle livraison” which caused some difficulty to his delegation but in any event those expressions were already employed in paragraph 1, which also dealt with the lessee’s right to terminate the leasing agreement.

Mr BERAUDO (France) stated that he could, in a spirit of compromise, accept the Swedish proposal as it eliminated the repetition in paragraph 3 of part of the content of paragraph 1, thus
making it possible to concentrate on the sanction in the event of rejection of the equipment or termination of the leasing agreement.

Mr GOODE (United Kingdom) considered that the text proposed by the representative of Sweden was brief and more direct. It avoided the difficulties which appeared to have been created by the existing text and he too could therefore accept it.

Ms PERT (Australia) stated that her delegation also could support the Swedish proposal although she welcomed clarification regarding the period within which rentals could be withheld.

Mr JACOBSSON (Sweden) explained that the intention of his delegation's proposal was that the part of the rule concerning the withholding of rentals should be included in a new paragraph 3 which it had submitted dealing with all the rights of postponing payment.

The CHAIRMAN invited the Committee to indicate whether the proposal for Article 10(3) as submitted by the United Kingdom delegation and amended by that of Sweden was acceptable.

Mr CASTILLO (Colombia) stated that he could accept the proposed amendment. He recalled however that the representative of Italy had already drawn attention to the sentence which read: "Nevertheless the lessee shall be obliged to pay the lessor a reasonable sum for the benefit the lessee has derived from the equipment". It was the view of his delegation that there could be circumstances in which such a calculation would be based on the measure of the benefit received by the lessee which would operate unfairly and it would therefore be more appropriate to refer to the indemnification of the lessor.

The CHAIRMAN suggested that this matter be dealt with once a decision had been taken on the Swedish proposal. He then enquired whether the Committee considered that the question of whether paragraph 3 should deal with termination by reference to the lessee's having exercised a right to terminate was also decided by the text proposed by the representative of Sweden.

It was so agreed.

The CHAIRMAN proposed that the Committee turn its attention to the Italian proposal, touched on by the representative of Colombia, which he had understood as calling for the deletion of the last sentence of the paragraph.

Mr FERRARINI (Italy) stated that he had not made a proposal but simply raised a point for discussion. He was however prepared to suggest that if there were to be any deletion, then it should take effect as from the word "meanwhile", in other words not to speak at all of the consequences of termination, and above all of the obligation of the lessee to pay anything to the lessor as the Convention did not deal with the rights of the lessee to obtain indemnification for damage it had sustained.

Mr ZYKIN (Union of Soviet Socialist Republics) recalled that while there were situations in which the lessee might claim damages these were not mentioned in the present text. Since however the provision under consideration was concerned with the remedies available to the lessee, he enquired whether the wording of the United Kingdom proposal as amended by the Swedish delegation precluded the lessee from obtaining damages and, if so, why?

Mr MOONEY (United States of America) considered that from the outset of the work on the draft Convention one of its principal purposes had been seen as establishing the essential concept, which was embodied in paragraph 5, that the lessor should bear no responsibility for the quality of the equipment. As the discussion on Article 10 proceeded however it seemed that the article was developing into a code of lessee remedies.

He tended therefore to the view that all that needed to be said had been said in paragraphs 1 and 2 of Article 10 and that perhaps the remainder of the article could be deleted, leaving it to the parties to make appropriate arrangements in their agreement.
Finally, he believed that the provisions under discussion would probably not be operative in any financial leasing transaction since the lessor would be unlikely to make any payments until it was satisfied that the lessee had assumed all the risks with respect to the quality of the equipment. He could therefore agree to any proposal to abstain from dealing in the Convention with the effects of termination.

Mr GOODE (United Kingdom) saw merit in the suggestion made by the representative of Italy as it reflected the new structure that had been agreed upon for Article 10 which avoided setting out a catalogue of rules, leaving a number of questions to be determined rather by those applicable to contracts of sale. It was however important from the viewpoint of the lessee that an express reference be retained to the lessee's right to recover rentals and other sums paid in advance in cases when the lessee had exercised a right to terminate the leasing agreement. On the question of the relationship between that right and damages, he recalled that it was generally accepted that in principle the lessor should not incur liability for non-delivery or non-conformity of the equipment unless it had itself in some way been at fault. On the other hand, it had been thought wrong to make the lessee pay rentals when it had not received the equipment, either because the equipment had not been delivered or because it had been rejected for non-conformity and not re-tendered. The intention had therefore been to strike a balance. If the lessee had not received or accepted the equipment, it could recover any rentals paid but, once it had received the equipment and retained it, or lost the right to reject it, its remedy would lie exclusively against the supplier, unless the lessor had in some way been at fault.

Mr MOONEY (United States of America) stated that it had not been his intention to propose a rule that the lessee did or did not have to continue to pay. What he had suggested was that having established the core framework of the article in the first two paragraphs, the details could be left to the agreement of the parties.

Mr RÉCZEI (Hungary) questioned the notion of a lessee having to pay a reasonable sum to the lessor for a benefit derived when the equipment was not in conformity with the contract. He was also puzzled by the fact that it was stated that the lessee could only recover rentals and other sums paid in advance while Article 9(1) on the contrary provided that duties of the supplier under the supply agreement were also owed to the lessee as if it were a party to that agreement.

In his opinion, if the lessee had derived a benefit which could be quantified then that sum should be deducted so as to reflect the damage suffered as a consequence of the delivery of defective equipment.

Finally he deemed it necessary to decide to whom the lessee owed the benefit. It had a claim against the supplier for delivery of defective equipment and against the lessor in respect of rentals and advance payments. On the other hand both the lessor and the supplier had a right of set-off against the lessee. It should be clarified to whom the benefit that had accrued to the lessee was due.

Mr FELSBERG (World Leasing Council) considered the new version of Article 10 to constitute a very great improvement over the original draft and that it went a long way to meeting the concern felt in the leasing industry. Nevertheless, paragraph 3 gave rise to a difficult problem in that it sought to provide a solution for a whole range of transactions regarding the consequences of termination by the lessee which were always dealt with by the parties in the leasing agreement. In his view it was sufficient to establish in Article 10 the lessee's right to terminate the leasing agreement in the circumstances therein specified and he believed therefore that the position of the delegation of the United States of America, recommending the retention of only paragraphs 1 and 2 of Article 10, was one worthy of support.

The CHAIRMAN enquired whether the representative of Italy wished to submit a formal proposal.

Mr FERRARINI (Italy) proposed the deletion of the whole of paragraph 3.

Mr REBMANN (Federal Republic of Germany) stated that he was opposed to the deletion of
paragraph 3. The issue dealt with by that provision was an important one which arose frequently before the courts. The Convention should seek to regulate the principal rights and obligations of the parties and, if it failed to do so, its value could be brought into question.

Mr DUARTE (Portugal) recalled that the main purpose of Article 10(4) in the basic text had been to state the right of the lessee to terminate the leasing agreement in certain circumstances and that only in a subsidiary manner had it dealt with the consequences of termination. The affirmation of the lessee's right to terminate the leasing agreement was now dealt with in paragraph 1 of Article 10 as proposed by the United Kingdom delegation and he could therefore support the proposal of the representative of Italy to delete paragraph 3 of the text submitted by the United Kingdom. Were the Committee not to follow that course he believed that the proposal to delete only the last sentence of paragraph 3 or that made by the Colombian delegation were somewhat unilateral in concept as their adoption would signify looking at the matter from the standpoint of the lessee alone. A preferable solution would be to provide that the lessee must pay the lessor a reasonable sum, taking into account the benefit received by the lessee and the costs incurred by the lessor.

The CHAIRMAN recalled that the discussion on paragraph 3 had been a lengthy one and he called upon delegations to consider the basic question of whether they wished to delete paragraph 3 altogether.

Mr MOONEY (United States of America) considered that there were advantages to deleting paragraph 3 which had not yet been mentioned. He recalled that his delegation had submitted a proposal in CONF. 7/C.1/W.P. 11 which was intended to make it clear that after a leasing agreement had been terminated and the rules of Article 10 applied, nothing in Article 10 would affect the standard provisions of leasing agreements to the effect that the lessee must reimburse the lessor for any advances made by the lessor to the supplier, which he understood to have been the same point as that made by the representative of Colombia. If paragraph 3 were to be deleted he would be able to withdraw the United States proposal to which he had referred.

As to the question raised by the representative of the Federal Republic of Germany, he drew attention to the draft preamble from which it was clear that it was only certain aspects of international financial leasing which the Convention was intended to address. The Convention was not designed to develop a complete codification of rules governing financial leasing but only to deal with certain situations which were peculiar to it.

The CHAIRMAN asked whether there was any support for the proposal to delete the whole of paragraph 3 of Article 10.

Mr YUAN (China) stated that he could not support the proposal to delete paragraph 3 in its entirety because, in the view of his delegation, it went a long way towards addressing the balance of interests of the parties. He expressed the opinion that the Committee should, for the purposes of discussion, consider either the original text of Article 10 or that proposed by the United Kingdom delegation in CONF. 7/C.1/W.P. 10.

Ms ASTOLA (Finland) stated that she did not support the proposal to delete paragraph 3 in toto. Article 10 provided a bridge between the supply agreement and the leasing agreement as regards non-conformity and non-delivery of equipment. If paragraph 3 were to be deleted the Convention would lose something very important and the question might then be raised of whether paragraph 4 of the United Kingdom text (paragraph 5 in the original text) which dealt with the right to withhold payments should also be deleted, a solution to which her delegation would be strongly opposed.

Mr BERAUDO (France) considered that while the Committee might wish to consider the deletion of the last sentence of paragraph 3, the essence of the provision should be maintained. It provided the sanction in relation to the rules set out in paragraphs 1 and 2 and to delete it would undo the compromise achieved by the adoption of the Swedish amendment to the United Kingdom proposal in CONF. 7/C.1/W.P. 10.
Mr REBMANN (Federal Republic of Germany) agreed with the statement of the French representative. He wondered what would be the consequences of deleting paragraph 3 in relation to the termination of the leasing agreement in accordance with paragraph 1 which, if left to stand alone, might be interpreted as meaning that the lessee could recover from the lessor the price of the equipment, which was certainly not intended.

Mr KATO (Japan) also considered that the deletion of paragraph 3 could render the interpretation of paragraph 1(a) highly ambiguous and he therefore supported its retention.

Mr GOODE (United Kingdom) expressed agreement with those delegations which had spoken against the deletion of paragraph 3. The Unidroit committee of governmental experts in Rome had sought to establish a fair balance of interests between the parties. Paragraph 5 of Article 10 had absolved the lessor from various liabilities, the counter-balance being that if the lessee did not obtain the equipment, it would not have to pay the rentals. There was some merit in the proposal to delete the last sentence of paragraph 3 but on reflection he believed that the paragraph should be maintained in its entirety so as to maintain the balance that had been worked out.

Mr ZYKIN (Union of Soviet Socialist Republics) stated that it was his delegation’s view that paragraph 3 should be retained in the interest of preserving the balance of interests between lessor and lessee. In this connection he drew attention to Article 11 which expressly listed the remedies available to the lessor, including a right to the payment of damages. No such right was granted to the lessee under Article 10 and he asked whether it had been the intention of the committee of governmental experts to exclude the lessee’s claim for damages even in those cases where the lessee had suffered loss as a consequence of an act or omission of the lessor.

Mr BRENnan (Australia) expressed support for the retention of paragraph 3.

Mr FERRARINI (Italy) stated that in the light of the views expressed by the other delegations he would limit his proposal in relation to paragraph 3 to the deletion of the last sentence, beginning with the word “[n]evertheless”.

The CHAIRMAN enquired whether any delegation wished to reintroduce the Italian proposal to delete paragraph 3 in toto and having established that this was not the case he ruled that the proposal was no longer on the table.

Mr RICHARDS (Antigua and Barbuda) asked whether the list of rights available to the lessee under paragraph 3 was intended to be exhaustive for if that were the case then the remedy of damages would seem not to be open to the lessee under the Convention.

Mr GOODE (United Kingdom) replied that the intention of the committee of governmental experts at its last session in Rome had been that, as long as the lessor was not at fault, paragraph 4 (now paragraph 3 in the United Kingdom proposal) would provide an exhaustive list of remedies. If, on the other hand, the lessor was at fault for non-delivery, delay in delivery or delivery of non-conforming equipment, then the lessor would lose its general immunity under the then paragraph 5 and the lessee would enjoy all the remedies available under the applicable law, including that of damages.

The CHAIRMAN observed that the situation facing the Committee was the following. The Italian proposal to delete paragraph 3 had been withdrawn. The proposal by the United Kingdom in CONF. 7/C.1/W.P. 10 as amended by the Swedish delegation (CONF. 7/C.1/W.P. 24) had been considered to constitute an acceptable compromise. The Italian proposal to delete the last sentence of paragraph 3 was still on the table, as also was that of the representative of Colombia, in the event of the paragraph being retained, to amend it so as to refer to the indemnification of the lessor and not the benefit of the lessee.

Mr RÉCZEI (Hungary) recalled that under a financial leasing transaction a lessee might have two claims, one against the lessor and the other against the supplier. The benefit derived by the lessee from the equipment originated from the supplier and under paragraph 3 the lessee would be
obliged to pay the lessor a reasonable sum for such benefit. The situation might then arise in which the lessee would institute proceedings against the supplier who would in turn invoke the benefit which had accrued to the lessee as a ground of set-off. In those circumstances the lessee would be exposed to double payment if paragraph 3 remained as it stood. He could therefore support the deletion of the last sentence of the provision so as to leave it to the judge to find an appropriate solution under the applicable domestic law.

The CHAIRMAN considered that the only outstanding issue was the retention of the last sentence of paragraph 3 and, if it were to be retained, then the form it should take.

Mr JACOBSSON (Sweden) observed that it was difficult to take a stand on the question since paragraph 3 was closely connected with the United States proposal for a new paragraph 6 contained in CONF. 7/C.1/W.P. 11, which provided that Article 10 should not affect any agreement made by the lessee to reimburse the lessor for payments by the lessor to the supplier, a proposal which had yet to be discussed by the Committee.

Mr BRENNAN (Australia) stated that he had understood from the intervention of the representative of the United Kingdom that the intention of the draftsmen in Rome had been to leave open the possibility, in cases where the lessor had been at fault, for the lessee to exercise other remedies and he enquired whether adoption of the Swedish amendment to the United Kingdom proposal for paragraph 3 still left open that possibility. If not, then some form of wording should be found which would indicate that the remedies described in paragraph 3 were not exhaustive.

Mr GOODE (United Kingdom) believed that the language of paragraph 5 of the basic text, which had been taken over word for word in paragraph 4 of his delegation’s proposal in CONF. 7/C.1/W.P. 10, made it abundantly clear that all the lessee’s remedies against the lessor in respect of non-delivery, delay in delivery or delivery of non-conforming equipment remained to the extent that such default resulted from an act or omission of the lessor. What those remedies might be would, of course, depend upon the applicable law but if the drafting were thought to be defective it could be looked at by the Drafting Committee.

Mr REBMANN (Federal Republic of Germany) stated that he could not understand the difficulties which some delegations had with the last sentence of paragraph 3. It was logical that if a contract were to be terminated, the mutual performances should be given back and if the lessor were to be obliged to return the rentals and other sums paid in advance by the lessee, then the lessee should be obliged to pay a sum for the benefit it had derived from the use of the equipment. Admittedly there might be cases in which no such benefit accrued but this did not invalidate the general rule which was perfectly clear. He was not convinced that the last sentence of paragraph 3 should be deleted.

Mr BERAUDO (France) believed that the last sentence of paragraph 3 of the United Kingdom proposal should be discussed together with the United States proposal for a new paragraph 6 (CONF. 7/C.1/W.P. 11) and that paragraph 4 of the United Kingdom proposal, formerly paragraph 5, be considered separately.

He noted that the last sentence of paragraph 3 of the United Kingdom proposal provided that the lessee should be obliged to pay the lessor a reasonable sum for the benefit the lessee had derived from the equipment while the United States proposal was concerned with the obligation on the lessee to reimburse the lessor for payments made by the lessor to the supplier. It was his understanding that the United States proposal did not contemplate the lessee’s having to make a double reimbursement. Of the two solutions he preferred that contained in the last sentence of paragraph 3 although the need for the lessee to have effectively derived benefits from the use of the equipment might be more clearly expressed if some such language as “if any” or “where applicable” were to be added.

The CHAIRMAN observed that a proposal had been submitted by the Swedish delegation along the lines indicated by the representative of France. He proposed that the Committee first
discuss the Swedish proposal in CONF. 7/C.1/W.P. 13 and then that of the United States in CONF. 7/C.1/W.P. 11, next decide upon the issue of whether or not to delete the last sentence of paragraph 3 and, in the event of its retention, determine its wording. The Committee might then take up the remaining parts of Article 10 after which it could revert to Article 9.

The meeting was adjourned at 4.15 p.m. and resumed at 4.35 p.m.

The CHAIRMAN recalled the procedure he had proposed prior to the adjournment for dealing with the various proposals made in relation to Article 10 and stated that in conformity with the Rules of Procedure he would entertain oral proposals only in respect of motions to delete articles, paragraphs or sentences, written proposals being necessary for the introduction of new wording.

He then called upon the representative of Sweden to introduce his delegation’s proposal for a new paragraph 4 of Article 10 (CONF. 7/C.1/W.P. 13) which contained some of the substance that had been omitted from that delegation’s proposal in relation to paragraph 3.

Proposed new paragraph 4

Mr JACOBSSON (Sweden) stated that the effect of his delegation’s proposal was to permit a lessee, in the event of a delay in delivery or the delivery of non-conforming equipment, to withhold payment of rentals until termination of the leasing agreement or until proper delivery was effected. The proposal was made in the light of the fact that many lessees were small and medium-sized enterprises whose importance would grow as commerce developed in many parts of the world. Boundaries, especially in Europe, were becoming less significant and an expansion of international financial leasing could be anticipated. The interests and needs of lessees should be given due consideration through the introduction of protective provisions, even if they were to be of a non-mandatory character. It was his delegation’s opinion that not every cost relating to the equipment under a specific leasing agreement should be borne by the individual lessee. It would be preferable in the interests of society as a whole for some risks to be allocated to the lessor and thus distributed among all the lessees of that lessor.

All lessees faced certain risks, some of which were unforeseen, and indeed unforeseeable and which were to a large extent outside the control of the lessee. He believed that the proposed new paragraph 4 would meet this particular concern and that it would avert the threat to the entire financial position of an individual lessee deriving from its duty to pay rentals before being able to use equipment.

In conclusion he noted that the discussions on paragraph 3 had shown that it would be necessary to make some changes to the text proposed in CONF. 7/C.1/W.P. 13 while it would in addition be necessary to amend the proposal so as to avoid its application in cases where the lessee had lost its right to reject the equipment. He had therefore prepared a redraft of the proposal which he now suggested be inserted before paragraph 3, and which could be distributed shortly in writing.

The CHAIRMAN stated that he would prefer discussion to take place on the basis of a written text.

Mr MOONEY (United States of America) suggested that, pending availability of the Swedish proposal, it might be appropriate to resume consideration of the last sentence of paragraph 3 together with the United States proposal for a new paragraph 6 contained in CONF. 7/C.1/W.P. 11.

The CHAIRMAN agreed to this suggestion and requested the representative of the United States to introduce his delegation’s proposal.

Mr MOONEY (United States of America) noted that the statements of some representatives had suggested that the United States proposal was in some way related to the Italian proposal to delete the last sentence of paragraph 3. He considered that the two proposals addressed different questions and he would prefer to see the United States proposal discussed after the question of the retention of the last sentence of paragraph 3.
The CHAIRMAN assumed that the United States proposal would be meaningful irrespective of the fate of the last sentence of paragraph 3.

Mr MOONEY (United States of America) agreed that that was possibly the case.

Mr COOK (United Kingdom) proposed a compromise solution regarding the last sentence of paragraph 3 which sought to remove the possible implication that it referred to the only right exercisable by the lessor. He suggested therefore that the last sentence be deleted and that the preceding sentence be completed by the words "less a reasonable sum for the benefit the lessee has derived from the equipment". This redraft would, he believed, make it clear that the lessor's right of set-off would be exercisable only if the lessee sought to recover rentals or other sums paid in advance and at the same time meet the concern expressed by the United States delegation.

Mr BERAUDO (France) found the proposed compromise to be a fair one which he could accept on condition that it replaced the proposal of the United States delegation. He suggested however that the words "s'il y a lieu" or "le cas échéant" be added in French after the word "matériel" and "if any" after the word "equipment" in English so as to make the point that there must actually have been a benefit accruing to the lessee from the use of the equipment.

Mr MOONEY (United States of America) stated that he was prepared to withdraw his delegation's proposal in favour of that of the United Kingdom delegation.

Mr FERRARINI (Italy) stated that he too could accept the proposal of the representative of the United Kingdom.

Mr FELSBERG (World Leasing Council) questioned the need for the compromise proposal and wondered how it would operate in practice in a situation where a leasing company had disbursed no money in advance, non-conforming equipment was delivered to the lessee and the lessor had already received advance payments from the lessee. Why should the lessor enjoy a right of set-off in such cases when it had incurred no costs?

Mr DE PAIVA (Brazil) considered that the first part of Article 10(3) was perfectly clear. If the lessee exercised the right to terminate the leasing agreement it would be entitled to recover payments made in advance. This was a satisfactory rule and he saw no need for any further balancing of the interests of the parties. In those circumstances his inclination would be to reintroduce the Italian proposal to delete the last sentence of paragraph 3 rather than to accept the compromise solution proposed by the representative of the United Kingdom.

Mr ILLESCAS (Spain) stated that his delegation could support the proposal of the representative of the United Kingdom, together with the additional language suggested by the representative of France, which reflected a proposal of his delegation contained in CONF. 7/3.

Mr MOONEY (United States of America) recalled that some delegations had strongly urged that for Article 10(3) to operate properly it had to contemplate the lessor's situation when it had given benefits to the lessee while others had been concerned by the inclusion of the last sentence of paragraph 3. In his view the United Kingdom proposal presented a reasonable compromise which in economic terms reached the same result as the existing text of the last sentence of paragraph 3.

With regard to the statements of the observer for the World Leasing Council and the representative of Brazil, he saw force in what they had said but it was necessary to remember that the rules laid down in Article 10 could not contemplate every possible situation and invariably provide a totally fair solution. Sometimes they might work to the benefit of the lessor and sometimes to that of the lessee, but hopefully most of those contingencies would have been regulated in a satisfactory manner in the leasing agreement itself.

Mr BRENNAN (Australia) supported the United Kingdom proposal as amended by the representative of France.

Mr GOODE (United Kingdom) stated that he too could accept the French amendment although
on a point of drafting he would prefer the words "if any" to be inserted after "benefit".

The CHAIRMAN asked whether the representative of Colombia maintained his proposal to reformulate the last sentence of paragraph 3 and whether that proposal had been submitted in writing.

Mr CASTILLO (Colombia) stated that he would withdraw his proposal.

The CHAIRMAN considered that there were now three options open to the Committee, the first to retain the last sentence of paragraph 3 of the basic text, the second to delete that sentence, and the third to adopt the oral proposal of the United Kingdom delegation with the amendment suggested by the representative of France with the consequence that the concluding language of paragraph 3 would read "to recover any rentals and other sums paid in advance less a reasonable sum for the benefit, if any, the lessee has derived from the equipment".

After ascertaining that no delegation favoured the retention of the existing language of the last sentence of the basic text, that one delegation preferred the deletion of the sentence as a whole and that thirty delegations supported the United Kingdom proposal as amended by France, he assumed that the proposal was acceptable to the Committee.

It was so agreed.

The CHAIRMAN noted that no other proposals were on the table in relation to paragraph 3 and enquired whether the delegation of the United States wished to maintain its proposal for a new paragraph 6 as set out in CONF. 7/C.1/W.P. 11.

Mr MOONEY (United States of America) stated that he was withdrawing his delegation's proposal.

Proposed new paragraph 3

The CHAIRMAN proposed that the Committee revert to the proposal by the delegation of Sweden originally submitted in CONF. 7/C.1/W.P. 13 as redrafted in CONF. 7/C.1/W.P. 24. He recalled that the representative of Sweden had already introduced that proposal, indicating that the paragraph should precede the present paragraph 4. If the proposal were to be adopted, then what had been adopted as paragraph 3 would be renumbered.

Mr GOODE (United Kingdom) noted that the Swedish proposal was a modification of a proposal earlier submitted by the United Kingdom delegation and stated that he could accept it without amendment.

Mr KATO (Japan) stated that his delegation also could support the proposal of the representative of Sweden.

Mr PHILIP (Comité Maritime International) understood the Swedish proposal as suggesting that the lessee could withhold rentals in respect of allegedly non-conforming equipment before it had actually been ascertained that such a defect existed. This could cause particular difficulty in relation to ships as it seemed to permit a charterer to refuse to pay charter hire because of an alleged defect in the ship. In such cases it would be likely that the parties would go to arbitration and the proceedings might last for anything up to two years. In the meantime the charterer would pay no charter hire which seemed unreasonable. In his view it would be preferable to leave the question to be dealt with, if necessary, in the bareboat charter agreement rather than for it to be governed by a general rule in the Convention.

Mr BERAUDO (France) stated that his delegation could support the Swedish proposal since it was a rule of equity that the lessee should not pay rentals when it did not enjoy the use of the equipment.
Mr GOODE (United Kingdom) believed that the difficulties seen by the observer of the Comité Maritime International could be resolved by the parties in their contract and he reiterated his support for the Swedish proposal.

Mr ILLESCAS (Spain) also supported the Swedish proposal.

In the absence of further comments on that proposal the CHAIRMAN took it that the Swedish proposal for a new paragraph 3 in CONF. 7/C.1/W.P. 24 had been adopted subject to drafting and that it could be referred to the Drafting Committee which would also attend to the renumbering of the paragraph containing the United Kingdom proposal as amended by the French delegation.

*It was so decided.*

The CHAIRMAN drew attention to a proposal by the Swiss delegation concerning the withholding of rentals which was contained in CONF. 7/3 Add. 1. It was however his understanding that the proposal could be subsumed under that just adopted.

*It was so decided.*

**Paragraph 4**

The CHAIRMAN recalled that paragraph 5 of the basic text appeared as paragraph 4 in the United Kingdom proposal for Article 10 contained in CONF. 7/C.1/W.P. 10. He noted that no comments had so far been made on that provision and in the absence of any proposals he would assume that the paragraph was adopted.

*It was so decided.*

The CHAIRMAN enquired whether he could consider the discussion on Article 10 to be concluded.

Mr DE PAIVA (Brazil) sought clarification as to how far the Swedish proposal contained in CONF. 7/C.1/W.P. 24 had been adopted.

The CHAIRMAN replied that the Committee had adopted paragraph 3 of the Swedish proposal after adopting a provision corresponding to the Swedish proposal for paragraph 4.

He concluded that the discussion on Article 10 had been completed and requested the Committee to resume consideration of Article 9.

*Article 9 (continued)*

The CHAIRMAN drew attention to a proposal by the delegation of the Philippines in CONF. 7/C.1/W.P. 22 and one by the delegation of Colombia in CONF. 7/C.1/W.P. 21. He invited the representative of the Philippines to introduce his proposal.

Mr SANTOS (Philippines) proposed adding in paragraph 1 the words "provided, however, that the supplier shall not be held liable twice for the same cause of action" so as to avoid the risk of the supplier being held liable both to the lessor and to the lessee. He also proposed the deletion of paragraph 2 which might negate the rights accorded to the lessee under paragraph 1.

Mr CASTILLO (Colombia) stated that his delegation's proposal in relation to paragraph 1 was very much in line with that of the delegation of the Philippines, the wording of which was acceptable to him. He did not however favour deleting paragraph 2 as the lessor would lose the protection offered to it in cases where the lessee purported to terminate or rescind the supply agreement. He therefore proposed amending paragraph 2 in such a way as to require the participation and express consent of the lessor to such termination or rescission of the supply agreement.
Paragraph 1 (continued)

The CHAIRMAN considered that in the light of the statement of the representative of Colombia there was now only one proposal before the Committee regarding paragraph 1, namely that of the delegation of the Philippines.

He had understood the earlier discussion on the matter as indicating that while there was agreement as to the principle that the supplier should not be liable both to the lessor and to the lessee for the same cause of action, views differed as to whether it was necessary to state this expressly in Article 9(1). He therefore considered the question to be one of drafting and if this view was shared by the Committee then he proposed that the proposals of both the Philippines and of Colombia be referred to the Drafting Committee for consideration.

It was so decided.

Paragraph 2

The CHAIRMAN observed that there were three options before the Committee, the first to delete paragraph 2, the second to retain the basic text, and the third to retain that text with the additional language proposed by the representative of Colombia.

Mr BERAUDO (France) stated that he could accept the Colombian proposal insofar as it required the consent of the lessor for termination or rescission of the supply agreement by the lessee. He was not however in favour of a reference to the express participation of the lessor as this amounted to the introduction of a procedural rule.

Mr CASTILLO (Colombia) agreed to the deletion of the reference to “participation” of the lessor while maintaining his proposal to speak of the lessor’s express consent.

The CHAIRMAN suggested that the main difficulty experienced by the representative of France was the use of the adjective “express”.

Mr BERAUDO (France) stated that in the French version of the Colombian proposal the adjective “expresse” qualified only the word “participation”. He expressed the hope that the representative of Colombia would be able to accept a formulation which would refer only to the consent of the lessor without requiring that such consent be express as the retention of that word would give rise to the same procedural difficulties as the use of the term “participation”. In effect, the requirements concerning consent were determined by the applicable law and a Convention containing a uniform law should not enter into such detail.

Mr MOONEY (United States of America) agreed with the sentiments expressed by the representative of France. The Committee had throughout its work sought to avoid, as far as possible, including language in the Convention which it would be more appropriate to include in the leasing agreement. His delegation therefore supported the deletion of the word “express” from the Colombian proposal.

Mr GOODE (United Kingdom) expressed the hope that the representative of Colombia would agree to delete the adjective “express”.

Mr KATO (Japan) supported the retention of the word “express”.

Mr RÉCZÉI (Hungary) stated that he was opposed to the proposal of the Colombian delegation. Article 9(1) created a legal fiction by treating the lessee as a party to the sales contract (the buyer), which conferred on it a number of rights exercisable against the supplier. The effect of Article 9(2) was to place limits on those rights by providing that the lessee was not entitled by the Convention to terminate or rescind the supply agreement. The language employed in the Colombian proposal however signified that the lessor could rescind the supply agreement by giving its consent to the lessee to do so. He believed that the basic text should remain unchanged and avoid giving
rights of rescission to a fictitious buyer who had not been involved in the conclusion of the supply agreement.

Mr BRENNAN (Australia) agreed with the observations of the representative of Hungary and supported the retention of the basic text.

Mr CASTILLO (Colombia) agreed to amend the proposal contained in CONF. 7/C.1/W.P. 21 to read: “Nothing in this article shall entitle the lessee to terminate or rescind the supply agreement without the consent of the lessor”.

The CHAIRMAN put to the vote the text of paragraph 2 of Article 10 as reformulated orally by the representative of Colombia.

*The proposal was adopted by eighteen votes to ten.*

The CHAIRMAN proposed that Article 9 be referred to the Drafting Committee.

*It was so decided.*

*The meeting rose at 5.40 p.m.*

CONF. 7/C.1/S.R. 10
18 May 1988

**TENTH MEETING**

Monday, 16 May 1988, at 9.40 a.m.

*Chairman:* Mr Sevón (Finland)

**AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING** (Study LI X – Doc. 48; CONF. 7/3 and Adds. 1-2; CONF. 7/4 and Add. 1; CONF. 7/C.1/W.P. 1; W.P. 6; W.P. 11; W.P. 14 and W.P. 23)

**Article 11**

The CHAIRMAN drew attention to a working paper, CONF. 7/C.1/W.P. 14, submitted by the United Kingdom delegation containing a reformulation of Article 11. Since however the proposed amendments were easily identifiable he suggested that the Committee take as the basic text that proposed by the Unidroit committee of governmental experts.

*It was so agreed.*

**Paragraph 1**

The CHAIRMAN noted a comment made by the Japanese delegation in CONF. 7/3 concerning the right to damages.

Mr KATO (Japan) stated that the problems which his delegation had encountered in relation to paragraph 1 would be overcome if the United Kingdom proposal were to be adopted.

The CHAIRMAN concluded that the Japanese comment was withdrawn in the light of the United Kingdom proposal. He called the attention of the Committee to comments submitted by the World Leasing Council in CONF. 7/4 Add. 1 and by the Asian Leasing Association (Asialease) in
CONF. 7/4 as well as those submitted by Pakistan in CONF. 7/3 Add. 2 which dealt with the same point. As he understood it, the World Leasing Council was of the view that the lessor should be entitled to interest for the remaining unexpired period and secondly that the lessor should have an overriding right to repossess. He called upon the observer of the World Leasing Council to present its proposals.

Mr FELSBERG (World Leasing Council) saw the proposals as being more of a drafting nature. As regards paragraph 1 which provided that in the event of default by the lessee the lessor might recover accrued unpaid rentals together with interest, it had to be recalled that some cases of default did not relate to payment so that the drafting of the present text was not fully appropriate. As to paragraph 2(b), which imposed on the lessor the obligation to mitigate its loss, he proposed the deletion of the word “all” before “reasonable steps”.

The CHAIRMAN suggested that for the time being the discussion be confined to paragraph 1 and he requested the representative of the United Kingdom to introduce his delegation’s proposal in CONF. 7/C.1/W.P. 14 to add the word “and damages” at the end of paragraph 1.

Mr GOODE (United Kingdom) stated that the purpose of the United Kingdom proposal was to meet the point raised by the observer of the World Leasing Council and to make it clear that the right of the lessor to sue the lessee for damages for breach of contract by the latter, a right which it enjoyed under existing contract law, was not dependent on the exercise by the lessor of its right to terminate the leasing agreement.

Mr MOONEY (United States of America) expressed support for the United Kingdom proposal.

The CHAIRMAN enquired whether there were any objections to the United Kingdom proposal to add, at the end of paragraph 1, the words “and damages” and in the absence of objections he declared the proposal to have been adopted.

**Paragraph 2**

The CHAIRMAN drew attention to the connection between paragraphs 2 and 5, as also to the Japanese comment in CONF. 7/3 to the effect that the relationship between paragraphs 2(b) and 3 of Article 11 was unclear. He asked the representative of Japan whether the problem would be solved by adoption of the United Kingdom proposal in that regard in CONF. 7/C.1/W.P. 14.

Mr KATO (Japan) replied in the affirmative.

The CHAIRMAN noted that Japan had also raised in its written comments the question of whether a provision on mitigation in a contract would affect the possibility of the contract being adjusted by a court.

Mr KATO (Japan) stated that his delegation withdrew its comment.

The CHAIRMAN drew attention to a proposal contained in the written comments of Spain in CONF. 7/3 concerning the use of the word “substantial” in the expression “where the lessee’s default is substantial” to replace that language by the words “[i]n the event of the lessee’s default in the payment of two (or three) rentals”.

Mr GUITARD (Spain) explained that the word “substantial” alone was insufficient to define the kind of default contemplated by paragraph 2.

The CHAIRMAN enquired whether there was support for the Spanish proposal and in the absence of such support asked whether there were objections to it.

Mr MOONEY (United States of America) admitted that the word “substantial” might not be perfect in the circumstances but nevertheless he believed that minor technical defaults should not be permitted to upset the whole transaction, an attitude which he believed would be shared by
most courts. The Convention should not enter into such detail.

Mr BERAUDO (France) suggested that the difficulty might be overcome if some such language were to be employed as "in the event of substantial or repeated default by the lessee". In other words the lessor could terminate the leasing agreement either where the lessee's default was serious or, if less serious, nevertheless repeated.

Mr GUITARD (Spain) stated that he could accept the French proposal as it reflected the thrust of that of his own delegation.

The CHAIRMAN enquired whether there was support for the proposal of the representative of France.

Mr CASTILLO (Colombia) supported the French proposal.

Mr FELSBERG (World Leasing Council) expressed some hesitations regarding the use of the word "repeated" as payment schedules varied very considerably from one leasing agreement to another and there were certain circumstances in which the use of the word "repeated" would not be appropriate.

Mr RICHARDS (Antigua and Barbuda) believed the word "substantial" to be more appropriate than some of the other alternatives suggested. It corresponded to the concept of "fundamental breach" in Common Law jurisdictions and had the added advantage that the judge could in each case decide on the facts of the case whether the default had indeed been sufficiently "substantial" to trigger the mechanism of paragraph 2.

Mr BRENNAN (Australia) stated a preference for the retention of the word "substantial". If the "repeated default" were to consist of a number of relatively minor events, the nature of the default would no longer be "substantial" and this would not accord with the purpose of Article 11.

Mr GOODE (United Kingdom) found the word "substantial" to be quite adequate and supported its retention.

Mr SÁNCHEZ CORDERO (Mexico) expressed support for the French proposal.

Mr RÉCZEI (Hungary) stated that he too favoured the French proposal, although not unreservedly. If, for example, a lessor made no objections over a lengthy period to receiving monthly payments from the lessee on the 15th of each month rather than on the 1st, on which they were due, the lessor should be estopped from terminating the leasing agreement under Article 11(2) without first giving notice to the lessee that further late payments would be considered to constitute substantial default.

Mr GOODE (United Kingdom) considered that if the French proposal were to be accepted then in the English text it would be preferable to employ the word "persistent" rather than "repeated" so as to cover omissions as well as positive acts.

The CHAIRMAN concluded from the discussions that the present text of Article 11(2) was deemed to cover some cases of persistent default by the lessee, but not necessarily all. The question of substance before the Committee was whether it wished to expand the lessor's right to terminate the leasing agreement also to situations in which the lessee repeatedly committed minor defaults. Some delegations believed that the term "substantial" covered all defaults which ought to be covered and had objected to the possibility of the lessor terminating the contract on the basis of several minor defaults by the lessee while others were prepared to admit termination in such cases, perhaps subject to the giving of adequate notice.

He asked the representatives of France and Spain whether they would find it acceptable to reflect their views in the English text by using the word "persistent" rather than "repeated" if the proposal were to be adopted.

Mr BERAUDO (France) considered the question to be one simply of drafting. The word
"persistent" would not be appropriate in French but he could see no objection to maintaining the term "répété" and rendering it in English by the word "persistent".

The CHAIRMAN proceeded to an indicative vote as to whether delegations wished to adopt the proposal to include the words "or persistent" after "substantial" in the chapeau of paragraph 2 from which it emerged that fourteen delegations favoured the proposal with nineteen against and one abstention.

The CHAIRMAN concluded that it was not the wish of the Committee to adopt the proposal.

The CHAIRMAN enquired whether there was support for the proposal by Pakistan in CONF. 7/3 Add. 2 to delete the word "all" before "reasonable steps" at the end of paragraph 2(b). In the absence of any such support he concluded that it was the wish of the Committee not to accept the proposal.

The CHAIRMAN drew attention to a proposal by Switzerland in CONF. 7/3 Add. 1 which he considered to be a question of drafting as it was to the effect that either paragraph 5 should be redrafted or paragraphs 2 to 5 reordered. He suggested that the Committee defer discussion on the point until it embarked on its consideration of paragraph 5.

It was so agreed.

The CHAIRMAN mentioned that three points were still outstanding in connection with the United Kingdom redraft of paragraph 2 contained in CONF. 7/C.1/W.P. 14, the first of which was a proposal to insert in the chapeau a reference to acceleration of payment of rentals.

Secondly, it was proposed to substitute the word "damages" for "compensation" in subparagraph (b) which he deemed to be a purely drafting matter that could be referred to the Drafting Committee.

It was so decided.

Thirdly, the United Kingdom delegation proposed the deletion of the words "except in so far as the lessor has failed to take all reasonable steps to mitigate its loss" at the end of paragraph 2(b) and to insert them in a new paragraph 4.

Mr GOODE (United Kingdom) stated that his delegation was withdrawing its proposal to insert a reference to acceleration of payment of rentals in the chapeau of paragraph 2 as it amounted to an unintended substantive amendment to the text. He agreed with the Chairman that the second proposal was one of drafting while the third, concerning the lessor's duty to mitigate its loss, was intended to make it clear that the duty should govern not only cases where damages were left to be assessed by the court but also those where the leasing agreement provided the mode of computation of damages since in both cases it would be unreasonable for the lessor to exact payment in respect of loss resulting from its own unreasonable behaviour.

Mr RONCORONI (Switzerland) asked whether the two remaining United Kingdom proposals could not be referred to the Drafting Committee as there seemed to be no disagreement as to substance.

The CHAIRMAN noted that the last proposal was in substance one to expand the applicability of the closing language of paragraph 2(b) since by transferring it to the new paragraph 4 it would now apply also to paragraph 2(a) and to paragraph 3.

Mr GOODE (United Kingdom) stated that the Chairman's interpretation was correct.

Mr SANTOS (Philippines) supported the proposal of the United Kingdom delegation for a new paragraph 4 embodying language formerly contained in paragraph 2(b).

Mr BERAUDO (France) recalled that the obligation to mitigate loss had become a general
principle of contract law and he saw no difficulty in its applying to the lessor in all the circumstances which the United Kingdom proposal seemed to encompass. If that were indeed the case then he agreed that the question could be referred to the Drafting Committee.

Mr MOONEY (United States of America) stated that his delegation also could support the United Kingdom proposal if its understanding of that proposal was correct. He assumed that even if there were a liquidated or stipulated damages clause, it would still be possible for the lessor not to be required to do anything in situations such as those where the formula used in the agreement gave the lessee all the benefits it would receive through mitigation but there was simply an agreed formula or standard, for example instead of the lessor selling or releasing the equipment there might be a requirement for an appraisal of the equipment to determine the amount of credit the lessee should receive with respect to loss of use of the equipment. If this was the case then his delegation could accept the general principle that the overriding concept of mitigation should not be undercut by the Convention.

Mr GOODE (United Kingdom) stated that the representative of the United States had fully understood the thrust of the United Kingdom proposal.

Mr RÉCZEI (Hungary) expressed support for the United Kingdom proposal which reflected a general rule in almost all countries.

Mr ROLLAND (Federal Republic of Germany) stated that his delegation also supported the United Kingdom proposal. Paragraph 4 should cover the case contemplated by paragraph 3 because if the lessor failed to take all reasonable steps to mitigate its loss then by applying paragraph 3 alone it might be argued that the compensation would be disproportionate.

The CHAIRMAN enquired whether there were objections to the United Kingdom proposal for a new paragraph 4 and after establishing that there were none he deemed the proposal to be adopted and suggested that the provision be referred to the Drafting Committee.

It was so decided.

Mr JACOBSSON (Sweden) stated that his delegation wished to reintroduce the United Kingdom proposal to insert in the chapeau of Article 11(2) the words “may also accelerate payment of the rentals”. This would make it clear that the right to accelerate the payment of rentals was dependent upon the lessee’s default being substantial.

The CHAIRMAN asked whether there was support for the Swedish proposal.

Mr FERRARINI (Italy) stated that he was opposed to the proposal. Acceleration of payment of rentals was not a general remedy under Article 11 as paragraph 5 provided that the lessor was entitled to the remedy of acceleration only if a term of the contract permitted it.

Mr STAUDER (Switzerland) saw the Swedish proposal as tackling a problem related to the understanding of paragraphs 2, 4 and 5, in particular as regards the question of whether the right to enforce an acceleration clause for payment of the rentals required an express clause to that effect in the agreement. He felt that Article 11 should give the lessor the option of either terminating the agreement or accelerating payment of the rentals. In the light of the work done in Rome, this latter possibility did not exist ex lege but had to be expressly provided for in the agreement. His proposal would therefore be identical to the United Kingdom proposal which had been withdrawn, with the significant difference that the right to enforce accelerated payment of the rentals would be based on an express term in the agreement. In his view his proposal would have the advantage of making it clear that in the case of substantial default by the lessee, the lessor had two causes of action open to it.

The CHAIRMAN asked if there was support for the Swiss proposal.

Mr BRENNAN (Australia) considered that there was a complication arising from the present
draft of Article 11 and believed that the Swiss proposal would help in overcoming that difficulty. He could therefore support the reordering suggested in the Swiss proposal.

Mr SANTOS (Philippines) expressed the opinion that the reintroduction of the United Kingdom proposal which had been withdrawn would unnecessarily burden lessees. Under paragraph 1 of Article 11 the lessor could only recover accrued unpaid rentals but also damages which he took as referring to actual damages, including liquidated damages. To adopt the Swedish proposal could make it difficult for the lessee to comply with the terms of the agreement.

Mr BERAUDO (France) fully supported the Swiss proposal. He pointed out, however, that the United Kingdom proposal which had earlier been adopted tended to reinforce the idea running through all the paragraphs of Article 11 that the lessor must take all reasonable steps to mitigate its loss. The amendment had the effect of bringing paragraph 4 and paragraph 2(b) much closer together and perhaps even of making them identical. The Swiss proposal was similar and it would be for the Drafting Committee to present the text in such a way that it could reflect the general principle of the lessor’s obligation to mitigate its loss.

Mr JACOBSSON (Sweden) stated that the aim of his proposal was to protect the lessee, not to burden him. If nothing was said in Article 11(2) regarding the nature of the events which would entitle the lessor to accelerate payment of rentals, then it would be able to do so for a very minor default by the lessee. If the lessor were to exercise its right to accelerate payment of rentals in such circumstances and the lessee were unable to make payment, the lessor might then treat this as substantial default and terminate the leasing agreement, which would in effect be a means for the lessor to circumvent the “substantial default” requirement.

Mr MOONEY (United States of America) agreed with the representative of France that the question was essentially one of drafting, if he was himself correct in his belief that a consensus had emerged on three points: first that for the lessor to accelerate the payment of rentals, provision for such acceleration must have been made in the leasing agreement; second that the activation of such a clause was subject to the overriding principle of mitigation of loss and third that the lessor could only exercise its right of acceleration if the lessee had been guilty of substantial default.

The CHAIRMAN explained that the interpretation of the representative of Sweden was based on a concern that a minor default by the lessee might bring about an acceleration of rentals for which provision had been made in the leasing agreement and that inability or failure on the part of the lessee to comply could then be treated by the lessor as a substantial default justifying termination of the leasing agreement. In other words the question was whether the operation of an acceleration clause could in effect turn what had initially been a minor default into a substantial one.

Mr GOODE (United Kingdom) explained that the reason for his delegation’s wishing to delete the reference to acceleration of the payment of rentals in its proposal for the chapeau of paragraph 2 in CONF. 7/C.1/W.P. 14 had been that the effect of retaining it would, in cases of substantial default, have been to allow acceleration of the payment of rentals in the absence of any provision in the leasing agreement to that effect. This had not been intended.

As regards the concern expressed by the representative of Sweden, if the lessor were to invoke a contractual clause permitting acceleration of rentals and then to terminate the leasing agreement, paragraph 4 of the basic text would come into operation with the consequence that the lessor could not rely on the acceleration clause although it might be taken into account when assessing the damages.

Mr STAUDER (Switzerland) stated that if he had correctly understood the representative of the United States, the proper interpretation of Article 11 was the following. First, it was only in the event of substantial default by the lessee that payment of the rentals could be accelerated. Second, such a sanction must be provided for expressly in the leasing agreement and, third, the lessor was obliged to take all reasonable steps to mitigate its loss. He could agree with this analysis but insisted
on the need to make it clear that the prohibition on the lessor’s terminating the agreement and accelerating payment of the rentals be maintained.

The CHAIRMAN enquired whether, in view of the explanation provided by the representative of the United Kingdom, the representative of Sweden still wished to have his proposal put to a vote.

Mr JACOBSSON (Sweden) considered that the problem alluded to by the representative of the United Kingdom could be solved quite simply by indicating that the lessor may invoke an acceleration clause or terminate the leasing agreement, although it would be necessary to specify that an acceleration clause must have been contained in the agreement. He would not however insist on his proposal if no delegation supported it.

The CHAIRMAN noted that the Swedish proposal had not been formally withdrawn but that there was an agreement as to substance and that an appropriate form of drafting of paragraph 2 should be found to reflect the interpretation of the representatives of the United Kingdom and the United States of America.

Mr CASTILLO (Colombia) expressed some doubts as to the idea that the lessor might either accelerate payment of rentals or terminate the leasing agreement in the event of substantial default and he enquired whether the lessor would be allowed to invoke the acceleration clause and at the same time maintain the leasing agreement, which he saw as being unfair on the lessee.

The CHAIRMAN considered it to be clear from the discussions that the lessor must exercise a choice between termination and acceleration of rentals and suggested that the proper construction of Article 11 would be first that acceleration would be possible only under a provision of the leasing agreement, second that it would be subject to mitigation by the lessor and third that it could only be activated by substantial default on the part of the lessee. If there was a consensus on those points then the Drafting Committee should be requested to find a suitable formulation.

Mr CASTILLO (Colombia) suggested postponing submission of paragraph 2 to the Drafting Committee until the Committee of the Whole had considered paragraph 5 of the United Kingdom proposal in CONF. 7/C.1/W.P. 14.

The CHAIRMAN agreed that Article 11 would be submitted to the Drafting Committee in its entirety.

**Paragraph 3**

The CHAIRMAN noted that there were three proposals relating to this paragraph and invited the representative of the United Kingdom to introduce what appeared to be merely a drafting proposal contained in CONF. 7/C.1/W.P. 14.

Mr GOODE (United Kingdom) stated that the amendment to the latter part of paragraph 3 was similar to that already adopted in connection with paragraph 2 in that the words “compensation is” would be replaced by “damages are”.

The CHAIRMAN drew attention to a comment by Japan in CONF. 7/3 relating to the last part of paragraph 3.

Mr KATO (Japan) stated that his delegation’s proposal was applicable both to the United Kingdom proposal and to the basic text. He suggested that the word “substantially” be included before the word “disproportionate”.

Mr GOODE (United Kingdom) considered that the point at issue was a linguistic one. In English the word “disproportionate” in effect meant “substantially disparate” or “substantially divergent from” and therefore the notion of “substantially” was already embodied in the English text.

Mr MOONEY (United States of America) concurred with the explanation given by the repre-
sentative of the United Kingdom that the question was a linguistic one that could be left to the Drafting Committee.

Mr BERAUDO (France) stated that the word “disproportionnée” in the French text conveyed exactly the same meaning as “disproportionate” in English in that it established that there was no valid correspondence between the compensation provided for in paragraph 2(b) and that contemplated by paragraph 3. He feared that the addition of an adverb would bring about more confusion than clarity.

The CHAIRMAN enquired whether it would be sufficient to leave it to the Drafting Committee to examine the language of the provision on the understanding that the word “disproportionate” in the English text and “disproportionnée” in the French encompassed the idea of the difference between the two amounts being substantial.

Mr KATO (Japan) reiterated his wish that the word “substantially” be added since he feared that without it liquidated damage clauses in leasing agreements would be rarely applied. Moreover, he drew attention to the fact that Article 8 of the UNCITRAL Uniform Rules on contract clauses for an agreed sum due upon failure of performance used the words “substantially disproportionate”.

Mr BERAUDO (France) considered that while it might be possible to find more appropriate language in English, the French text clearly expressed what was intended, namely that while the amount of damages calculated under paragraph 3 could well, and probably would, differ from that computed under paragraph 2(b), the difference must not be excessive. He insisted that the Japanese proposal would, if applied to the French text, have the effect of obscuring the meaning of the provision.

The CHAIRMAN suggested that paragraph 3 be submitted to the Drafting Committee with a direction that it consider the possibility of finding language which would satisfactorily reflect what seemed to be a consensus regarding the substance of the provision, on the understanding that any change which might be made to the English text need not necessarily affect the French version.

It was so agreed.

The CHAIRMAN drew attention to the third proposal concerning paragraph 3 which had been submitted by the United States delegation in CONF. 7/C.1/W.P. 11 and which contemplated the addition of a new sentence at the end of the provision.

Mr MOONEY (United States of America) stated that the substance of the concerns which had led his delegation to make its proposal were adequately treated in paragraph 5 of the United Kingdom proposal in CONF. 7/C.1/W.P. 14.

The CHAIRMAN suggested that in the event of the wording suggested by the United Kingdom for paragraph 5 not being adopted, then the United States delegation might wish to revert to its proposal.

It was so agreed.

Paragraph 4

The CHAIRMAN called upon the representative of the United Kingdom to explain his delegation’s proposal in CONF. 7/C.1/W.P. 14 for a new paragraph 5 which would replace paragraph 4 of the basic text.

Mr GOODE (United Kingdom) stated that the proposed amendment was one of drafting rather than substance. It was suggested adding the words “but the value of future rentals under the leasing agreement may be taken into account in computing damages under paragraphs 2(b) and 3 of this article”. This addition was not intended to alter the text but simply to remove an ambiguity which
had troubled some readers of the original text.

Mr REBMANN (Federal Republic of Germany) considered that the United Kingdom proposal would clarify the text and that it constituted a considerable improvement.

Mr STAUDER (Switzerland) agreed that the United Kingdom proposal might clarify the scope of paragraph 2(b) but he expressed doubts at the need for such detail in a Convention intended to establish general principles. He was therefore of the opinion that it was unnecessary to add the proposed language.

Mr REBMANN (Federal Republic of Germany) recalled that paragraph 2 of Article 11 offered the lessor two possibilities, namely to accelerate the payment of rentals or to terminate the leasing agreement. Many readers in his country had understood Article 11 in the sense that if the agreement were to be terminated it would not be possible to take account of future rentals, which had not been the intention of the committee of governmental experts.

The CHAIRMAN noted that no objections had been made to the idea underlying the United Kingdom proposal. To that extent the matter seemed to be one of drafting rather than of substance. If that were the case then he saw no need for a lengthy discussion on the matter and suggested that it be referred to the Drafting Committee which would take account of the explanation of the representative of the United Kingdom and of the comments of the Swiss delegation.

Mr BERAUDO (France) shared the views of the representative of Switzerland. He feared that in an attempt at clarification there was a risk of giving the impression of stressing certain points and not others. Moreover the emphasis had hitherto been one-sided in that the clarifications requested had generally related to the rights of the lessor so as to give them the broadest possible interpretation. The rights of the lessee on the other hand had been expressed only in terms of general principles. The text should as far as possible be drafted in general and neutral terms and if there was a need to reflect in the Convention the idea underlying the United Kingdom proposal, as to the substance of which he was in agreement, then this should be done by redrafting Article 11(2)(b).

Mr MOONEY (United States of America) agreed with the views expressed by the representative of the Federal Republic of Germany. As to the statement of the representative of France he recalled that the need to clarify the exact meaning of Article 11 had arisen principally from the exaggerated attention that had been paid to its provisions as a result of the fact that Article 14 provided that it was not possible to derogate from the paragraph under discussion.

The CHAIRMAN reiterated his understanding that the addition of the language proposed by the United Kingdom representative at the end of paragraph 4 of the original text was a matter of drafting rather than of substance and that the only question before the Committee was whether the idea contained in the language of the United Kingdom proposal should be reflected in the text or not.

Mr SANTOS (Philippines) agreed that the issue was one of drafting. What should however be borne in mind was that according to Article 11(2), if the lessee's default was substantial, the lessor was entitled to terminate the leasing agreement and to recover possession of the equipment as well as damages. A description of those damages was given in paragraph 5, the second part of which took into consideration the value of future rentals under the leasing agreement. In consequence, a reading of paragraph 2 together with paragraph 5 could suggest that the lessor would be entitled to recover possession of the equipment and also to collect future rentals.

Mr GOODE (United Kingdom) stated that the thrust of his delegation's proposal was in the first instance to make it clear that the lessor could not claim rentals as such during the period after the leasing agreement had come to an end. What could be received were damages under paragraph 2 and in computing those damages the lessor would be entitled to take account of the loss of its bargain. In other words the court would, when assessing damages, have regard to the fact that if the agreement had run its full course the lessor would have received the rentals. The loss of the rentals
would thus be the starting point for the court's assessment of damages but the value of the repossessed equipment would have to be taken into account as a deduction when computing damages. There was therefore no question of the lessor being enabled to recover the equipment and payment of future rentals and indeed Article 11(2) made it quite clear that the lessor's right of reposition and entitlement to damages were subject to paragraph 5 of the article.

Mr SANTOS (Philippines) stated that he could accept the concept explained by the representative of the United Kingdom and requested that the matter be referred to the Drafting Committee so as to ensure that the final text would reflect the idea that there would be no double recovery by the lessor after substantial default by the lessee.

Mr RÉCZEI (Hungary) suggested that the proper place for the provision under discussion would be either as paragraph 2 or at the end of Article 11.

Mr GOODE (United Kingdom) agreed with the representative of Hungary that the most appropriate place for the provision would be at the end of Article 11 as this would meet the concern of the Swedish delegation that it be perfectly clear that when considering the value of future rentals for the purpose of assessing damages regard should also be had to the lessor's duty to mitigate its loss. The order of paragraphs 4 and 5 of the United Kingdom proposal should therefore be reversed.

In the absence of any further proposals regarding paragraph 4 the CHAIRMAN suggested that it be referred to the Drafting Committee.

It was so decided.

Paragraph 5

The CHAIRMAN noted that the United Kingdom proposal for paragraph 6 in CONF. 7/C.1/ W.P. 14 involved no changes to paragraph 5 of the basic text. There was in addition a proposal by the delegation of Switzerland in CONF. 7/3 Add. 1 which appeared to be of a drafting nature and he enquired whether the proposal was still on the table in view of the amendments that had been made to the provisions of Article 11.

Mr STAUDER (Switzerland) recalled that Article 11 was in the process of being remodelled. As the representative of Hungary had pointed out, the order of paragraphs 4 and 5 of the United Kingdom proposal as originally submitted could give rise to differing interpretations but the reordering of the provisions of Article 11 could itself pose new problems. In view of the consensus reached during the discussions on matters of substance he would however confine himself to one question, namely: if the lessor were to take advantage of a clause permitting the accelerated payment of rentals, would its obligation to mitigate its loss include a duty to accord the lessee a deduction equivalent to the benefit derived by the lessor from the earlier payment of the rentals? If the answer were affirmative, his delegation would not press its proposal in CONF. 7/3 Add. 1 to add a new paragraph 6 to Article 11. If not, then he would like the proposal to be discussed, since it seemed that the solution it recommended corresponded to existing practice as evidenced in the comments submitted by the Asian Leasing Association (CONF. 7/4).

The CHAIRMAN enquired whether the Committee was of the opinion that Article 11 should be interpreted in conformity with the view expressed by the representative of Switzerland.

Mr BERAUDO (France) expressed full agreement with the position of the Swiss delegation. In addition, if in the course of its dealings with the lessee, the lessor were for some other reason to receive payments in advance from the lessee after their respective rights and obligations had been established, then the lessor should reimburse benefits deriving from such over-payments. This was a matter which the Drafting Committee should address by making it clear that the duty to mitigate loss extended also to such situations.

The CHAIRMAN noted that there seemed to be no objections in the Committee to interpreting
Article 11 in the manner suggested by the delegations of Switzerland and France and he enquired whether the representative of Switzerland would in those circumstances be prepared to withdraw his delegation’s proposal to add a new paragraph 6.

Mr STAUDER (Switzerland) stated that in principle he was willing to withdraw his delegation’s proposal. He insisted on the need to limit the Convention as far as possible to the enunciation of general principles but if the proposal which had earlier been made to spell out the lessor’s rights under paragraph 4 were to be endorsed by the Drafting Committee then the same should be done in respect of the rights of the lessee as reflected in the Swiss proposal in CONF. 7/3 Add. 1.

The CHAIRMAN noted that no further proposals remained in respect of Article 11 and suggested therefore that the article, as amended, be referred to the Drafting Committee with the directions to reflect the proper interpretation of the word “disproportionate”, the order of paragraphs, bearing in mind the suggestions made by the representatives of Hungary and of Switzerland, the general formulation of the provision dealing with mitigation of loss and any other amendments made during the discussions.

It was so decided.

The meeting was adjourned at 11.20 a.m. and resumed at 11.45 a.m.

Article 12

Paragraph 1

The CHAIRMAN noted a proposal by Spain in CONF. 7/3 concerning the effect of an assignment by the lessor on the duty to pay rentals and requested the representative of Spain to introduce the proposal.

Mr GUITARD (Spain) stated that the proposal did not deal with the duties of the lessee per se but rather with certain incidental duties such as the place or time for paying rentals or returning equipment at the end of the leasing transaction. If such elements were altered as a result of an assignment by the lessor as provided for in paragraph 1 they should be notified to the lessee in writing.

The CHAIRMAN pointed out that the proposal was distinct from that of the Swiss delegation which would be considered shortly and asked for comments on the Spanish proposal.

Mr MOONEY (United States of America) expressed concern at the wording of the proposal since it implied that a unilateral act by the lessor in giving notice might somehow impair or modify the lessee’s rights under the leasing agreement.

Mr REBMANN (Federal Republic of Germany) recalled that, as a general rule, assignment of the rights of the lessor to a third person could not change the duties of the lessee. He was, therefore, hesitant to include in the Convention a clause of the kind suggested by the representative of Spain as it gave the impression that the duties of the lessee could be changed by virtue of a transfer or an assignment by the lessor which should not be the case.

The CHAIRMAN understood the comment by the representative of the Federal Republic of Germany as meaning that the question of the effect of the assignment of specific duties should be left to national law.

Mr BRENAN (Australia) shared the opinion of the representative of the Federal Republic of Germany and preferred to retain paragraph 1 of Article 12 as drafted in the basic text.

Mr PIŠEK (Czechoslovakia) supported the views of the representative of the Federal Republic of Germany as he was opposed to the possibility of the lessee’s duties being changed unilaterally.
Mr GUITARD (Spain) explained that his proposal did not refer to the unilateral act of the lessor’s transferring its rights under the leasing agreement. What he had in mind were merely incidental elements such as the address to which payment should be sent.

The CHAIRMAN put to the vote the Spanish proposal contained in CONF. 7/3.

The proposal was rejected by twenty-six votes to one, with one abstention.

The CHAIRMAN drew attention to two proposals by Switzerland in CONF. 7/3 Add. 1.

Mr STAUDER (Switzerland) stated that he would initially confine his remarks to his delegation’s comments on paragraph 1 of Article 12. His concern was to be sure that the interpretation to be given to the provision would allow a lessee to raise against an assignee those defences that it might have raised against the lessor. In addition he noted that paragraph 2 described the effects of assignment on the lessor and in his view paragraph 1 should achieve a certain parallelism by indicating the effects of the assignment on the lessee.

Mr GOODE (United Kingdom) considered the interpretation of the representative of Switzerland to be the correct one, or, to refine it, one could say that the effect of the transfer was governed by the applicable law and it seemed to be a fairly universal rule that a transfer cannot affect the rights of the other party. The reason paragraph 2 appeared was that, although at first sight one might think that a lessor might not be prejudiced by a transfer of the use of the equipment when its legal rights would be unaffected, the position in practice was that once the control of the equipment, its use and the financial benefits had moved away from the lessee to the third party, that might adversely affect the lessee’s ability to fulfil its obligations under the leasing agreement. It was for this reason that there was a divergence between paragraphs 1 and 2 as the same considerations did not apply in cases where the lessor transferred its rights.

The CHAIRMAN enquired whether the representative of Switzerland found this explanation to be satisfactory.

Mr STAUDER (Switzerland) stated that he was fully satisfied.

The CHAIRMAN suggested that no decision on the matter was needed and that the discussion that had been held be reflected in the summary records. He then asked the representative of Switzerland whether he maintained his proposal regarding Article 12(2).

Paragraph 2

Mr RONCORONI (Switzerland) stated that he wished to maintain his delegation’s proposal to amend paragraph 2 since he did not consider it an appropriate solution that the validity of the assignment should be subject to the consent of the lessor. He understood, however, that the Canadian delegation would be making a proposal in that regard which he would support.

The CHAIRMAN enquired of the Canadian delegation whether it intended to submit a proposal and, if so, the nature of its contents.

Mr SAMSON (Canada) stated that he supported in principle the Swiss proposal. He believed however that there could be circumstances in which the lessor might reasonably object to an assignment by the lessee of its right to the use of the equipment and suggested adding the words “[t]he lessor may object on reasonable grounds to the assignment of the right to the use of the equipment”.

The CHAIRMAN asked whether he correctly understood the proposal of the Canadian delegation as being to insert the word “assign” in paragraph 2.

Mr SAMSON (Canada) suggested that the question of whether an amendment should be made
to Article 12(2) or a new paragraph included was one which might be referred to the Drafting Committee.

The CHAIRMAN considered that it would at this stage be helpful if a specific proposal could be submitted for discussion.

Mr MOONEY (United States of America) expressed concern as to inserting precise and perhaps subjective standards into the conditions for transfer by a lessee. In connection with an assignment by a lessor, the lessee was normally fully protected as long as it complied with its leasing obligations and, because financial lessors would not be expected to have obligations of maintenance or servicing etc., lessees would normally be indifferent as to whom they paid the rentals and for whom they were obliged to maintain the equipment. On the other hand, from the lessor's standpoint, the nature of the person in possession and control of the equipment was a very important consideration. He suggested that this was why the committee of governmental experts had struck the balance in the way that it had. On the other hand, in circumstances where a lessee desired flexibility, it was quite usual for the parties to negotiate certain standards for the kind of persons to whom a lessee might assign its rights.

He urged therefore that the Committee allow the matter to be left to the contract but if the Committee did not see fit to do that and if some standard were to be imposed, perhaps wording such as "[t]he lessor shall not withhold consent unreasonably" might commend itself to the Committee. This standard would require an objective test that would not allow a lessor to withhold consent in circumstances where there could be no possible harm or risk. His delegation's preference however would be to retain the existing text.

The CHAIRMAN saw difficulty in discussing a proposal and amendments to it, none of which had been submitted in writing, and enquired first whether he had correctly understood the Canadian proposal as being that the lessor's consent would not be necessary for the lessee to transfer its rights, with the exception of the right to use of the equipment when such consent would be required.

Mr SAMSON (Canada) stated that his delegation supported the Swiss proposal that the lessee should be able to assign all its rights under the leasing agreement without the consent of the lessor, except for the right to use of the equipment in respect of which the lessor should be entitled to object if it had reasonable grounds for so doing.

Mr RICHARDS (Antigua and Barbuda) endorsed the views expressed by the representative of the United States of America that the lessor's consent should be necessary for a transfer of rights by the lessee to a third party although he could accept the addition of language such as "and provided that such consent shall not be unreasonably withheld".

Mr FELSBERG (World Leasing Council) recalled that in practical life a lessor would, prior to concluding a financial leasing agreement, take a credit decision which would be affected in particular by the lessee's creditworthiness. Once the credit operation had been approved, the lessor would at once disburse the necessary funds, after which few obligations would remain for it to discharge. The lessee, on the other hand, remained responsible for payment of rentals, maintaining the equipment, providing insurance, using it in accordance with the terms of the agreement, etc. It was his belief that any assignment of the rights of the lessee to a third party ought to be subject to a new credit decision on the part of the lessor and in consequence the lessor's consent should be sought before any transfer of rights was effected by the lessee.

The CHAIRMAN interpreted the statement of the observer of the World Leasing Council as constituting support for the basic text.

Mr RÉCZEI (Hungary) observed that there was a great difference between assigning a receivable and transferring the right to use equipment. For instance equipment could have been designed for a particular purpose for use by a lessee but if that equipment were to be used for a different purpose then it might be irreparably damaged. The lessor must therefore know the user of the equipment and the use to which the equipment was to be put. This would be impossible if the
lessee’s rights could be assigned or transferred to another party without the lessor’s consent.

The CHAIRMAN noted that, apart from the basic text, there were now two proposals before the Committee. The first was that orally submitted by the representative of Antigua and Barbuda, the effect of which would be to add the words “and provided that such consent shall not be unreasonably withheld” after the words “only with the consent of the lessor” in paragraph 2. The other was the written proposal by Switzerland in CONF. 7/3 Add. 1 according to which, “[s]ubject to the rights of third parties, the lessee may transfer the right to the use of the equipment or any other rights under the leasing agreement”. This proposal had been the subject of an oral amendment by the Canadian delegation which had proposed including language to the effect that the lessor would be entitled to object to the assignment if it had reasonable grounds, the question being left open whether such language should be included in paragraph 2 or in a new paragraph, which was however a drafting matter. Support had also been expressed for the basic text.

He suggested that the Committee start its discussion on the Swiss proposal as amended by the representative of Canada and called for comments on that proposal.

Mr ROLLAND (Federal Republic of Germany) stated that his delegation preferred the basic text. He believed that any addition to the text could give rise to uncertainty as regards the relationship between the parties. If however a majority favoured the proposal of the delegation of Antigua and Barbuda he could accept it but that was as far as he could go.

Mr BRENNAN (Australia) agreed with the position of the delegation of the Federal Republic of Germany.

Mr GOODE (United Kingdom) stated that his delegation’s position was also in line with that of the delegation of the Federal Republic of Germany.

The CHAIRMAN invited the Committee to proceed to an indicative vote in respect of the three proposals before the Committee.

*Four delegations favoured the Swiss proposal as amended by the Canadian delegation, twenty the basic text, and seven the basic text as amended by the delegation of Antigua and Barbuda.*

The CHAIRMAN proposed that the Committee proceed to a formal vote.

Mr RONCORONI (Switzerland) stated that in the circumstances his delegation would withdraw its proposal.

Mr RICHARDS (Antigua and Barbuda) stated that he too was withdrawing his delegation’s proposal.

The CHAIRMAN enquired as to whether there was any objection to the basic text. In the absence of objections and of any other proposals on Article 12, he suggested that Article 12 as a whole be referred to the Drafting Committee.

*It was so decided.*

*Article 13*

The CHAIRMAN noted two proposals relating to Article 13, the first of which, submitted by the United Kingdom delegation in CONF. 7/C.1/W.P. 1, concerned the place of the article in the Convention and seemed to him to be only a drafting matter that might be considered after the substantive discussion on the article. The second proposal, or rather comment, on Article 13 had been made in the Japanese observations to be found in CONF. 7/3 which drew attention to what was seen as the unclear relationship between paragraphs 1 and 2 of the article. He invited the representative of Japan to introduce his observations.
Mr KATO (Japan) recalled that Article 13 was composed of two paragraphs. Paragraph 1 seemed to provide for the case of a lease followed by a sub-lease transaction whereas paragraph 2 contemplated a leasing transaction and a number of subsequent sub-lease agreements. It appeared to him that paragraph 1 was subsumed by paragraph 2 and if that were the case then paragraph 1 could be deemed superfluous and the question would then be one simply of drafting. If this were not the case however he would welcome elucidation regarding the different purposes of the two paragraphs.

Mr MOONEY (United States of America) stated that he too felt some concern as to the precise drafting of Article 13 which he understood to be shared by the United Kingdom delegation and in these circumstances he agreed that the wording of the article should be carefully considered by the Drafting Committee. It was his understanding that the intention of paragraph 1 was to identify the lessor at the top of the chain as a supplier to a sub-lessee in a financial leasing transaction. On the other hand, the purpose of paragraph 2 was to deal with the special situation where there would be more than one financial lessor, in which case, and relying on the general rule, it could be interpreted so as to make a financial lessor in the chain a supplier which was not what was intended.

The CHAIRMAN noted that no proposal had been made for the amendment of the substance of Article 13 and that the issue raised by the representative of Japan could be referred to the Drafting Committee. He was, however, a little uneasy at following that course of action as, depending on the answer to the question raised by the Japanese delegation, it might transpire that an element of substance was involved.

Mr REBMANN (Federal Republic of Germany) considered that paragraph 1 should be deleted as its content was already covered by paragraph 2.

The CHAIRMAN stated that if paragraph 1 could be seen simply as a special situation that might be dealt with by paragraph 2 then the Drafting Committee could be entrusted with finding an appropriate solution.

Mr MOONEY (United States of America) considered that the situation might be clarified by the use of a hypothetical case. If a manufacturer of aircraft were to lease an aircraft to a financial institution which in turn sub-leased it to a user, that sub-lease transaction ought to be a financial leasing transaction for the purposes of the Convention while the manufacturer’s lease would not. In other words there would not be a series of financial leasing transactions but rather an operating lease followed by a financial sub-lease. Such a situation would fall within the scope of paragraph 1 but not that of paragraph 2.

Mr GOODE (United Kingdom) observed that the Drafting Committee would make every effort to remove any possible duplication in the article without altering its substance.

The CHAIRMAN believed that the issue before the Committee fell on the borderline between substance and drafting. It was his assumption that it was intended that the Convention address both situations contemplated by paragraphs 1 and 2 of Article 13 and he suggested that the Drafting Committee be directed to attempt to simplify the article.

Mr REBMANN (Federal Republic of Germany) considered that the problem could be solved by including the words “[i]n the case of two or more transactions” in paragraph 2.

The CHAIRMAN having ascertained that there were no further proposals or comments on Article 13 he proposed that the article be referred to the Drafting Committee.

It was so decided.

Mr GOODE (United Kingdom) reverted to his delegation’s proposal that Article 13 be brought forward in the Convention to become Article 2.

The CHAIRMAN noted that there were no objections to the proposal being treated as one of
drafting and suggested that Article 13 as a whole be referred to the Drafting Committee.

*It was so decided.*

**Proposed new Article 13 bis**

The CHAIRMAN drew attention to a proposal by the delegation of Colombia for an Article 13 bis (CONF. 7/C.1/W.P. 23) concerned with renegotiation and settlement of disputes and he asked the representative of that delegation to introduce his proposal.

Mr CASTILLO (Colombia) stated that his delegation’s proposal was in line with the draft preamble to the Convention and in particular that part which referred to the awareness of States Parties of the need to make financial leasing more available to developing countries, one of the main problems of which was the instability of political and economic circumstances and the resultant insecurity for foreign lessors. The main thrust of the proposal was two-fold, first to offer the necessary guarantees to international lessors so as to encourage them to deal with lessees in developing countries and second to permit the restoration of equity amongst all three parties to a financial leasing transaction.

In response to a suggestion that the content of the article could assume the form of a contractual provision instead of being included as an article in the Convention, he expressed the belief that it should be affirmed prior to the negotiation of international financial leasing transactions involving developing countries and in effect constitute a *rebus sic stantibus* clause in all such contracts. There would thus be a necessary framework for international lessors contemplating the lease of equipment in developing countries and a mechanism ensuring the maintenance of equity in relation to the rights and obligations of the parties during the performance of the leasing contract.

The CHAIRMAN suggested that the Committee first restrict its consideration to the question of whether or not to include in the Convention a provision on the effect of macroeconomic events of the kind envisaged, without entering into detailed discussion of the mechanisms proposed by the Colombian delegation.

Mr KATO (Japan) expressed the opinion that if a provision on macroeconomic events were to be included in the Convention the result would be to introduce an undesirable element of unpredictability in relation to financial leasing transactions and he was therefore unable to support the Colombian proposal.

Mr DE PAIVA (Brazil) stated that he also had difficulties with the Colombian proposal. In the first instance he recalled that the Committee had yet to discuss the draft preamble, in respect of which his delegation was uneasy at the reference to making financial leasing more available to developing countries; he had not been able to identify any single article to which that reference could apply and did not believe that that was the purpose of the Convention.

He feared that the insertion of a reference to macroeconomic events, the meaning of which was not clear, would have the effect of introducing an element of instability into financial leasing transactions and it had in addition been his assumption that the committee of governmental experts in Rome had decided not to include such a provision. In conclusion he observed that the Conference had as yet discussed no mechanism for the settlement of disputes and for all those reasons he considered adoption of the proposal to be undesirable.

Mr SÁNCHEZ CORDERO (Mexico) indicated that his delegation was unable to support the Colombian proposal.

Mr RÉCZEI (Hungary) considered that the purpose of the Convention was to lay down limited rules governing international financial leasing transactions and not to regulate them in a comprehensive manner. The other uniform law Conventions, for example those dealing with the international sale of goods or international transport, contained no provisions concerning macroeconomic events or a *rebus sic stantibus* clause and he saw no reason why the Leasing Convention should do so.
The CHAIRMAN noted that there had so far been no support for the Colombian proposal.

Mr MOONEY (United States of America) stated that although his delegation sympathised with the motivation underlying the Colombian proposal it believed that there were more appropriate fora in which to continue the positive dialogue which had established a broad degree of cooperation with those States with an external debt problem and thereby avoided resort to legal enforcement of outstanding debt obligations. In addition, he believed that the incorporation of provisions of the kind envisaged by the Colombian delegation in the Convention would run counter to the credit policies of many financial institutions.

Mr CASTILLO (Colombia) stated that in the absence of support he would withdraw the proposal contained in CONF. 7/C.1/W.P. 23.

The CHAIRMAN thanked the representative of Colombia for his cooperation.

Article 15

The CHAIRMAN drew attention to a proposal by the delegation of China in CONF. 7/C.1/W.P. 6 concerning the wording of paragraph 2.

Ms ZHANG (China) stated that her delegation's proposal raised only a question of drafting and she suggested that it be forwarded to the Drafting Committee for consideration.

The CHAIRMAN noted that there were no comments on the Chinese proposal, from which he concluded that there was agreement that the matter was indeed only one of drafting. In the absence of any other proposals regarding Article 15 he suggested that the article be referred to the Drafting Committee with instructions to take into account the point raised by the Chinese delegation.

It was so agreed.

The meeting rose at 1.00 p.m.

CONF. 7/C.1/S.R. 11
18 May 1988

ELEVENTH MEETING

Monday, 16 May 1988, at 3.30 p.m.

Chairman: Mr Sevón (Finland)


Article 7 (continued)

The CHAIRMAN recalled that the Committee had concluded its deliberations on paragraph 1 of the article. Paragraph 2 had however given rise to extensive discussion in the course of which the delegation of the Federal Republic of Germany had indicated that it found neither of the two alternatives contained in the basic text to be entirely satisfactory and had submitted an intermediate proposal. Ultimately the Committee had decided to set up a small working group whose mandate had, in accordance with the terms of an indicative vote, been to elaborate a broadly acceptable solution in the form of an amended version of Alternative I. He invited the representative of
Australia to present the proposals submitted by the working group as contained in document CONF. 7/C.1/W.P. 27.

Paragraphs 2 and 3 (continued)

Ms PERT (Australia) stated that the working group had been composed of members of the delegations of Australia, Austria, Brazil, Canada, China, Egypt, the Federal Republic of Germany, Hungary and Japan, which represented a broad cross-section of the views that had been expressed on Article 7(2) and that the proposals submitted by the working group had been adopted unanimously by its members as a reasonable compromise.

As regards paragraph 2, this established a broad warranty by the lessor that the lessee’s quiet possession would not be disturbed by any person with a superior title or right, or who claimed a superior title or right and acted under the authority of the court, where the title, right or claim was derived from an act or omission of any person other than the lessee, a text similar to that of the former Alternative I. The proposed paragraph 3 constituted a prohibition on the limitation of the warranty, but only to the extent that the superior title, right or claim derived from an intentional or grossly negligent act or omission of the lessor, a solution which seemed to be consistent with the state of public policy of a number of Civil Law jurisdictions. In conclusion, she noted that the formulation required no further consideration of Article 7 in the context of Article 14 although some minor redrafting of that article would in due course be necessary.

Mr MOONEY (United States of America) complimented the working group on its attempt to find a compromise solution reflecting the various points of view expressed during the initial discussion on Article 7(2) and stated that his delegation could in principle support the new proposal. He had however to express some concern in relation to the proposed paragraph 3 which did not take sufficient account of the not uncommon case of sub-leases, especially in those situations where the lessee in a financial leasing transaction represented a strong party upon whom the lessor and those lending to the lessor might rely and the sub-lessee was a person whose credit-worthiness would not have been such as to have induced the lessor to conclude a leasing agreement with it. Typically in such situations the sub-lessee would agree that since the primary credit in the transaction was not its own credit it would sub-lease the equipment from the first lessee subject to the first lease. If then the lessee were to default, perhaps intentionally, this might expose the sub-lessee to interruption of its quiet possession. This was nothing more than recognition by the sub-lessee that its interest must yield to those of the original lessor and lessee and the United States delegation therefore proposed that the text of Article 7(3) as proposed by the working group be completed by the language “except where such superior title, right or claim is specifically identified in the leasing agreement”.

The purpose of the proposal was to make it clear that if there were to be any deviation from the general rule contained in paragraph 3 it would have to be specifically identified at the outset of the transaction and not a general exclusion of the lessor’s responsibility not to interfere with the lessee’s quiet possession. The situation addressed by his delegation’s proposal was an important one as it was not unusual for up to three sub-leases to be entered into in international financial transactions so as to permit more than one party to benefit from tax concessions in more than one country. While therefore being in agreement with the philosophy underlying the working group’s proposals, he felt that it would be undesirable for the provisions of the future Convention to impede the existing arrangements concerning sub-leases in international leasing transactions.

Mr BERAUDO (France) also congratulated the working group on having reconciled the widely differing views that had been expressed in connection with Article 7. The new text contained a paragraph 2 which was substantially similar to the former Alternative I while paragraph 3 provided that paragraph 2 was not of a mandatory character in regard to the relations between the lessor and the lessee. In principle, his delegation could endorse the spirit of the compromise solution but would express its content in a different way.

As drafted, paragraph 3 raised a problem of legal consistency because it was concerned with liability whereas what was being dealt with was the warranty of quiet possession. In fact, paragraph
1 embodied the principle known to most legal systems that the lessor grants the lessee a warranty whereas paragraph 2 allowed the lessor to provide for an exception in the leasing agreement, other than in cases of an intentional or grossly negligent act or omission of the lessor. Liability for such conduct was universally recognised and he saw therefore no need for making express provision for such an exception in Article 7(3). He therefore proposed the deletion of paragraph 3 and of the reference to paragraph 2 of Article 7 in Article 14. The effect would be that the lessor would be obliged to give the lessee a warranty against any disturbance of its quiet possession, except that resulting from an act or omission of the lessee itself. This would constitute a uniform rule which should be acceptable to all delegations and he feared that the proposal of the United States delegation risked destroying the compromise which it had proved so difficult to secure.

The CHAIRMAN enquired of the representative of the United States whether, in the event of the French proposal being accepted, the substance of his delegation's proposal would still be relevant.

Mr MOONEY (United States of America) stated that if the French proposal were to be accepted then the substance of his proposal would cease to be relevant as there would no longer be any restrictions on the possibility to derogate from the provisions of Article 7(2). Such a solution would however in his opinion be at variance with the essence of the compromise as he understood it.

Mr CUMING (Canada) agreed with the views expressed by the representative of the United States that to delete the proposed paragraph 3 of Article 7 would eliminate the compromise. It was perhaps the case that under the laws of some jurisdictions it was impossible to exclude liability for one's own acts but that was not a universal rule and such an exclusion could be made in Common Law jurisdictions. The effect of the French proposal would be to return to a situation where the lessor's warranty of quiet possession could be excluded by the agreement with the consequence that the lessee would have no protection.

Mr EL-KATTAN (Egypt) stated that his delegation supported the proposal of the working group as it stood.

Mr FERRARINI (Italy) expressed support for the French proposal even though it could create problems for some jurisdictions since the maintenance of paragraph 3 might suggest that the principle embodied in it applied only within the context of Article 7 and not in respect of other exemption clauses which might be included in leasing agreements.

Mr GOODE (United Kingdom) supported the French proposal although it went against the compromise. His delegation did not favour the compromise since it saw no reason to single out one warranty as non-excludable in an international Convention on international financial leasing when it was not mandatory under the present law of most States for domestic transactions. Although there ought to be some provision concerning quiet possession in the Convention, it should be possible to exclude it as this represented the existing law of the jurisdictions of most delegations present, and this was in itself a good reason for not seeking to impose change contrary to the domestic law of most States represented at the Conference. The first choice of his delegation would therefore be the French proposal but if that were not adopted then it could support the compromise solution with the modification suggested by the representative of the United States.

Mr RÉCZEI (Hungary) argued in favour of the compromise solution. It was of course true that under domestic legislation a party could not exclude its liability for intentional or grossly negligent conduct but to delete paragraph 3 could give rise to ambiguity and he preferred a clear statement in the Convention that there was a limitation on the lessor's right to exclude its liability.

With a view to clarifying the situation the CHAIRMAN invited delegations to express their first preference from among the three solutions put forward, namely the French proposal to retain Article 7(2) as proposed by the working group and to omit in Article 14 any reference to that provision, the United States proposal to add at the end of the working group's proposal for
Article 7(2) the language "except where such superior title, right or claim is specifically identified in the leasing agreement" and finally the compromise proposed by the working group.

Fourteen votes were cast in favour of the French proposal, two for the United States proposal and nineteen for the compromise solution of the working group.

Mr MOONEY (United States of America) withdrew his delegation’s proposal. It had been made out of a desire for clarification and he believed that the same result could hopefully be achieved through the construction either of the compromise proposal or of the French proposal in the sense that adoption of either of those proposals without the addition of the language proposed by his delegation would necessarily make the kind of agreements which it had in mind unenforceable.

Mr FELSBERG (World Leasing Council) suggested that the drafting of the compromise proposal would be improved if paragraph 3 were to be recast in a positive formulation as follows: "The provisions of the previous paragraph are subject to limitation by agreement between the parties except to the extent that the superior title, right or claim is derived from an intentional or grossly negligent act or omission of the lessor".

Ms PERT (Australia) stated that her delegation had no objections to the proposal of the World Leasing Council which it viewed as a matter of drafting.

Mr BERAUDO (France) considered that the compromise elaborated by the working group would have been more acceptable to those States supporting the French proposal if the text of paragraph 3 had been based on the text of the former Alternative II of paragraph 2, that is to say by omitting the adjectives "intentional or grossly negligent" which qualified the acts or omissions of the lessor and he suggested that such a solution might permit unanimity to be achieved.

The CHAIRMAN noted that there were still two questions to be addressed before putting the matter to a final vote, the first of which was whether the suggestion by the observer of the World Leasing Council to cast paragraph 3 in a positive form would obtain broader support than the formulation proposed by the working group. In the absence of comments, he then enquired whether there was support for the French proposal to delete in paragraph 3 the words "intentional or grossly negligent".

Mr FERRARINI (Italy) stated that his delegation opposed the French proposal.

The CHAIRMAN noted that the proposal did not seem to be attractive to the delegations present.

Mr RÉCZEI (Hungary) believed that the French proposal would greatly restrict the lessor’s ability to exclude its own liability. He recalled that when the present text of paragraph 3 with its reference to "intentional or grossly negligent" conduct of the lessor had been drafted he had had in mind Article 100 of the Swiss “Code des Obligations” which permitted a contracting party to exclude its liability for any acts other than those committed intentionally or with gross negligence.

The CHAIRMAN recalled that if the Committee failed to reach agreement on the question before it and no two-thirds majority were to be achieved in Plenum than there would be no provision at all. He noted that an effort had been made to seek a compromise between three points of view, one favouring Alternative I of the basic text, another favouring Alternative II and at least one delegation at that stage making a proposal for an intermediate formula. He believed that all those proposals were still on the table and he enquired of the representative of the Federal Republic of Germany whether he maintained his proposal as set out in CONF. 7/C.1/W.P. 17.

Mr REBMANN (Federal Republic of Germany) stated that his delegation was withdrawing its proposal.

The CHAIRMAN suggested that three options now faced the Committee, the adoption of
Alternative I, that of Alternative II or that of the compromise formula as there were no other formal proposals before it.

Mr REBMANN (Federal Republic of Germany) enquired whether the Chairman had, when referring to Alternatives I and II of the basic text, contemplated that they should be read together with the original Article 14(2) which allowed no possibility of derogation from Article 7(2).

The CHAIRMAN stated that he could not answer that question as no decision had as yet been taken either on Article 14 or on whether Article 7(2) was to be mandatory. Furthermore he did not think that it would be helpful to deal with Article 14 before concluding the debate on Article 7.

Mr REBMANN (Federal Republic of Germany) believed that a decision should be taken concerning the extent of the freedom to be accorded to the parties to derogate from the provisions of Article 7. If the reference to Article 7(2) in Article 14 were to be deleted then the parties would be given wide freedom to exclude the warranty but if that freedom were to be restricted to some degree then the proposal of the working group should be adopted so that no derogation from Article 7 would be permitted in cases of intentional or grossly negligent conduct of the parties.

Mr JACOBSSON (Sweden) expressed agreement with the observations of the representative of the Federal Republic of Germany and suggested that the Chairman might wish to consider proceeding to a three-option vote: first Alternative I as non-mandatory, second Alternative II as mandatory and finally the compromise solution proposed by the working group.

The CHAIRMAN suggested that first the proposal of the working group be put to the vote, after which he would allow discussion of Alternatives I and II of the basic text including any proposals regarding their mandatory character. Alternatives I and II could then be put to the vote, together with any amendments thereto. As regards the proposal of the working group he recalled that the Committee need not consider the question of mandatory application as that issue was settled in the text itself.

Mr BERAUDO (France) recalled, by way of reply to the representative of the Federal Republic of Germany, that Article 7(2) was concerned not with the question of civil liability but with the warranty of quiet possession which was a very different matter. The warranty of quiet possession consisted in the lessor’s guaranteeing to the lessee quiet possession of the equipment handed over to the lessee and existed totally independently of whether the lessor had committed a fault. It constituted an obligation common to all Civil Law systems of so fundamental a character that there could be no leasing contract in its absence. It was for this reason that the French delegation had always preferred Alternative I which protected the lessee in all circumstances except those where it had itself been at fault. Alternative II on the other hand totally falsified the character of the warranty by subordinating it to the question of whether the lessor had committed a fault. The acceptance of Alternative II, together with paragraph 3 of the working group’s proposal for Article 7, would cause severe difficulties to the French delegation and to those representing other Civil Law countries and would oblige them to call for a reservation clause permitting their courts not to apply paragraph 3. If, on the other hand, paragraph 3 were to be deleted and paragraph 2 rendered optional by removing any reference to it in Article 14, judges of Civil Law countries would still find themselves faced with contracts embodying the principle contained in paragraph 3 but in reliance on the law applicable to the contract they could treat such clauses as null and void.

The CHAIRMAN put to the vote the proposal of the working group as contained in CONF. 7/ C.1/W.P. 27.

The proposal was adopted by twenty-eight votes to eight.

Mr BERAUDO (France) enquired whether it would, in the light of the vote, be possible at this juncture to consider the possibility of introducing a reservation clause permitting those States whose legal systems were not compatible with the provisions of Article 7(3) not to apply that provision. He
had not as yet prepared a precise text reflecting the proposed reservation clause which he felt would facilitate the adoption of the Convention by States for whom the Convention was acceptable except for the content of paragraph 3.

The CHAIRMAN stated that he understood the French proposal to include a simple reservation clause permitting States which found paragraph 3 to be unacceptable not to apply its provisions without making any reference to the public policy reasons underlying the reservation.

Mr BERAUDO (France) confirmed the Chairman's understanding of his delegation's proposal.

Mr REBMANN (Federal Republic of Germany) recalled that although the discussion of the Committee on Article 7 had been wide-ranging, paragraph 2 dealt not with the quiet possession of the lessee in general but only with a very restricted range of cases, namely those where the lessee's quiet possession was disturbed by a third party who claimed a superior right over the equipment.

The CHAIRMAN called for comments on the suggested inclusion in the Convention of a reservation clause.

Mr GOODE (United Kingdom) supported the French proposal.

Mr KATO (Japan) stated that his delegation was opposed to the introduction of a reservation clause of the kind proposed by the representative of France.

*The meeting was adjourned at 4.30 p.m. and resumed at 4.50 p.m.*

Mr BERAUDO (France) stated that the effect of his delegation's proposal would be to allow the courts of a State availing itself of the reservation not to enforce a clause of a leasing agreement under which the lessor had made the warranty of quiet possession dependent upon an intentional or grossly negligent act on its part. This did not mean that the lessor could exclude its liability to the lessee in all cases including those where its conduct had been intentional or grossly negligent.

Mr GOODE (United Kingdom) called for clarification of the proposed reservation clause as it seemed to introduce something along the lines of what was already contained in paragraph 3. He had understood the proposal in the sense that it would permit a State to exclude the application of paragraph 3 and on that basis he had supported it.

Mr BERAUDO (France) indicated that his proposal could be formulated as follows: "A Contracting State may declare that it will not apply paragraph 3 of Article 7."

The CHAIRMAN stated that he understood the proposed text as meaning that for a Contracting State availing itself of the reservation clause Article 7 would be totally non-mandatory.

Ms DEBOYSER (Belgium) believed that the proposed reservation clause would allow a Contracting State to prevent the parties derogating from the warranty of quiet possession contemplated by paragraph 2. However it would be more easily understood if paragraph 3 were reformulated to read, for example, "[T]he provisions of the previous paragraph are subject to limitation by agreement between the parties, except to the extent that the title, right or claim is derived from an intentional or grossly negligent act or omission of the lessor".

The CHAIRMAN recalled that paragraph 3 had already been adopted by the Committee and that any reservation ought therefore to be formulated in such a manner as to correspond to that text.

Mr KATO (Japan) sought clarification as to the meaning of the French proposal. If a State were to make the reservation with the consequence that paragraph 3 did not apply, would this mean that the lessor would not be responsible even for an intentional act? In most Civil Law jurisdictions such a stipulation would be prohibited on grounds of public policy and in these circumstances he did not understand the thrust of the proposal.

The CHAIRMAN stated that he understood the French proposal as signifying that if a State
were to make a reservation in respect of Article 7(3) such a State would regard the Convention as not containing paragraph 3 at all and that it would then be up to the law of that State to determine the status of paragraph 2. In most Civil Law countries the result would be that a lessor which had defaulted would not be relieved of liability if its conduct had been intentional or grossly negligent while in other States, especially Common Law jurisdictions, that would be possible.

Mr BRENNAN (Australia) agreed with the interpretation of the Chairman of the effects of the proposed reservation clause as well as his earlier observation that it would render Article 7 non-mandatory in toto, a solution which seemed to be in direct contradiction with the decision taken by the Committee in connection with paragraphs 2 and 3 of Article 7 as proposed by the working group.

Mr MOONEY (United States of America) also agreed with the interpretation of the Chairman. It was his belief that the balance achieved by the working group and endorsed by the Committee should be adhered to.

Mr GOODE (United Kingdom) considered that the Committee was now faced with a choice between retaining Article 7 as a mandatory provision of the Convention but limited in scope so that in the absence of the reservation all Contracting States would be obliged to give effect to the mandatory provisions but equally to do so only as regards the limits imposed by paragraph 3 and to discard any wider mandatory limits under their own law or alternatively, if there were to be a reservation of the kind contemplated, leaving reserving States the power to apply their own rules of public policy which might be broader or even narrower than paragraph 3.

Mr KATO (Japan) considered that if the purpose of the reservation was to uphold the principle of freedom of contract, then a similar reservation should apply to the whole content of Article 14. If therefore Article 14 were to contain a reference to provisions other than Article 7(3) it might be preferable to discuss the proposed reservation in the context of the discussion on Article 14.

The CHAIRMAN stated that his understanding of the proposal of the working group was that the issue of whether the provision was mandatory or not was dealt with in paragraph 3 and that Article 14(2) would therefore have no impact upon it. If the representative of Japan insisted, he would put to a vote the proposal to defer discussion on the reservation clause to Article 7(3) until that on Article 14 but in his view the only issue before the Committee at this stage was to take a decision on the fate of the French proposal.

Mr KATO (Japan) withdrew his proposal.

The CHAIRMAN put to the vote the French proposal to introduce a reservation clause according to which a Contracting State could declare that it would not apply the provisions of Article 7(3).

The proposal was rejected by twenty-three votes to ten, with four abstentions.

The CHAIRMAN declared the discussion on Article 7 to be concluded.

CHAPTER III – GENERAL PROVISIONS

Article 14 (continued)

The CHAIRMAN recalled that this article had been the subject of lengthy debate in the course of which a number of proposals had been considered, as also had the question of whether there was a conflict between paragraphs 1 and 2. An indicative vote had then been held in the course of which twelve delegations had expressed a preference for the solution that the Convention and all of its provisions should be non-mandatory, fourteen for a solution permitting the parties to contract out of the Convention but that if they did not do so then certain provisions, yet to be determined, might be
mandatory, while two delegations had sustained the position that the parties ought not to be allowed to contract out of the scope of the Convention and that some provisions of the Convention might be mandatory. In the light of the indicative vote a working group had been set up whose report was now before the Committee in CONF. 7/C.1/W.P. 20 and he invited the Chairman of the working group on Article 14 to present that report.

Mr DE PAIVA (Brazil) considered the points described in CONF. 7/C.1/W.P. 20 to be self-explanatory. He recalled however that the working group had not touched upon the question of drafting as it had been set up very early during the Conference at a time when most of the articles of the draft Convention had not yet been discussed. Second, he stressed that the ideas reflected in the report of the working group had been accepted by its members by consensus as a result of a compromise between the various positions of the delegations expressed within the working group. He therefore appealed to the Committee to approve the compromise formula proposed by the working group, subject to drafting, and suggested that paragraphs 5 and 6 of the report, which related to Article 14(1), could first be discussed, after which the more complex questions dealt with in paragraph 7 of the report might be addressed.

The CHAIRMAN noted that if this procedure were to be followed it would first be necessary to decide the issue of what was intended by the word "parties" in paragraph 1 and then, if the parties were not to exclude the Convention, whether certain of its provisions should be mandatory and, if so, which. He invited the delegations to comment on the working group's report.

Mr GOODE (United Kingdom) enquired whether he was correct in understanding that the group had proposed the amendment of Article 14(1) in the sense that for the Convention to be excluded in toto all three parties must agree to such exclusion. If this were the case then he supported the proposal.

Mr DE PAIVA (Brazil) confirmed that this had indeed been the intention of the working group.

Mr FELSBERG (World Leasing Council) stated that he was speaking not on behalf of the World Leasing Council but of the Comité Maritime International whose representative was unable to attend the meeting. The concern he was expressing was therefore one rather of lessees than of lessors, namely that if the agreement of all three parties involved in a financial leasing transaction were to be necessary for the exclusion of the application of the Convention, in those cases where it would be in the lessee's interest to secure such exclusion it would be dependent on the agreement of the parties to the supply agreement to that effect. It should therefore be sufficient for the exclusion to be agreed upon by the lessor and the lessee in the leasing agreement.

Mr SANTOS (Philippines) and Mr RÉCZEI (Hungary) expressed their support for the compromise proposal submitted by the working group.

Mr BERAUDO (France) congratulated the working group on Article 14 and its Chairman on the work accomplished by it. His delegation could fully support its proposal and he felt that the concern of the Comité Maritime International reflected a point of view expressed earlier during the Conference that had failed to secure the support of governmental delegations and had been overtaken by the discussions of the working group.

Mr MOONEY (United States of America) also supported the compromise proposal of the working group relating to Article 14(1) and in response to the concerns of the Comité Maritime International he recalled that if a lessee desired that the application of the Convention be excluded it was sufficient for it to withhold its approval of the supply agreement until such time as the supplier also agreed to exclude the application of the Convention.

Mr NISHIKAWA (World Leasing Council) noted that some of the provisions of the Convention, such as Article 7(2), concerned only the relationship between the lessor and the lessee. Article 9 on the other hand related to that between the lessee and the supplier and he could not
understand why the supplier’s consent should affect the lessor/lessee relationship as regards the application of the Convention.

Mr PELICHET (Hague Conference on Private International Law) expressed support for the views expressed by the observer representative of the World Leasing Council. He believed that the compromise proposed by the working group on Article 14 could give rise to serious practical difficulties and ran the risk of providing a lawyer’s paradise. By way of illustration he cited the case where the parties to the supply agreement had expressly excluded the application of the Convention in its entirety whereas the leasing agreement contained a number of clauses, some of which reproduced provisions of the Convention while others modified certain provisions of the Convention and in particular one or more of those of a mandatory character. Should the provisions of the leasing agreement in such circumstances be deemed to constitute an implied exclusion of the application of the Convention and, if not, would the Convention be deemed to be applicable?

Mr FERRARINI (Italy) voiced an objection to the proposal of the working group. There could be reasons why the supplier might wish to exclude the application of the Convention, for example on account of Article 9. Was it justifiable in such a case to apply the Convention simply because the lessor and the lessee had not excluded it? If Article 9 were not to apply then Article 7 and other provisions of the Convention should not apply. He preferred therefore the maintenance of the original text.

Mr DE PAIVA (Brazil) appealed to the representative of Italy to support the compromise proposed by the working group.

Mr FERRARINI (Italy) stated that he could do so in the absence of support for his views although he could not conceal his concern that the new text afforded less protection to the lessee than had been the case under the basic text.

Mr CASTILLO (Colombia) understood the doubts expressed by the representative of Italy. As he saw it however there were under a financial leasing agreement as treated by the Convention two kinds of parties, the lessor and the lessee, who might be described as “active” parties, and a “passive” party, the supplier. Under this analysis it would not be fair to allow the latter to determine the relations between the lessor and the lessee under their contract, but the interests of the supplier could not be entirely ignored. In these circumstances he recommended that the Drafting Committee include in Article 14 a reference to the “express” consent of the three parties to exclude the application of the Convention.

Mr GOODE (United Kingdom) recalled that if it were to be open to the supplier to exclude the operation of the Convention simply by a provision in the supply agreement the lessee would not necessarily know whether the Convention applied or not as he would often be unaware of the terms of the supply agreement. For this reason it was sensible to require that all three parties should participate in excluding the Convention.

Mr RÉCZEI (Hungary) suggested that there was another way of excluding the application of the Convention. Laws governing leasing existed in some countries and if the parties stipulated in their contract that the law of such a country should apply then in his view this would amount to an express exclusion of the Convention.

Having established that the Committee saw the Colombian proposal as a matter of substance rather than drafting, the CHAIRMAN asked whether there was support for the proposal to require the “express” consent of all three parties to the exclusion of the application of the Convention.

In the absence of support for the Colombian proposal, the CHAIRMAN put to the vote the proposal of the working group in respect of Article 14(1), subject to drafting.

*The proposal of the working group was adopted by thirty-three votes to five with three abstentions.*
The CHAIRMAN noted that paragraph 7 of the working group's report in CONF. 7/C.1/W.P. 20 suggested that Article 14(2) should provide that when the application of the Convention had not been excluded certain provisions listed individually should be considered to be mandatory. It was however difficult to take any decision on the proposal until it was known which provisions would be of a mandatory nature and in that connection he drew attention to a proposal of the delegation of Sweden in CONF. 7/C.1/W.P. 28.

Mr JACOBSSEN (Sweden) stated that his delegation's proposal was more in the nature of a technical one and did not specifically address the question of which provisions should be mandatory. As he understood the position, the provisions which had hitherto been considered as perhaps meriting a mandatory character were all to the benefit of the lessee. He assumed that it was not the intention to strike down as invalid terms of the contract which varied mandatory provisions in the sense that they were still more favourable to the lessee and it was this idea that was reflected in his delegation's proposal for Article 14(2).

Mr MOONEY (United States of America) considered that it was difficult to form an opinion on the Swedish proposal until it was known which provisions would be mentioned in Article 14(2). In his view the Committee of the Whole should first focus its attention on the question of which provisions of the Convention, if any, should be mandatory before addressing the Swedish proposal.

The CHAIRMAN agreed with the procedural proposal of the representative of the United States of America and referred delegations to the basic text of Article 14(2). The first of the provisions mentioned therein as possibly being accorded mandatory status was Article 7(2) but he assumed that there was no point in mentioning that provision in Article 14(2) in view of the decision taken in connection with Article 7(3) which itself made Article 7(2) mandatory.

It was so agreed.

The CHAIRMAN noted that the second provision referred to in the basic text of Article 14(2) was Article 11(3) and he enquired whether there was support for making the provision mandatory.

Mr JACOBSSEN (Sweden) expressed the view that Article 11(3) should be mandatory as it was one of the provisions of the Convention of most crucial importance for the protection of lessees.

Mr REBMANN (Federal Republic of Germany) was of the same opinion as the representative of Sweden. Article 11(3) was by its very nature mandatory and would be of no value at all if the parties were allowed to derogate from it.

Mr BERAUDO (France) also believed that Article 11(3) should be mandatory.

Mr ZYKIN (Union of Soviet Socialist Republics) drew attention to the fact that Article 11(3) contained two provisions, the first of which allowed the parties to provide for the manner in which the compensation would be computed while the second was concerned with the situations in which such provisions would be enforceable. As he saw it, only the second part of Article 11(3) could be considered mandatory as the first part contained the words “may provide” which expressly recognised its optional character.

The CHAIRMAN assumed that a reference in Article 14(2) to Article 11(3) could, for the reasons given by the representative of the Soviet Union, relate only to the latter part of paragraph 3, and he therefore considered the point raised to be one of drafting.

Mr BRENNAN (Australia) reiterated his delegation's position that it did not favour the listing of mandatory provisions in Article 14(2). It had accepted an exception in relation to Article 7(2) but was opposed to admitting any further exceptions.

The CHAIRMAN stated that the possibility should not be excluded of the discussions of the Committee leading to the conclusion that no provisions should be made mandatory.
Mr RICHARDS (Antigua and Barbuda) echoed the view already expressed that the permissive language of Article 11(3) was such as to create a logical difficulty in making that provision mandatory under Article 14(2).

Mr GOODE (United Kingdom) expressed sympathy with those who experienced such difficulties but in any event he supported the Australian approach that Article 11(3) ought not to be of a mandatory character.

Mr MOONEY (United States of America) supported the views of the Australian and United Kingdom delegations although in so doing he did not wish to suggest that in all circumstances a result that was the opposite of what those provisions provided was to be expressly approved. Rather, he was convinced that the fewer the number of mandatory provisions in the Convention, the wider would be its acceptance and the greater its usefulness in practice.

The CHAIRMAN suggested that the Committee of the Whole first settle the question of whether Article 11(3) should be considered to be mandatory on the understanding that its mandatory character was restricted to the latter part of the provision. If the Committee were to take a decision to that effect it would be for the Drafting Committee to reflect the concept in appropriate language.

Mr BERAUDO (France) insisted that the first and second sentences of paragraph 3 were inseparable with the consequence that it was impossible to decide that only the second sentence should be mandatory.

The CHAIRMAN recalled the difficulties of some representatives with the fact that the opening language of Article 11(3) contained the words "may provide" and that a reference to the whole of Article 11(3) as being mandatory in Article 14(2) would be in contradiction with the words "may provide".

Mr DE PAIVA (Brazil) agreed that a valid point had been raised by the representative of the Soviet Union but more generally he sought advice as to the legal status of provisions of the Convention which were not considered to be mandatory and in particular whether they were to be viewed as mere guidelines.

The CHAIRMAN suggested that the effect of such provisions would be twofold. First, and mainly, non-mandatory provisions of the Convention would apply unless excluded by the contract. Second, and this would be true only in certain jurisdictions, the courts might consider such provisions as setting a standard against which they would determine whether to adjust a contract.

Mr GOODE (United Kingdom) suggested that the Drafting Committee might face a problem in connection with the difficulty raised by the representative of the Soviet Union in that the Committee of the Whole had already adopted Article 11. If, however, the latter part of paragraph 3 were to be made mandatory, then it might be preferable to redraft Article 11 in such a way as to reflect the idea that the leasing agreement might provide for the manner in which the compensation referred to in paragraph 2(b) of Article 11 would be computed and that such provision should be enforceable between the parties, but that the parties might not agree on a provision for compensation disproportionate to the compensation provided for under paragraph 2(b). He wondered however whether the Drafting Committee would be acting contrary to the Rules of Procedure if it were, if necessary, to redraft Article 11(3) along the lines he had suggested which would obviate the need for any reference to Article 11(3) in Article 14(2).

The CHAIRMAN believed that the Committee must first decide which provisions, if any, of the Convention should be mandatory, after which questions of drafting could be addressed although in principle he saw no objection to the Drafting Committee, in the event of the Committee of the Whole making Article 11(3) mandatory, reformulating Article 11(3) to reflect that decision.

Mr CASTILLO (Colombia) stated that the only articles of the Convention which might be considered to be mandatory were those without which a leasing transaction could not exist and he was of the opinion that the Convention should contain no mandatory provisions. As it had been
developed, the Convention provided a general framework for leasing transactions which was more indicative than imperative in character. This was especially important for those countries which had no specific regulation of leasing contracts and it was essential that the development of leasing should not be hindered by the imposition of mandatory rules.

Mr ZYKIN (Union of Soviet Socialist Republics) agreed that it was desirable to elaborate general guidelines for the parties to international leasing transactions but what concerned him was the fact that the absence in the Convention of mandatory provisions would mean that the Contracting Parties would be precluded from treating any of its provisions as mandatory. Taking Article 11(3) as an example, it was quite fair to stipulate that the damages envisaged by a contract should not be substantially in excess of the damages to which a party would be entitled under the applicable law. If the parties were allowed to contract out of this provision then it would be possible for a contractual provision to be agreed by the parties providing for compensation which would be manifestly in excess of that provided for by the applicable law. To admit this would in his view be to go too far.

He recalled that Article 11(3) was probably in line with the law of nearly all countries and if it were to be decided not to make the provision mandatory this would signify that any clause agreed upon by the parties relating to damages would be automatically enforceable notwithstanding the rules of public policy of the applicable law.

Mr GOODE (United Kingdom) considered that the point raised by the representative of the Soviet Union opened the way to a possible compromise which would consist in Article 11(3) not being made mandatory under the Convention and the efficacy of the contractual provisions being governed by the applicable law.

The CHAIRMAN considered that the question of whether anything would be achieved by making Article 11(3) mandatory had to be viewed in the light of whether any jurisdiction would accept a clause in a contract stating that irrespective of the compensation being disproportionate the provision was enforceable.

Mr MOONEY (United States of America) believed that the laws of a number of countries might contemplate that if a damages provision in a contract were not disproportionate with what the parties might have expected in the future, then the provision might well be honoured even though with hindsight it might appear that the provision had operated in a manner somewhat different from that originally anticipated.

The CHAIRMAN put to the vote the question of whether Article 11(3) should be made mandatory.

*It was decided by twenty-seven votes to ten, with one abstention, that Article 11(3) should be mandatory.*

The CHAIRMAN recalled that the basic text of Article 14(2) had contained a reference to Article 11(4) and he enquired whether there was support for conferring mandatory status on that provision.

Mr JACOBS (Sweden) proposed that Article 11(4) be made mandatory.

The CHAIRMAN put to the vote the question of whether Article 11(4) should be made mandatory.

*It was decided by twenty-nine votes to nine that Article 11(4) should be mandatory.*

The CHAIRMAN having enquired whether there were proposals to make any other provisions of the Convention mandatory and established that this was not the case, he assumed that it was the wish of the Committee of the Whole to refer Article 14 to the Drafting Committee and that in
respect of paragraph 2 thereof the Drafting Committee might be requested to consider whether to make paragraphs 3 and 4 of Article 11 mandatory either in Article 14(2) or in some other manner.

Ms PERT (Australia) suggested the addition at the beginning of Article 14(2) of the words "[c] except as otherwise provided in this Convention" so as to take account of Article 7(3) and possibly other provisions.

Mr REBMANN (Federal Republic of Germany) proposed that in view of its nature Article 4 also be made mandatory.

Mr SANTOS (Philippines) supported the proposal of the representative of the Federal Republic of Germany.

The CHAIRMAN put to the vote the question of whether Article 4 should be made mandatory.

It was decided by sixteen votes to eleven, with seven abstentions that Article 4 should not be made mandatory.

Mr JACOBSSON (Sweden) stated that he had voted against the proposal of the representative of the Federal Republic of Germany because in his view Article 4 already operated on a mandatory basis so that it was unnecessary to refer to it in Article 14(2).

Mr FELSBERG (World Leasing Council) insisted that in his earlier intervention regarding Article 14 he had not intended to speak against the compromise proposal. He had simply discharged the obligation he had assumed towards the observer of the Comité Maritime International to bring to the attention of the Committee of the Whole its concern regarding Article 14(2).

The CHAIRMAN raised the question of whether the Swedish proposal in CONF. 7/C.1/W.P. 28 was one relating to substance or to drafting. For his own part he felt that it was one of substance.

Mr REBMANN (Federal Republic of Germany) stated that while he agreed generally with the underlying aim of the Swedish proposal he had to recall that the Committee was concerned with the mandatory character of only paragraphs 3 and 4 of Article 11 and if these provisions were carefully examined then it was difficult to see how derogations from them could benefit the lessee still further. He too had earlier favoured a provision of the kind proposed by the representative of Sweden but now felt it to be unnecessary.

Mr RÉCZEI (Hungary) expressed agreement with the analysis of the representative of the Federal Republic of Germany and for the same reasons his delegation opposed the Swedish proposal to insert additional language in Article 14(2).

Mr JACOBSSON (Sweden) stated that in the light of the comments of the previous speakers he would withdraw his delegation's proposal concerning Article 14(2).

The CHAIRMAN drew attention to the proposal made by the United Kingdom delegation in CONF. 7/C.1/W.P. 1 relating to the location of Article 14 and ascertained that there were no objections to this question being dealt with by the Drafting Committee.

In these circumstances he closed the discussion on Article 14.

Article F (continued)

The CHAIRMAN invited the Committee of the Whole to turn to Article F of the Final Clauses which contained a reservation allowing a Contracting State to declare at the time of signature, ratification, acceptance, approval or accession that it would not be bound by Article 2(1)(b). In respect of this article two proposals had been submitted, one by the Hague Conference on Private International Law in CONF. 7/4 Add. 2 and the other by the delegation of Finland in CONF. 7/W.P. 3, calling for the deletion of Article F. During the earlier discussion of Article F no objections had been made to the Finnish proposal although the representative of Japan had requested that any
final decision in that regard be deferred until such time as the Committee had been able to consider the draft substantive articles as a whole. This had now been done and he enquired whether the representative of Japan considered this to be an appropriate time to settle the issue.

Mr KATO (Japan) stated that he considered this to be an appropriate time to consider Article F.

The CHAIRMAN ascertained that the Committee was now willing to take a decision on Article F.

Mr KOMAROV (Union of Soviet Socialist Republics) stated that his delegation was unable to support the proposal for the deletion of Article F which it saw as an important part of the mechanism of the draft Convention. The retention of Article F would admittedly impose limitations on the application of the Convention but it would on the other hand make possible acceptance of the Convention by States which, while anxious to participate in the process of unification of international trade law, were unable to agree to the application of the Convention in the circumstances contemplated in Article 2(1)(b). For these reasons his delegation supported the maintenance of Article F.

In the absence of any other comments on the article, the CHAIRMAN put to the vote the proposal to delete Article F:

*The proposal to delete Article F was adopted by twenty-three votes to six with five abstentions.*

*Proposed new Article 15*

The CHAIRMAN invited the representative of Canada to introduce his proposal regarding the status of usages which was to be found in CONF. 7/C.1/W.P. 26.

Mr SAMSON (Canada) stated that his delegation's proposed Article 15 reproduced, subject to the necessary adjustments, Article 9 of the United Nations Sale Convention, the first paragraph dealing with practices established between the parties themselves and the second with usages. The aim of the proposal was to harmonise the present Convention with other international Conventions and in particular with the United Nations Sale Convention and the Geneva Agency Convention. The proposal was moreover in line with the principle of freedom of contract of the parties embodied in Article 14(2) of the draft Convention.

The effect of the text proposed would be to enable the parties to derogate from the rules of the draft Convention on the basis of practices established between themselves and of usages to which they had agreed. In addition, the insertion of the proposed provisions would assist in the determination of approved terms under Article 1(1)(a) according to the type of equipment leased or the activities of the parties.

In conclusion he suggested that it must be left to the international community to develop business practices intended to meet specific needs although it would not be appropriate to establish in the Convention a detailed list of usages current in financial leasing.

Mr CASTILLO (Colombia) expressed support for the Canadian proposal.

Mr ILLESCAS (Spain) enquired whether, in the Canadian proposal, the reference to the "parties" to the agreement was intended to cover only the lessor and the lessee since the relations between the lessor and the supplier would be regulated, in appropriate cases, by the United Nations Sale Convention or by the applicable law.

Mr SAMSON (Canada) affirmed that this was indeed the intention of his delegation.

Mr ZYKIN (Union of Soviet Socialist Republics) stated that in principle his delegation was not opposed to an attempt to seek concordance with the United Nations Sale Convention and indeed it supported the goal of achieving uniformity in international commercial transactions. It was
however necessary to bear in mind the fact that the United Nations Convention and the draft Convention under discussion related to different subject-matters so that it was not desirable automatically to import articles from the former into the latter. Customs and usages had grown up over hundreds of years in relation to sales contracts which were easily ascertainable by the parties, for example IMCOTERMS, and an article dealing with them was necessary and useful in the United Nations Sale Convention but financial leasing was a relatively recent phenomenon where no widely recognised usages and customs had as yet been developed. He feared that the inclusion of the provisions proposed by the Canadian delegation might be interpreted as imposing some form of obligation on courts to seek out such usages. Moreover a usage common in one country might be unknown in another.

It had also to be recalled that there were practically no mandatory provisions in the United Nations Sale Convention whereas there were in the draft Leasing Convention and he wondered what would be the situation if a usage were to be in contradiction with a mandatory provision of the future Convention. For all these reasons it would seem to be premature to adopt a provision on customs and usages in that instrument.

Mr BERAUDO (France) shared the hesitations of the representative of the Soviet Union. It should be remembered that financial leasing had developed in international commerce after the Second World War and that it had existed in France only for some thirty years. It was in his view not as necessary to make a reference to usages in the future Leasing Convention as it had been in the United Nations Sale Convention. Moreover the longest established usages were those established by lessors, whereas one of the aims of the Convention was to seek a new balance between lessors and lessees. For these reasons he had difficulty with paragraph 2 of the Canadian proposal although he could accept paragraph 1 as it was concerned with usages to which the parties to the leasing agreement had agreed or which they had established between themselves.

Mr GOODE (United Kingdom) stated that while his delegation understood the reasons underlying the Canadian proposal it too shared the doubts expressed by the Soviet delegation. Courts in all countries had their own procedures for dealing with usages and for deciding whether a usage had in fact been established by the evidence. Furthermore, the adoption of the Canadian proposal could potentially create problems in relation to the mandatory provisions which the Convention would contain and in these circumstances his delegation favoured the introduction of neither paragraph of the proposed additional article.

Mr ROLLAND (Federal Republic of Germany) agreed with the sentiments expressed by the representative of the Soviet Union and by other delegations. He did not believe that it was possible to compare the future Leasing Convention with the United Nations Sale Convention which was of a more general character. It would be unwise to incorporate in the Leasing Convention objective rules to which the parties might not have agreed and indeed it seemed unnecessary to contemplate a provision of the kind proposed by the Canadian delegation for if there did in fact exist firmly established practices or usages in connection with international leasing transactions then the courts could be expected to apply them. His delegation was therefore opposed to the introduction of the proposed new Article 15.

Mr ILLESCAS (Spain) recalled the lengthy discussions of the Committee of the Whole relating to Article 14 of the draft Convention and the question as to which of its provisions, if any, should be mandatory. As he understood it, paragraph 2 of the Canadian proposal would have the effect of conferring mandatory status on certain rules of which the participants in the Conference had no knowledge and which might have been unknown to the parties to the leasing agreement at the time of its conclusion. Recognising however the importance of efforts to harmonise international trade law his delegation could agree to paragraph 1 of the Canadian proposal.

Mr SANTOS (Philippines) stated that while his delegation could support a proposal for the employment of usages in the implementation of the provisions of the Convention or of any agreement between the parties, it could not agree to the employment of usages to derogate from the
provisions of the Convention.

Mr PISEK (Czechoslovakia) reiterated the views of the representative of the Philippines. In his opinion, if a case could not be solved by reference to the provisions of the Convention, then he saw no obstacle to the court’s taking into consideration practices or usages established either individually by the parties or generally. If, however, the parties wished to derogate from the provisions of the Convention because they preferred to apply a usage then they should do so specifically in their contract rather than rely on a usage whose existence the court would have to ascertain.

Mr SAMSON (Canada) stated that in the light of the discussions on his delegation’s proposal it might be split into two parts and only the first part voted upon.

The CHAIRMAN understood the statement of the representative of Canada as signifying that paragraph 2 of the proposal was withdrawn. In these circumstances he put to the vote paragraph 1 of the Canadian proposal for a new Article 15.

The proposal was rejected by twenty-five votes to seven, with three abstentions.

Preamble

The CHAIRMAN noted that there were no further proposals relating to the substantive articles of the draft Convention. He drew attention however to the fact that the preamble did relate to a matter of substance in that a reference to it was contained in Article 15 dealing with the interpretation of the Convention, which had already been the subject of a decision by the Committee of the Whole. It might therefore be appropriate for the Committee to proceed to a brief exchange of views on the preambular provisions although strictly speaking such consideration did not fall within its terms of reference and it was not his intention in any way to reopen discussion on Article 15.

It was so agreed.

The CHAIRMAN established that there were no comments on either the introductory language of the preamble or of the first paragraph.

Mr DE PAIVA (Brazil) believed that the second paragraph had no connection with the substance of the draft Convention and in consequence proposed its deletion.

Mr BRENNAN (Australia) considered that it would constitute a loss for the Convention if the paragraph were to be deleted in its entirety and suggested that agreement might be reached if the words “developing countries” were to be replaced by “all countries”.

The CHAIRMAN suggested that in those circumstances it might be sufficient simply to state the need to make financial leasing more available.

Mr GAVALDA (France) stated that his delegation would regret the disappearance of paragraph 2. In certain jurisdictions the principle expressed therein, affirmed as a rule of international ethics, could be of benefit to developing countries.

Mr THIAM (Guinea) supported the view of the French delegation, all the more so as he represented a developing country and it was his belief that a Convention on international financial leasing would be of value to such countries. He would therefore prefer a reference to “all countries” rather than the deletion of the paragraph as a whole.

Mr MOONEY (United States of America) considered that the decision whether or not to make a specific reference to developing countries was one which should be left to those countries.

Mr FELSBERG (World Leasing Council) suggested that language be included in the preamble to the effect that the Convention would assist the development of international trade. The leasing
industry saw the Convention as a necessary first step but not one sufficient to ensure that cross-border leasing play the role it could in international transactions. Other measures would have to be taken in other fields in order to achieve that result, some of which had already been discussed by the committee of governmental experts in Rome.

Mr RÉCZEI (Hungary) believed the reference to developing countries to be politically correct and he proposed that after the words "[a]ware of the need", language be inserted such as "to create more balanced legal conditions in order", the rest of the paragraph remaining unchanged.

Mr RICHARDS (Antigua and Barbuda) recalled that implicit in all the articles was the idea of increasing international financial leasing among countries and he understood that it was the intention of the Conference to bring to the knowledge of developing countries the availability of these facilities. He therefore suggested that the preamble be redrafted in such a way as to refer to the need to make international financial leasing available to all countries and to developing countries in particular.

The CHAIRMAN enquired whether there was any support for the proposal of the delegation of Hungary to insert in the second paragraph the words "... to create more balanced legal conditions in order..."

Mr MOONEY (United States of America) did not believe that evidence had been submitted to the Committee that there was today a problem of balance in international leasing transactions, an idea which seemed to be implicit in the Hungarian proposal. What the Committee had done was to discuss the balance necessary in terms of whether or not the Convention should impose certain rules on the parties. It would therefore distress his delegation to reflect in the preamble a suggestion that the future Convention was designed to redress unbalanced transactions and in these circumstances it did not support the Hungarian proposal.

The CHAIRMAN having found that there was no support for the Hungarian proposal, he asked whether it was the wish of the Committee to replace the reference to "developing countries" in the second paragraph of the preamble by one to "all countries".

Mr DE PAIVA (Brazil) stated that his delegation could accept the Australian proposal as a compromise.

Mr BERAUDO (France) believed that if the proposed reference to "all countries" was intended simply to replace the words "developing countries" then the new language was superfluous. It would then be preferable for the paragraph in question to finish with the word "accessible".

The CHAIRMAN considered that the point raised by the representative of France was one of drafting.

Mr GOODE (United Kingdom) suggested the formulation "more available, in particular to developing countries".

The CHAIRMAN stated that he had understood the proposal of the representative of Brazil as being based on the view that there was no need to make a special reference to developing countries in the preamble and in these circumstances he enquired whether there would be any objection simply to deleting the words "to developing countries" at the end of the second paragraph of the preamble. In the absence of any such objection he deemed this to be the wish of the Committee.

It was so agreed.

The CHAIRMAN having found that there were no comments on the remaining paragraphs of the preamble and no proposals for additional paragraphs, he considered the discussion on the preambular provisions to be concluded, as also was the first reading of the draft Convention.

The meeting rose at 7.15 p.m.
TWELFTH MEETING

Wednesday, 18 May 1988 at 9.15 a.m.

Chairman: Mr Sevón (Finland)

AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING (CONF. 7/D.C./1; CONF. 7/C.1/W.P. 31 – 32)

REPORT OF THE DRAFTING COMMITTEE

The CHAIRMAN stated that the Committee of the Whole had before it the text of the substantive provisions of the draft Leasing Convention as prepared by the Drafting Committee and contained in CONF. 7/D.C./1. He proposed that the Committee proceed to a second reading of the text article by article and recalled that amendments other than those for the deletion of an article, paragraph or sentence must, in accordance with the Rules of Procedure, be submitted in writing. He noted that four proposals for amendment to the text of the Drafting Committee had been submitted, one by the delegation of the Federal Republic of Germany relating to Article 8 (CONF. 7/C.1/W.P. 29), one by the delegations of France and Mexico in CONF. 7/C.1/W.P. 25 to introduce a reservation clause in Article F, one by the delegation of the United Kingdom originally submitted to the Final Clauses Committee permitting a reservation as to the application of the Convention to ships in CONF. 7/C.2/W.P. 5 and finally one by the delegation of Sweden containing a number of drafting amendments which had yet to be distributed.

Mr CUMING (Canada) stated that his delegation would be submitting a proposal for the addition of a new paragraph 4 to Article 9.

The CHAIRMAN suggested that given the shortage of time between the completion by the Committee of the Whole of its second reading and the consideration by Plenum of the text as adopted by the Committee of the Whole proposals of a purely drafting nature should as far as possible be settled in the course of the second reading. He then gave the floor to Mr Goode (United Kingdom), the Chairman of the Drafting Committee.

The CHAIRMAN of the Drafting Committee expressed his gratitude to his colleagues for their unstinting efforts as well as his appreciation to the Unidroit Secretariat and to the Conference staff whose efforts had so greatly facilitated the task of the Drafting Committee. The Committee had endeavoured to reproduce as faithfully as possible the substance of the text referred to by it by the Committee of the Whole but it was necessary to recall the fine line that existed between drafting and substance. It was possible that the Drafting Committee might in a few instances have trespassed over that line but if it had done so it had been inadvertently, without any intention of changing the policy as declared by the Committee of the Whole but rather to clear up any ambiguities which the Drafting Committee had perceived. He would, of course, draw the particular attention of the Committee of the Whole to such instances. Language was moreover elusive and perhaps not all ambiguities would necessarily be undesirable.

He proposed therefore first to explain the revised structure and sequence of the draft and then to identify the substantive changes which had been agreed by the Committee of the Whole and to indicate how those changes had been incorporated by the Drafting Committee in the new text. In conclusion, he sought the approval of the Committee of the Whole to the Drafting Committee's addressing a few matters of "toilette", which the time available had not permitted it to clear up, with a view to the submission of the final text to Plenum.
The CHAIRMAN found that the Committee of the Whole agreed to the suggestion of the Chairman of the Drafting Committee that minor matters of drafting such as the deletion of the words "of this article" could be left to the Drafting Committee without the need for a specific mandate to be conferred on it in each case.

The CHAIRMAN of the Drafting Committee stated that it had revised the structure and sequence of the draft Convention first by drawing together all the articles concerning its scope and arranging them by reference to the transactional components of the scope of application followed by the connecting factors so that Articles 1 and 2 embodied the former Articles 1, 3 and 13. These were followed by a new Article 3 which contained the connecting factors and a new Article 4 which was seen as a continuation of the scope provisions. The general provisions (former Articles 14 and 15) had become Articles 5 and 6. To assist the Committee of the Whole he had prepared a paper providing a table of concordance of the provisions of the basic text and of that submitted by the Drafting Committee (CONF. 7/C.1/W.P. 32).

Preamble

The CHAIRMAN of the Drafting Committee stated that only two changes had been made to the provisions of the preamble, namely the deletion of the reference to "developing countries" in the second paragraph and the substitution of "recognising" for "recognizing" in the first paragraph to reflect English usage.

Mr JACOBSSON (Sweden) proposed that in the third paragraph the words "distinctive triangular relationships" should be altered to read "distinctive triangular relationship" as the following words "financial leasing transaction" were cast in the singular form.

The CHAIRMAN of the Drafting Committee stated that he had no difficulties with the Swedish proposal and that the suggested wording was probably more accurate as there was only one triangular relationship involving two contracts.

Mr MOONEY (United States of America) expressed a preference for the original text as there was more than one relationship contained in a financial leasing transaction.

Mr BERAUDO (France) considered that in the French text the plural form must be used.

The CHAIRMAN agreed that the proposal was addressed only to the English version and as he understood it there was only one triangular relationship which included several relationships. He enquired whether there were any objections to the Swedish proposal and, finding there to be none, he put the preamble as a whole to the vote.

The preamble was adopted by thirty votes to none.

CHAPTER 1 – SPHERE OF APPLICATION AND GENERAL PROVISIONS

Article 1

The CHAIRMAN of the Drafting Committee recalled that the Committee of the Whole had requested that two substantive changes be made to Article 1, the first being the removal of the implication that the lessee must necessarily approve all the terms of the supply agreement and the second to formulate the exclusion from the scope of the Convention of consumer transactions in a positive rather than a negative manner.

The Drafting Committee had considered the suggestion made in connection with the first line of paragraph 1 that the word "financial" be deleted or that the words "financial leasing" be placed in brackets after the word "transaction" so to avoid the possible implication that the Convention was providing a definition of a financial leasing transaction whereas what was intended was simply to describe its characteristics for the purpose of determining which transactions should be governed by
the Convention under paragraph 2. The Drafting Committee had however believed that it would be undesirable in a Convention dealing with financial leasing either to omit the word "financial" or to place the words "financial leasing" in parenthesis and had proposed instead that the word "described" be substituted for the word "defined" in the first line.

In paragraph 1(a) the Drafting Committee had sought to encapsulate the idea of terms not affecting the lessee and the neatest way of doing this had seemed to be by incorporation of the words "so far as they concern its interests". If therefore a term was one affecting the interests of the lessee then it must be approved by it. In sub-paragraph (b) of paragraph 1 the words "with the lessee" had been added in the first line after the words "(the leasing agreement)" as suggested by the representative of China to make it clear with whom the relationship created by the leasing agreement was.

No changes had been made either to paragraph 2 or to paragraph 3 which in the original text had been Article 3, while paragraph 4 reformulated the basic text in a positive form as requested by the Spanish delegation and reflected the compromise suggestion that had been made by that of the United Kingdom.

No comments having been made on any paragraphs of the article, the CHAIRMAN put Article 1 as a whole to the vote.

Article 1 was adopted by thirty-one votes to none.

Article 2

The CHAIRMAN of the Drafting Committee noted that Article 2 replaced the former Article 13. The substantive changes that had been made were designed to remove certain weaknesses in the original text as identified by the delegation of the United States of America and in particular to ensure that the Convention covered every financial leasing transaction in a chain of such transactions and not merely the last one. The changes were also intended to remove an element of duplication and paragraphs 1 and 2 of the basic text had been reformulated as a single paragraph. The main purpose of the reformulation was to make sure that a financial lessor was never treated as a supplier in relation to a sub-lessee and that no matter how long the chain there was only one supplier in relation to all lessees in the chain, namely the person from whom the first financial lessor acquired the equipment. In a situation therefore where there was a supplier, a financial lessor, a financial sub-lessee and a financial sub-lessee, the supplier in relation to that transaction would not be the head lessor but rather the initial supplier. If the chain were however to be supplier – operating lessor – operating lessee – financial sub-lessee then the supplier would be the operating lessor.

The CHAIRMAN called upon the representative of Sweden to present his delegation's proposals as contained in CONF. 7/C.1/W.P. 31.

Mr JACOBSSON (Sweden) stated that his paper did not in fact contain a proposal. He invited delegations to read the two relevant paragraphs of CONF. 7/C.1/W.P. 31 so as better to understand his concerns. His objection was that in a chain of leases and sub-leases there could be only one financial leasing agreement under the Convention.

The CHAIRMAN of the Drafting Committee stated that that had not been the understanding of the Committee of the effect of Article 2 because any financial sub-lease, if it presented the characteristics prescribed by Article 1, was also a financial lease for the purposes of the Convention. Nor could he agree that only one lessee could specify the equipment and select the supplier.

Mr MOONEY (United States of America) considered this to be a very complex matter but it was his belief that the drafting of the provision was sound. He recalled the importance of chains of sub-leasing transactions in international financial leasing for tax reasons and to remove all transactions but the first, which was moreover often of a domestic character, from the application of the Convention would seriously limit its effectiveness.
Mr BRENNAN (Australia) agreed with the substance of Article 2 as drafted but he enquired whether from the standpoint of drafting the words "otherwise subject to this Convention" were directed to the question of whether the transaction met the characteristics set out in Article 1.

The CHAIRMAN of the Drafting Committee stated that the intention was to make it clear that what was contemplated was a financial leasing transaction which was fully within the scope of the Convention so that it must meet not only the requirements of Article 1 but also those of any other scope provisions.

Mr BRENNAN (Australia) expressed his appreciation for the explanation given by the Chairman of the Drafting Committee but wondered whether more felicitous wording might not be employed in Article 2, for example by speaking of a financial leasing transaction "which falls within the scope of this Convention".

The CHAIRMAN of the Drafting Committee agreed that it might be possible to express the intention of the Drafting Committee in more elegant language although the Committee itself had been unable to do so. One further improvement which could be made to the text was to replace the word “defined” in the third line by “described”.

The CHAIRMAN enquired whether there would be any objections to the substitution of the word “defined” by “described” in Article 2 as had already been done in Article 1. In the absence of any objections he would take it that the Committee agreed to the amendment.

*It was so decided.*

The CHAIRMAN enquired whether there was any support for developing the idea put forward by the Swedish delegation that there could not be two or more financial leasing transactions in the same chain.

Mr JACOBSSON (Sweden) stated that he had been convinced by the explanation offered by the Chairman of the Drafting Committee as long as it was agreed that there could be a financial leasing transaction for the purposes of the Convention only when the lessee had selected the supplier. He would however welcome an amendment along the lines suggested by the representative of Australia.

The CHAIRMAN asked whether the proposal of the representative of Australia was to replace the words “otherwise subject to” by the words “which falls within the scope of”.

Mr BRENNAN (Australia) stated that the purpose of his intervention had been to clarify the meaning of the words “otherwise subject to this Convention” and he appreciated the difficulties which had faced the Drafting Committee. His delegation would therefore be satisfied if the summary records of the Committee of the Whole were to reflect the meaning of the term.

Mr REBMANN (Federal Republic of Germany) enquired whether the application of the Convention to a sub-lease was subject to the condition that the supplier had knowledge of the intended sub-lessee. The language of Article 1(2)(b) suggested that this was the case and if the supplier had no knowledge of the sub-lease then it would be under no obligations to the sub-lessee.

The CHAIRMAN of the Drafting Committee stated that the understanding of the representative of the Federal Republic of Germany was in full accord with the intentions of the Drafting Committee. He pointed out that any problem of knowledge was dealt with by the express language of Article 1(2)(b) which was implicitly incorporated into Article 2 by the words "otherwise subject to this Convention”.

Mr FERRARINI (Italy) suggested that the beginning of Article 2 might be reformulated to read as follows: “This Convention applies to each transaction which would otherwise be a financial leasing transaction according to paragraph 2 of the previous article as if ...".
Mr KATO (Japan) considered that the Italian proposal, by referring simply to "the previous article", would not be satisfactory where there was a chain of sub-leases and where the first lease was a domestic lease to which the Convention would not apply. He therefore preferred retention of the existing text.

Mr FERRARINI (Italy) stated that any reading of Article 2 was subject to the provisions of Article 3 concerning the sphere of application.

The CHAIRMAN of the Drafting Committee suggested that the representative of Italy might possibly have misunderstood the intervention of the representative of Japan, namely that a reference in Article 2 to a financial leasing transaction within paragraph 2 of Article 1 would not incorporate all the ingredients necessary for the application of the Convention; it would also, for example, have to contain a reference to Article 3 since in the absence of such a reference it would be difficult to bring a number of financial leasing transactions within the scope of the Convention.

Moreover, he had some difficulty with the phrase "would otherwise be" in the formulation suggested by the Italian delegation as the transactions under consideration were in fact financial leasing transactions. He therefore proposed that the language of Article 2 remain unchanged.

Mr FERRARINI (Italy) stated that it had been his intention when making his proposal to clarify Article 2 but in the light of the comments made he would withdraw it.

Mr REBMANN (Federal Republic of Germany) suggested that rather than laying down a rule on application in Article 2 it might be preferable to designate the original supplier as "the supplier" for all sub-leases.

Mr BERAUDO (France) stated that the earlier decision of the Committee of the Whole to replace the word "défini" by "décrit" caused difficulties. Those English speakers who had proposed the substitution seemed to have understood that the parenthesis referred to a financial leasing transaction whereas it was clear from the French text that it referred to the lessor and that a definition and not a description of the lessor was given in paragraph 1.

The CHAIRMAN of the Drafting Committee agreed with the observation of the representative of France.

The CHAIRMAN established that there were no objections to reopening the question and in the absence of any objections to reverting to the original text he assumed that this was the wish of the Committee of the Whole.

*It was so decided.*

The CHAIRMAN asked whether the Chairman of the Drafting Committee had any comments to make on the proposal of the representative of the Federal Republic of Germany.

The CHAIRMAN of the Drafting Committee considered that the proposal of the representative of the Federal Republic of Germany would not achieve the intended result. Certain ingredients were necessary in Article 2, for example a sub-leasing transaction in line 1 which might or might not be a financial leasing transaction. There had also to be a reference to a financial leasing transaction which was within the scope of the Convention and then it would have to be made clear what was meant by "the supplier". Inelegant as the text might be, he feared that any attempts to simplify it would only create further problems.

The CHAIRMAN enquired whether there was any support for the proposal of the representative of the Federal Republic of Germany.

Mr REBMANN (Federal Republic of Germany) stated that in the absence of support for his proposal he would withdraw it.

Mr NISHIKAWA (World Leasing Council) sought clarification as to the operation of Article 2
in its application to the following hypothetical situation: the initial supplier sells equipment to an operating lessor who in turn leases to an operating lessee who is also a financial lessor; that operating lessee/financial lessor then sub-leases to a financial lessee. He had understood the Chairman of the Drafting Committee as suggesting that in such cases the supplier would be considered not to be the initial supplier but the operating lessor who actually transferred title to the operating lessee who was in fact the financial lessor.

Furthermore when the representative of Australia had sought clarification as to the meaning of the words "otherwise subject to this Convention" the Chairman of the Drafting Committee had suggested that they could be equated with the words "which falls within the scope of this Convention". It was his understanding that that latter phrase implied that every transaction must be regarded as a financial leasing transaction under the Convention. It was however evident that operating leasing transactions did not fall within the scope of the Convention so that the example offered by the Chairman of the Drafting Committee would not, on the interpretation of the representative of Australia, fall within the chain of financial leasing transactions. Nor did he fully understand the reply of the Chairman of the Drafting Committee to the question posed by the representative of the Federal Republic of Germany. He believed that according to the interpretation of the latter the supplier was not the operating lessor in the hypothetical case discussed. He was therefore confused as to how Article 2 should be interpreted.

The CHAIRMAN of the Drafting Committee replied that the Convention applied to every financial lease and every financial sub-lease in a chain. It did not apply to an operating lease but if there were to be a sale by a supplier to an operating lessor and the operating lessee in turn granted a financial sub-lease the operating lease would be outside the Convention, the financial lease within it and the supplier in relation to the financial lessee would be not the top supplier but the operating lessor.

Mr NISHIKAWA (World Leasing Council) stated that his interpretation of Article 2 differed from that of the Chairman of the Drafting Committee because the article simply provided that in the event of one or more sub-leasing transactions involving the same equipment the Convention would apply to each transaction which was a financial leasing transaction otherwise subject to the Convention. In his opinion the interpretation of the Chairman of the Drafting Committee was correct without however making any reference to Article 2 because for a financial leasing transaction to be covered by the Convention each and every part of the chain must fall within the scope of the Convention. If one of these transactions was not a financial leasing transaction it would fall outside the scope of Article 2 and Article 1 would apply.

The CHAIRMAN of the Drafting Committee insisted that if there were to be a chain of leases and sub-leases, any one of those which was an operating lease would fall outside the scope of the Convention and that any of those which were financial leases and met the requirements of the scope of application would be governed by the Convention. The particular point made by Article 2 was that in applying the Convention a financial lessor was not to be treated as a supplier, the reason being that in a situation where there was a supply to a financial lessor who granted a financial lease and the lessee were to make a financial sub-lease, then without the article the supplier in relation to the financial sub-lessee would not be the top supplier but rather the financial lessor, a result which it had been sought to avoid. It had been avoided in Article 2 by ensuring that operating leases remained outside the Convention and that any financial lease that attracted the characteristics required for the Convention to apply remained within the Convention not because of Article 2 but by virtue of Article 1 and the subsequent articles. All that Article 2 said was not that the Convention would apply to a financial lease, because it would do so by virtue of Article 1, but that where there was a financial sub-lease within Article 2 then the supplier was identified in the manner prescribed by Article 2.

Mr REBMANN (Federal Republic of Germany) questioned the need for Article 2 in view of the language of Article 15(2) which allowed the lessee to transfer the right to use of the equipment or any other rights under the leasing agreement to a sub-lessee with the consent of the lessor.
The CHAIRMAN requested the Committee to address itself to the question of whether Article 2 should be deleted, a decision which would certainly have effects on the application of the Convention.

Mr MOONEY (United States of America) considered that the deletion of Article 2 would have the impact of depriving the benefit of the Convention to many financial leases representing some of the most important financial leasing transactions which occur today. Reliance only on Articles 1 and 3, without Article 2, with respect to a financial sub-leasing transaction would give rise to the anomalous result that in a chain of financial leasing transactions a financial lessor would be the supplier in a sub-leasing transaction. If the supplier knew about all of the financial lessees in the chain and if all the financial lessees in the chain selected the supplier, and the Convention otherwise applied, then it would apply to each financial leasing transaction in the chain and to identify the supplier it would be necessary merely to mount the chain to find someone who might be a supplier or an operating lessor who had supplied the equipment but was not a financial lessor.

Mr FELSBERG (World Leasing Council) believed that the comments made by the Chairman of the Drafting Committee and by the representative of the United States of America had made it clear that once in a chain there had been a financial lease there could be no subsequent operating lease and vice versa.

The CHAIRMAN enquired whether there was support for a proposal by the representative of the Federal Republic of Germany to delete Article 2. There being none he saw no need to proceed to a formal vote on the matter.

It was so agreed.

Mr ADENSAMER (Austria) suggested that the word “otherwise” be deleted from the second line of Article 2 which would ensure closer correspondence with the French text.

The CHAIRMAN of the Drafting Committee stated that the Drafting Committee had discussed this question and had concluded that the use of the word “otherwise” better reflected the purpose of the article.

Mr ADENSAMER (Austria) withdrew his delegation’s proposal.

No further proposals being made, the CHAIRMAN put Article 2 to the vote in the form in which it had been submitted by the Drafting Committee.

Article 2 was adopted by thirty-two votes to one, with two abstentions.

Article 3

The CHAIRMAN of the Drafting Committee stated that the new Article 3 constituted a redraft of the former Article 2 to which no substantive changes had been made, except to limit the scope of the former paragraph 2 in referring to business transactions to the content of the chapeau and of the former paragraph 1(a). The reason was that in the original text paragraph 2 could have been taken as enabling a court to use the refinement in paragraph 2 so as to arrive at a conclusion on a “place of business” not directly for the purposes of the Convention but for the purposes of applying its own conflict of laws rules which might hold that a particular law applied when a party was carrying on business in a particular place. The intention of the former paragraph 2 had however been simply to identify what was being referred to in the chapeau and in paragraph 1(a) and the new formulation was intended to achieve that result.

As regards the actual textual amendments the second “when” appearing in the chapeau had been deleted to avoid the possible suggestion that the chapeau created an independent ground for the application of the Convention whereas what was intended was that for the Convention to apply both the lessor and the lessee must have their places of business in different States and the
requirements of either sub-paragraph (a) or (b) satisfied.

The Drafting Committee had also considered a Canadian proposal in CONF. 7/D.C./W.P. 2 to insert the phrase "pursuant to rules of private international law" at the beginning of paragraph 1(b) in order to match the language of the United Nations Sale Convention. The conclusion had however been reached that while such language might be appropriate for the Sale Convention, which envisaged two parties who were necessarily carrying on business in different States, the Leasing Convention contemplated three parties and was capable of applying in the not uncommon situation where the supplier and the lessor had their places of business in the same State. In such cases it would be possible to envisage a supply transaction governed purely by domestic law, which contained no foreign element and which was not therefore susceptible to the rules of private international law. The presumably unintended effect of the Canadian proposal would be to exclude such transactions from the scope of application of the Convention as it would not be rules of private international law that would lead to the application of the law of a Contracting State to the supply agreement but simply the domestic law of that State.

In addition he wished to record the view of the Drafting Committee that when Article 3(1)(b) referred to the supply agreement and the leasing agreement being governed by the law of a Contracting State, it did not necessarily mean that both transactions had to be governed by the law of the same Contracting State, and that this was sufficiently clear from the text itself. Finally, he suggested that the effect of reformulating paragraph 2 was to ensure that it was confined to those provisions of the chapeau and of paragraph 1 which referred to a party's place of business.

Paragraph 1

Mr PELICHET (Hague Conference on Private International Law) stated that he did not understand why the conditions in sub-paragraphs (a) and (b) were introduced by the words "soit" in the French text, for which there was no equivalent in the English version. He accordingly proposed that the word "soit" be deleted and that the word "ou" be inserted after the semicolon in sub-paragraph (a).

Mr BERAUDO (France) supported the proposal.

The CHAIRMAN having established that there were no objections to the suggestion of the observer from the Hague Conference on Private International Law, he assumed that it was the wish of the Committee to adopt it.

It was so decided.

Paragraph 2

Mr RÉCZEI (Hungary) stated that he had some difficulty with the rule in paragraph 2 that when a party had more than one place of business the closest relationship to the relevant agreement and its performance must be taken into consideration. He wondered in what way that nexus would be determined as there were a number of factors of importance such as the place of the making of the contract, the place of its performance, the place of payment, the location of the equipment at the time of the conclusion of the contract, the place where the equipment would be situated during performance of the contract etc. He could not personally decide which of those places bore the closest relationship to the contract or its performance and it seemed to him that this was a question of fact to be determined by the courts. He asked therefore whether it might be possible to use language such as "the place of business which has the closest relationship to the relevant agreement and primarily to its performance".

The CHAIRMAN of the Drafting Committee recalled that both the original text and that proposed by the Drafting Committee followed the corresponding language of Article 10 of the United Nations Sale Convention and that the Drafting Committee had not been invited by the Committee of the Whole to make any amendments to paragraph 2.
No support being forthcoming for the suggestion of the Hungarian delegation and no other comments being made on paragraph 2, the CHAIRMAN put Article 3, with the amendment agreed in the French text to paragraph 1, to the vote.

*Article 3 was adopted by forty votes to none.*

Mr BERAUDO (France) proposed that sub-paragraph (b) of paragraph 1 begin with the word "que".

The CHAIRMAN suggested that this was a matter of "toilette" which could be left to the Drafting Committee.

*It was so agreed.*

*Article 4*

The CHAIRMAN of the Drafting Committee recalled that Article 4 was a new provision which had been agreed upon by the Committee of the Whole and he stated that only one change had been made by the Drafting Committee, namely the substitution of the words "The provisions of this Convention" for "This Convention" at the beginning of the article.

The CHAIRMAN invited the representative of Sweden to present his delegation's proposal set out in CONF. 7/C.1/W.P. 31.

Mr JACOBSSON (Sweden) noted that the Drafting Committee had substituted a positive formulation for the negative one to be found in the original United States proposal. This modification seemed to have introduced an element of uncertainty as it was not clear how broad would be its impact on national legislation and he would prefer the original text which had been limited to stating that the mere fact that equipment became a fixture to land did not have the effect that the provisions of the Convention would cease to apply.

The CHAIRMAN of the Drafting Committee believed the point raised by the representative of Sweden to be correct and agreed that it might be preferable to redraft the provision as follows: "This Convention shall not cease to apply merely because the equipment has become a fixture to or incorporated in land".

The CHAIRMAN having found that there were no objections to the Swedish proposal and no other proposals for Article 4, he put Article 4 as amended by that proposal to the vote, on the understanding that if the text were adopted then it would be referred to the Drafting Committee.

*Article 4 was adopted by thirty-two votes to one, with one abstention.*

*The meeting was adjourned at 10.55 a.m. and resumed at 11.35 a.m.*

The CHAIRMAN requested the Chairman of the Drafting Committee to introduce Article 5.

*Article 5*

The CHAIRMAN of the Drafting Committee stated that the new Article 5 corresponded to what had been Article 14 of the basic text. The one substantive change which had been made in paragraph 1 was to permit the exclusion of the future Convention only by the agreement of all three parties so that it would not be sufficient to exclude the Convention either in the leasing agreement or in the supply agreement. The text submitted by the Drafting Committee reflected the solution proposed by the informal working group on the former Article 14 and approved by the Committee of the Whole.
As regards paragraph 2, the text had been clarified so as to make it quite clear that the two paragraphs of the article were mutually exclusive and that either was available to the parties. Moreover, paragraph 2 identified for the first time the provisions from which the parties were not free to derogate. There was in a sense a certain duplication as some of the provisions of the draft Convention themselves contained express non-derogation clauses. It had however been deemed preferable to avoid any possible misunderstanding that might have arisen from the omission of any reference to those provisions in Article 5(2).

Paragraph 1

Ms ASTOLA (Finland) enquired as a matter of drafting whether the permissive language employed in paragraph 1 necessarily implied that two of the parties could not exclude the application of the Convention.

The CHAIRMAN of the Drafting Committee replied that it was the clear implication of the language employed in Article 5(1) that two of the three parties to the financial leasing transaction could not exclude the application of the Convention in the absence of the consent of the third party.

Mr GAVALDA (France) shared the concern of the representative of Finland and suggested that any possible doubts regarding the need for all three parties to agree to exclude the application of the future Convention under paragraph 1 could be dispelled, in the French version, by the insertion of the words “d’un common acord” after the word “peuvent”.

The CHAIRMAN suggested that if the French version of Article 5(1) were to be amended in the sense suggested by the representative of France then it would be necessary to add in the English text some form of wording such as “by common agreement”.

The CHAIRMAN of the Drafting Committee stated that he saw no objections to the insertion of the words “by common agreement” in the English version of the draft Convention even though on a proper construction of Article 5(1) he did not believe them to be necessary. If however there was a feeling that the French text would gain in clarity if the proposal of the French delegation were to be adopted, then it would be desirable for the English version to be aligned on it.

Mr PELICHER (Hague Conference on Private International Law) considered that the proposal of the French delegation raised a question of substance and not merely of form. As he understood the proposal it implied the need for a single written document expressing the common intention of all three parties to exclude the application of the future Convention whereas the present text would allow that result to be achieved by the parties in the leasing and supply agreements respectively.

Mr GAVALDA (France) stated that his proposal was not intended to require that the three parties express their wish to exclude the Convention in a single written document. It could be done either jointly or separately with no requirement as to form.

Mr CUMING (Canada) voiced the same reservations regarding the French proposal in respect of the English text as the observer of the Hague Conference on Private International Law had done in relation to the French version. He felt that the proposal did not succeed in its aim of clarifying the provision as it left open the interpretation that a “common agreement” must be one to which the lessor, the lessee and the supplier were parties and that it could not be expressed separately in the leasing agreement and in the supply agreement. His delegation was therefore opposed to the proposal.

Mr MOONEY (United States of America) shared the concern of the representative of Canada as to the French proposal to add the words “by common agreement” in Article 5(1). If further clarification were thought to be necessary, then this might perhaps be achieved by amending the paragraph to read: “The application of this Convention may be excluded only by the agreement of the lessor, the lessee and the supplier”.
Ms DEBOYSER (Belgium) considered that the proposal of the French delegation would improve the wording of the French text of Article 5(1) and she did not experience the difficulties alluded to by the representative of the Hague Conference on Private International Law. She believed however that the purpose of the French proposal could be met by adding the word “ensemble” after “peuvent” which would make it perfectly clear that no written document was required for the parties to express their intention to exclude the application of the Convention. Finally, she suggested that her proposed amendment need have no impact of the English version which could remain unchanged.

Mr SAMSON (Canada) supported the proposal of the Belgian delegation.

Mr GAVALDA (France) stated that with a view to simplifying the discussion he would withdraw his delegation’s proposal and add its support to the proposed Belgian amendment which was perfectly acceptable.

The CHAIRMAN enquired whether the Committee could accept the proposal of the Belgian delegation to insert the word “ensemble” in the French version of Article 5(1) while leaving the English text unchanged. In the absence of any objection he considered the proposal to be adopted and suggested that it would not be necessary to refer the matter to the Drafting Committee.

*It was so agreed.*

**Paragraph 2**

The CHAIRMAN requested the representative of Sweden to introduce his delegation’s proposal for amendment contained in CONF. 7/C.1/W.P. 31.

Mr JACOBSSON (Sweden) stated that the proposal of his delegation related to the problem of duplication to which reference had already been made by the Chairman of the Drafting Committee. It did not believe it to be sound drafting to state the same rule twice in the same legal text. For these reasons it proposed that the specific reference to the mandatory provisions in Article 5(2) be deleted and the words “except as otherwise stated in the Convention” added at the end of the paragraph. It would thus be for the parties themselves to verify which provisions of the Convention were mandatory.

Mr KATO (Japan) sympathised with the underlying purpose of the Swedish proposal. Nevertheless he preferred the maintenance of the existing text as he feared that the proposed amendment could lead to an unnecessary debate as to which provisions of the Convention were mandatory.

Mr COOK (United Kingdom) agreed with the views expressed by the representative of Japan. A number of delegations believed strongly that Article 5(2) should contain a list of the mandatory provisions and this was perhaps a case where a spirit of pragmatism should prevail over strictly logical considerations.

Mr RONCORONI (Switzerland) supported the Swedish proposal as he found the arguments advanced by the representative of Sweden to be convincing.

Mr FERRARINI (Italy) also supported the Swedish proposal although with a view to clarification it might be reformulated to read “... except as provided in Articles ...”.

Mr DUARTE (Portugal) stated that he too supported the Swedish proposal.

Mr MOONEY (United States of America) strongly urged the retention of the existing language of Article 5(2) for the reasons given by the representatives of Japan and the United Kingdom. The working group on Article 14, now renumbered Article 5, had unanimously reported back to the Committee of the Whole that if the Convention were to contain any mandatory provisions then they should be specifically mentioned so as to avoid claims and disputes in the future as to whether a given provision of the Convention was or was not mandatory. This was a highly sensitive issue for a number of delegations and he believed that it would be desirable to defer to their wish to see a
specific listing of mandatory provisions.

Mr BRENNAN (Australia) supported the retention of the existing text of Article 5(2) as it clearly indicated those provisions which it had been agreed should be mandatory.

Mr RONCORONI (Switzerland) recalled, in the light of the intervention of the representative of the United States of America, that the working group had wished to enumerate the mandatory provisions of the Convention but had been unable to do so as, when it had met, the Committee of the Whole had not yet decided to state expressly in Article 9(3) and in Article 14(3)(b) and (4) that those provisions would be mandatory.

Mr JACOBSSON (Sweden) withdrew his delegation’s proposal in CONF. 7/C.1/W.P. 31 in favour of the solution suggested by the representative of Italy which had the advantage of maintaining the list of mandatory provisions without however restating the rule that they were mandatory.

Mr RICHARDS (Antigua and Barbuda) preferred the maintenance of the existing text of Article 5(2). It was important to be quite clear which were the mandatory provisions of the Convention so as to avoid unnecessary disputes in the future.

Mr PÉREZ-AGUILAR (Mexico) expressed support for the proposal of the Italian delegation.

Mr REBMANN (Federal Republic of Germany) stated that he too supported the Italian proposal.

In response to a request for clarification by the Chairman, Mr FERRARINI (Italy) stated that his proposal constituted a compromise intended to maintain the list of mandatory provisions in Article 5(2) while seeking at the same time to avoid the problem of duplication to which the attention of the Committee had been drawn. He therefore proposed that the end of the paragraph be amended to read “... except as provided in Articles 9(3) and 14(3)(b) and (4)”.

The CHAIRMAN of the Drafting Committee agreed that the proposal of the Italian delegation presented the advantage of recognising the element of duplication to which he had himself already referred. On balance he preferred the existing text but could accept the Italian proposal which, if he understood it correctly, meant that the parties could derogate from or vary the effect of any of the provisions of the Convention except for those listed in Article 5(2).

Mr BRENNAN (Australia) stated that his delegation continued to support the existing text as it believed that the additional language proposed by the representative of Italy might create a problem.

The CHAIRMAN considered that the Italian proposal was essentially in the nature of a drafting amendment designed to avoid stating twice in different articles of the Convention that certain provisions were mandatory by indicating in Article 5 that the parties cannot derogate from those provisions which according to their own text are mandatory. If this was so, he wondered whether the Committee would be prepared to refer the proposal of the Italian delegation to the Drafting Committee.

Mr GUITARD (Spain) enquired whether adoption of the Italian proposal would necessitate consequential amendments elsewhere in the text.

The CHAIRMAN replied that if the approach suggested by the Italian delegation were to be adopted then it would be necessary to find a form of wording in Article 5 which covered the situation where it was not explicitly stated in one of the mandatory provisions that that provision was indeed mandatory. It would in his view be dangerous at this stage to embark on any exercise which would involve amendment of the texts of Articles 9(3) and 14(3) and (4).

Mr SANTOS (Philippines) announced that his delegation could accept the Italian proposal for the reasons set out by the Italian representative.

The CHAIRMAN put to the Committee the question of whether it deemed it advisable to
instruct the Drafting Committee to reconsider a redrafting of Article 5(2) so as to reflect the idea underlying the Italian proposal, on the understanding that such a decision did not constitute a mandate to the Drafting Committee to amend the language of other articles.

Mr BRENAN (Australia) suggested that the Drafting Committee might also consider the language of Article 5(1) with a view to ensuring consistency with the negative form of wording of Article 4 as amended in accordance with the proposal of the Swedish delegation in CONF. 7/C.1/W.P. 31.

The CHAIRMAN stated that he was reluctant to refer more matters to the Drafting Committee at this stage but the point raised by the representative of Australia might offer a way of aligning the English and French versions given the decision to insert in the French text of Article 5(1) the word "ensemble". The Drafting Committee could perhaps also investigate the possibility of a negative formulation of paragraph 1.

_The Committee of the Whole agreed to the Chairman’s proposals and Article 5 as a whole was referred to the Drafting Committee._

Article 6

The CHAIRMAN of the Drafting Committee stated that this article corresponded to the former Article 15. Paragraph 1 remained unaltered but a change of substance had been made in paragraph 2 which the Drafting Committee had believed to reflect the intention of the Committee of the Whole.

In other commercial law Conventions such as the United Nations Sale Convention and the Geneva Agency Convention it was provided that questions concerning matters not governed by the Convention which were not expressly settled in it were to be settled in conformity with the general principles on which it was based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law. In Article 15(2) of the basic text equal status had been given to these two sources of interpretation and the Drafting Committee had altered the wording of what was now Article 6(2) to conform to that of the corresponding provisions of the Conventions to which he had referred so as to give priority to the general principles on which the future Leasing Convention was based.

_Paragraph 1_

The CHAIRMAN found that there were no comments on this provision.

_Paragraph 2_

Mr PISEK (Czechoslovakia) stated that his delegation supported the thrust of the amended text of paragraph 2. From a drafting point of view however he believed the language employed to be defective in that reference was made to the absence of principles on which the Convention was based. This was incorrect as the Convention was based on certain principles.

The CHAIRMAN of the Drafting Committee recalled his earlier statement that the proposed language of paragraph 2 followed the model of existing Conventions. This was not however to say that unsatisfactory precedents should automatically be perpetuated. As he saw it, the intention of the provision was that a court would take into consideration the rules of private international law only in the absence of principles on which the Convention was based applicable to the dispute before it.

Mr PISEK (Czechoslovakia) suggested that the word "applicable" be added after the words "such principles".

The CHAIRMAN of the Drafting Committee believed that this proposal captured the essence of what was intended by paragraph 2 although it might be preferable to leave the precise language to
be determined by the Drafting Committee.

The CHAIRMAN assumed that there would be no objection to referring the proposal of the representative of Czechoslovakia to the Drafting Committee although he expressed concern at the number of matters which were, at this late stage, being remitted to it and he requested delegations to refrain from raising matters of drafting unless they were of same importance.

Mr REBMANN (Federal Republic of Germany) stated that he would prefer to retain the text of paragraph 2 as submitted by the Drafting Committee as its language corresponded to that employed in other international Conventions such as the United Nations Sale Convention.

Mr SANTOS (Philippines) considered that the proposal of the delegation of Czechoslovakia served to clarify the provision.

The CHAIRMAN put to the vote the question of whether the Czechoslovak proposal should be referred to the Drafting Committee.

The proposal was rejected by eighteen votes to seven, with six abstentions.

In the absence of further proposals the CHAIRMAN put Article 6 as a whole to the vote.

Article 6 was adopted by thirty-three votes to none.

CHAPTER II — RIGHTS AND DUTIES OF THE PARTIES

Article 7

The CHAIRMAN of the Drafting Committee stated that Article 7 corresponded to Article 5 of the basic text. In general it was based on the recommendations of the Working Group of Technical Experts which had met in Rome in February 1988, as reformulated in the joint proposal of the delegations of the United States of America, Canada and the United Kingdom embodied in CONF. 7/C.1/W.P. 16.

The Drafting Committee had endeavoured to give effect to five changes of substance adopted by the Committee of the Whole. The first was to extend the classification of the general representative of an insolvent debtor by expanding the word "trustee in bankruptcy"; the second to make separate provision for ships and aircraft; the third to exclude reference to registration systems for vehicles and other types of equipment and to transfer those to the remaining categories; fourth to expand the range of rights, particularly admiralty rights in rem, which would be unaffected by paragraph 1 and finally to preserve the effect of other Conventions such as the Geneva Convention on the Recognition of Rights in Aircraft which required the recognition of the lessor’s rights.

As regards the precise changes, paragraph 1(a) was unchanged except for the insertion of the letter "a" while sub-paragraph (b), apart from the inclusion of the letter "b" was unchanged except for the insertion at the beginning of the words "for the purposes of this paragraph" as suggested by the representative of Australia.

Paragraph 2 also was substantially unchanged, only a slight verbal reformulation already reflected in the work of the technical experts in Rome having been effected which read "those rights shall be valid against that person only if there has been compliance with such rules" an amendment which added clarity to the text.

With respect to paragraph 3 a drafting amendment had been made to the chapeau of the English version, the words "at the time specified in paragraph 4" replacing "at the relevant time" which facilitated correspondence with the French text.

Sub-paragraphs (a) and (b) of paragraph 3 dealt respectively with ships and aircraft. Sub-paragraph (a) embodied with a slight addition the content of the report of the informal working group contained in CONF. 7/C.1/W.P. 19 relating to the proposal of the Comité Maritime International concerning the former Article 5(3). The proposal of the working group as adopted by the Committee
of the Whole was confined to registered ships and was designed to make it clear that in the case of a registered ship where there might be owner registration and bareboat charterer registration it was the former registration which was relevant. The words in brackets “for the purposes of this sub-paragraph a bareboat charterer is deemed not to be the owner” had been added because under the 1986 United Nations Convention on Conditions for Registration of Ships, a registered bareboat charterer was deemed to be the owner for the purposes of certain provisions of that Convention.

Paragraph 3(b) was substantially unchanged but in the light of the report of the informal working group the Drafting Committee had identified more precisely the Chicago Convention on International Civil Aviation of 7 December 1944.

The language of paragraph 3(c) which had spoken of “mobile” equipment and of equipment “normally used in more than one State” had been considered unsatisfactory and the provision now referred to “equipment of a kind normally moved from one State to another”. A specific reference had also been made to aircraft engines so as to make it clear that they were not treated as part of an aircraft.

Paragraph 3(d) was unchanged.

Paragraph 4 followed the language adopted by the Working Group of Technical Experts which differed from the original text in that it made the definition of the relevant time applicable to the whole of paragraph 3 whereas previously it had been confined to the former Article 5(3)(c) which had probably been erroneous.

Paragraph 5 raised a question which had caused difficulty to the Drafting Committee. The word “Convention” had been introduced in place of “international agreement” so as to convey the notion not of a registration system which might be dealt with in a purely bilateral trading agreement between States but rather in a multilateral Convention. This being said, the Drafting Committee had been unable to identify any established usage in international law of such terms as “Convention” “international agreement” or “treaty”. It had opted for the word “Convention” but clearly the views of the Committee of the Whole would be welcome.

Paragraph 6 had been revised in accordance with the report of the technical experts. In the chapeau the word “priority” had been substituted for “rights” while sub-paragraph (a) incorporated the words “consensual or non-consensual” as proposed by the representative of Canada to qualify liens or security interests so as to make it clear that the paragraph applied to liens whether created by agreement or by operation of law.

In relation to paragraph 6(b), the Drafting Committee had added an express reference to “the rules of private international law” while the scope of the provision was confined to “any right of arrest, detention or disposition conferred specifically in relation to ships or aircraft” and was not intended to relate to the general rights of execution available against any goods regardless of their character which could include ships.

The CHAIRMAN called for comments on Article 7(1).

Paragraph 1

Mr DUARTE (Portugal) enquired whether the Drafting Committee had considered the correspondence between the English and French texts in relation to the terms “attachment and execution” and “titre exécutoire”.

The CHAIRMAN of the Drafting Committee stated that the Committee had indeed considered the matter and the view had been taken that the words “titre exécutoire” covered both attachment and execution.

Mr FERRARINI (Italy) stated that he too had problems with the correspondence between the two language versions as in Italian law, at least, there was a substantial difference between “attachment and execution” on the one hand and “titre exécutoire” on the other and he wondered whether the French delegation could offer a more accurate translation of the words “attachment and execution”.

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The CHAIRMAN noted that there had as yet been no proposals for resolving the issue of the concordance of the English and French texts. This was an area where it was practically impossible to achieve identical texts.

Mr FELSBERG (World Leasing Council) enquired whether the French word "saisie" might not be a better translation of "attachment and execution".

Mr FERRARINI (Italy) proposed that the French text be amended to speak of "saisie ou exécution".

Mr PELICHET (Hague Conference on Private International Law) considered that it was insufficient in the French text of paragraph 1(a) to speak of "exécution" since what was involved was judicial attachment or execution. It seemed to him that the word "séquestre" corresponded to the English term "attachment" and he therefore proposed that the words "ou au bénéfice d'un séquestre" be added after "exécutoire".

Mr GAVALDA (France) found the wording proposed by the observer of the Hague Conference on Private International Law to be too restrictive and, in order to meet the concern of the representative of Italy, he proposed that the French text be amended to speak of "titre exécutoire, definitif ou provisoire".

Mr FERRARINI (Italy) stated that he was not entirely satisfied with the French proposal from the viewpoint of Italian law although it certainly constituted an improvement on the present text and he could accept it.

Ms DEBOYSER (Belgium) supported the proposal of the French delegation.

The CHAIRMAN enquired whether the Committee wished to approve the proposal of the representative of France.

It was so agreed.

Paragraph 2

Mr DUARTE (Portugal) stated that the words "shall be valid against that person only if there has been compliance with such rules" did not correspond to the French text which read "ces droits ne lui seront opposables que dans les conditions fixées par ces règles".

The CHAIRMAN enquired whether any delegation wished to make a specific proposal to cure the inconsistency perceived by the representative of Portugal.

Mr BERAUDO (France) proposed that the French text be amended to read "ces droits ne lui seront opposables qui si les conditions fixées par ces règles ont été respectées".

Mr DUARTE (Portugal) stated that he found the text as so amended to be satisfactory.

Ms DUSSEAUX (Commission of the European Communities) believed the negative formulation proposed by the French delegation to be inappropriate as it conveyed the idea of a restriction which she did not feel to be necessary. It would be preferable either to delete the words "ne ... que" or to say that "ces droits lui seront opposables si les conditions fixées par ces règles ont été respectées".

The CHAIRMAN stated that he was not sure as to whether the last proposal might not alter the substance of paragraph 2 and in the absence of any objections he concluded that the French proposal was acceptable to the Committee.

It was so agreed.
Paragraph 3

The CHAIRMAN requested the representative of Sweden to introduce his delegation’s proposal contained in CONF. 7/C.1/W.P. 31.

Mr JACOBSSON (Sweden) stated that the proposal, which merely involved a change in the order of the wording of paragraph 3, was of a purely drafting character.

The CHAIRMAN of the Drafting Committee stated that he could see no objection to the Swedish proposal.

Mr BRENNAN (Australia) had no objections to the proposal of the Swedish delegation but he wondered whether the Drafting Committee had given any consideration to placing the content of paragraph 4 in the chapeau of paragraph 3.

The CHAIRMAN of the Drafting Committee recalled that in an earlier formulation of the article the content of the two provisions had been included in the same paragraph but the result had been that the text had become extremely cumbersome and in the interests of clarity he thought that it would be preferable to maintain the existing formulation.

The CHAIRMAN enquired whether there were any objections to the Swedish proposal which affected only the English text and, hearing none, he assumed that the proposal was adopted.

It was so agreed.

The meeting rose at 1.00 p.m.

THIRTEENTH MEETING

Wednesday, 18 May 1988 at 2.30 p.m.

Chairman: Mr Sevón (Finland)

AGENDA ITEM 6: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING (CONF. 7/D.C./1; CONF. 7/C.1/W.P. 31)

REPORT OF THE DRAFTING COMMITTEE (continued)

Article 7 (continued)

Paragraph 3 (continued)

The CHAIRMAN called for further comments on Article 7(3).

Ms REINSMA (Netherlands) drew attention to an apparent divergence between the English and French versions of sub-paragraph (a). Whereas the English text spoke of “ships”, the French used the word “navires”. As she understood it, the English word “ships” comprehended both sea-going ships and inland navigation vessels while the word “navires” did not extend to the latter. She was raising this matter not as one of substance but with a view to obtaining clarification of what was the intention of the Drafting Committee.

The CHAIRMAN of the Drafting Committee confirmed that the use of the word “ship” in
England was not restricted to sea-going ships and noted that the question had not been the subject of discussion within the Drafting Committee.

The CHAIRMAN recalled that when the matter had first been discussed the representative of the Netherlands had made a reference to inland navigation vessels and had at that time seen some difficulties with the text operating in respect of such vessels; he enquired whether those difficulties persisted in the light of the present text.

Ms REINSMA (Netherlands) stated that her difficulties had been removed because the connecting factor for determining the applicable law had formerly been the flag State which had now been replaced by that of registration. This solved her problem because inland navigation vessels exceeding certain measurements were subject to registration.

The CHAIRMAN stated that the point that had been raised by the observer representative of the Comité Maritime International was in his view one relevant in the context of sea-going ships. If it were the wish of the Committee to proceed in accordance with the view expressed by the observer from the CMI then the word “sea-going” should be added to the English text which would ensure consistency with the French text as presently drafted. If the Committee wished to go even further in the application of Article 7(3)(a) then a redraft of the French text would be necessary. He therefore enquired whether it was the wish of the Committee that the text cover both sea-going ships and inland navigation vessels or that it apply only to sea-going ships.

Ms REINSMA (Netherlands) believed that it would be a more elegant solution to include inland navigation vessels, all the more so as the same legal regime applied to such vessels and to sea-going ships in her country. This being said, however, she would not object if another solution were to be contemplated.

Mr CUMING (Canada) stated that the position in Canada was the same as that in the Netherlands in the sense that its registration law did not draw a distinction between sea-going ships and inland navigation vessels. In English therefore the word “ship”, which comprehended both types of vessels, was appropriate, as also was the choice of the applicable law through this method applicable to both kinds of vessels.

The CHAIRMAN suggested that such a decision would call for a redraft of the French text.

Mr PELICHET (Hague Conference on Private International Law) proposed that the French text be amended to read “les navires ou bateaux immatriculés”.

The CHAIRMAN enquired whether the proposal was acceptable to the Committee of the Whole.

Mr SAMSON (Canada) suggested that the matter be referred to the Drafting Committee as in Canada the term “navire” also included ships navigating on inland waters.

The CHAIRMAN concluded that it was the intention of the Committee of the Whole that subparagraph (a) cover both sea-going ships and inland navigation vessels and that this decision be reflected in an appropriate manner by the Drafting Committee.

It was so agreed.

The CHAIRMAN asked whether there were other proposals in relation to Article 7(3).

Mr JACOBSSON (Sweden) recalled that when this provision had first been discussed the representative of the Federal Republic of Germany had called for the restriction of the application of Article 7(3)(b) to aircraft which were actually registered. The text before the Committee of the Whole did not reflect that proposal as it covered all aircraft whether registered or not. His delegation’s proposal as submitted in CONF. 7/C.1/W.P. 31 sought to achieve the result recommended by the representative of the Federal Republic of Germany by replacing the existing text of sub-
paragraph (b) by the following formulation "in the case of an aircraft which is registered pursuant to the Convention on International Civil Aviation done at Chicago on 7 December 1944, the State in which it is so registered". Unregistered aircraft would then fall under sub-paragraph (c) or, on more rare occasions, under sub-paragraph (d).

Mr MOONEY (United States of America) expressed support for the Swedish proposal which had the effect of bringing sub-paragraph (b) into parallel with sub-paragraph (a).

The CHAIRMAN enquired whether there were any objections to the Swedish proposal. Having found that there were none he suggested that the proposal be referred to the Drafting Committee.

It was so decided.

Mr RÉCZEI (Hungary) believed the words "including an aircraft engine" in Article 7(3)(c) to be out of place. If an aircraft engine was "equipment of a kind normally moved from one State to another" then it was unnecessary to refer to it specifically in a general provision and if it were not then it was incorrect to mention it at all. He was not proposing deletion of the words but could not abstain from criticising the drafting technique employed.

The CHAIRMAN noted that there were no further comments on paragraph 3.

Paragraph 4

Mr BRENNAN (Australia) recalled that the Drafting Committee had modified paragraph 3 so as to speak of the "time specified". Paragraph 4 however continued to speak of the "relevant time" and he proposed that it too be amended so as to secure consistency with paragraph 3.

The CHAIRMAN of the Drafting Committee stated that he saw no difficulty in the proposed amendment to the English text but suggested that it might be wise, before making the change, to consider its implications for the French version.

The CHAIRMAN enquired whether the Committee found it acceptable to request the Drafting Committee to consider an amendment to paragraph 4 which would consist in the replacement of the word "relevant" by "specified" and to make that change if it could be done without creating any complications for the French text.

It was so decided.

Mr PELICHET (Hague Conference on Private International Law) considered that there was a significant difference between the English and French versions of paragraph 4 in that the former provided that "the relevant time is the time when a person ..." and the latter that "le moment à prendre en considération est celui où la personne visée au paragraphe 1 ...".

He understood Article 7(1) as referring to the lessor’s real rights and if that were so then it was the French version of paragraph 4 which was correct. However the text could be simplified, for example by providing that "for the purposes of paragraph 3 the relevant time is the time when the lessor becomes entitled to invoke the rules referred to in paragraph 2".

The CHAIRMAN of the Drafting Committee preferred the retention of the existing text in English as the proposed change would not make it clear that what was being contemplated was any one of the persons specified and that there might at any time be more than one person. As to the French version, the use of the word "la" had been considered by the Drafting Committee and it was his recollection that despite the use of the definite article, the latter encompassed any person.

Mr PELICHET (Hague Conference on Private International Law) stated that he did not understand the explanation since a reference was made to paragraph 1(a) and the whole of Article 7
concerned the real rights of the lessor that might be asserted in the event of bankruptcy. The relevant time for the purposes of paragraph 4 was the time when the lessor, that is to say the person referred to in paragraph 1, asserted its rights.

The CHAIRMAN of the Drafting Committee pointed out that what was at issue was not the lessor's rights but those of a person entitled to complain that the lessor had failed to comply with a registration requirement.

The CHAIRMAN noted that there was no support for any alteration of the text as proposed by the observer of the Hague Conference on Private International Law and accordingly suggested that paragraph 4 be referred to the Drafting Committee which would consider whether the word "relevant" should be replaced by "specified".

*It was so agreed.*

**Paragraph 5**

Mr SAMSON (Canada) drew attention to the need to secure conformity between the French and English versions of paragraph 5 and in particular with regard to use of the words "accord international" in the former and "Convention" in the latter. In his opinion the term "accord international" was broad enough to cover multilateral instruments other than Conventions and he enquired whether it was the intention of the Conference to contemplate such other instruments.

The CHAIRMAN recalled that the expression "international agreement" which had been employed in the basic text had been thought to be inexact because it did not make it clear that what was being referred to were only agreements between States. The question raised by the representative of Canada had not however been considered by the Committee.

The CHAIRMAN of the Drafting Committee stated that the question had caused difficulty to it since there seemed to be no consistent established use of terms such as "international agreement", "treaty", "convention", "multinational convention" and "international instrument". Moreover it appeared that in some jurisdictions, such as France, the description of the instrument depended on the level of authority under which the instrument was executed rather than on the number of parties involved.

Mr BRENNAN (Australia) agreed that this was a difficult question to solve. Many different terms could be employed but some progress would, he believed, be made if the Committee could define the type of international agreements which it had in mind. It was the assumption of his delegation that it was not the intention to comprise agreements between States and companies from another jurisdiction. The next question would then be whether the agreements between sovereign States which were contemplated included bilateral as well as multilateral agreements. If, as his delegation believed, it was intended to cover only the latter, then it might be appropriate to speak of "multilateral treaties" as did the United Nations Convention on the Law of Treaties.

The CHAIRMAN stated that it was his understanding that the Committee of the Whole had, during its previous discussion of the matter, been of the opinion that it was the intention to refer only to those other agreements that had been concluded between States, which he ascertained as being the case. It had not however considered the question of whether it contemplated only multilateral agreements, to the exclusion of bilateral agreements. In his view, whatever language was included in the text, the Vienna Convention on the Law of Treaties would still enable States to agree between themselves on other solutions than those provided by the Conference.

Mr RICHARDS (Antigua and Barbuda) believed that since the Convention under discussion was one which would be concluded among sovereign States it would enjoy the same status as other treaties concluded between such States.
Mr RÉCZEI (Hungary) stated that in the light of what had been said by the Chairman effect would be given also to those Conventions concluded after the entry into force of the Leasing Convention. In consequence it would be possible not only for the parties to the financial leasing transaction but also Contracting States to exclude the application of the Convention, a result which could always be achieved by two States.

Ms DEBOYSER (Belgium) expressed concern that the Committee was, like the Drafting Committee before it, entering into the subtleties of diplomatic language. She suggested that the Committee first seek to establish the English text of the provision, after which appropriate language could be found for that French text to ensure consistency between the two versions.

Mr PELICHET (Hague Conference on Private International Law) considered that the French term “convention” was too narrow. Paragraph 5 should therefore be amended to read “... ne porte pas atteinte à toute autre convention ou tout autre instrument international”, which would have the advantage of including instruments such as directives of the European Communities which were not international conventions.

Mr BRENNAN (Australia) thought that the proposal of the observer of the Hague Conference on Private International Law went too far. If the word “Convention” was considered to be too narrow than a satisfactory alternative might be “treaty”, the interpretation of which would rely on the definition of that term contained in the Vienna Convention on the Law of Treaties.

The CHAIRMAN enquired whether the proposal of the Australian delegation to speak of an “international treaty” was acceptable, on the understanding that the term was to be understood in the sense employed in the United Nations Convention on the Law of Treaties.

Ms TRAHAN (Canada) recalled that the French delegation had in the Drafting Committee insisted on the use of the word “accord” since the term “traité” in French law signified a multilateral document signed by Heads of State.

Mr BRENNAN (Australia) quoted the definition of “treaty” in Article 2 of the Vienna Convention on the Law of Treaties which made no reference to signature by Heads of State.

The CHAIRMAN pointed out that since France was not a party to the Vienna Convention the expression “traité” could have a different connotation in that country. He believed however that as long as it was understood that what the Committee had in mind were international Conventions concluded between States, the precise language used was not of great consequence. He enquired whether there was any objection to the use of the words “treaty/traité” on the understanding that those word were to be interpreted in accordance with the United Nations Convention on the Law of Treaties. He found that there were no objections.

**Paragraph 6**

Mr DUARTE (Portugal) noted that as in paragraph 1(a), the expression “titre exécutoire” was used in the French text.

The CHAIRMAN suggested that the same amendment be made to the French text as that made in paragraph 1(a).

*It was so agreed.*

In the absence of any further proposals in relation to the article the CHAIRMAN put Article 7 as a whole, subject to drafting, to the vote.

*Article 7 was adopted by twenty-seven votes to none.*
Article 8

The CHAIRMAN of the Drafting Committee stated that Article 8 corresponded to the former Article 6 and that no changes had been made to the text by the Drafting Committee.

The CHAIRMAN noted that proposals in relation to the article had been made by the delegations of the Federal Republic of Germany in CONF. 7/C.1/W.P. 29 and of Sweden in CONF. 7/C.1/W.P. 31.

Mr REBMANN (Federal Republic of Germany) proposed that the words “inter se” be deleted. In the first place, Article 8 was related to Article 7(1) because it was concerned with the real rights of the lessor. However since real rights were valid, or invalid as the case might be, as against all other persons and not just between certain persons the presence of the words “inter se” could give rise to ambiguity. For example, if the lessor’s equipment became incorporated in land and by operation of law the rights in the equipment were to be transferred to the owner of the land questions could arise regarding not only the relations between the lessor and that owner but also in respect of those of the lessor and creditors of the owner of the land. In this connection the matter should be determined by the lex rei sitae. If the text were to remain as it stood, then it could be taken to mean that the lessor’s real rights in the equipment would stand, which was not the case.

Second, he understood that there was a divergence between the English and French texts of Article 8 in that the English version spoke of “rights inter se” and the French of “droits respectifs” as he had been advised that the French language did not convey the idea of the mutual rights of two parties.

Mr ADENSAMER (Austria) supported the proposal of the representative of the Federal Republic of Germany.

Ms DEBOYSER (Belgium) considered it necessary to retain the word “respectifs” in the French text as it facilitated comprehension and its deletion would make the text less clear.

Mr FERRARINI (Italy) expressed support for the proposal of the delegation of the Federal Republic of Germany although he believed that only the English text called for amendment.

Mr PELICHET (Hague Conference on Private International Law) agreed that the French text was quite satisfactory and that it would be sufficient to improve the English version.

The CHAIRMAN of the Drafting Committee considered “inter se” to be perfectly appropriate language as all that Article 8 did was to address the situation of a conflict between the rights of the lessor and those of a person claiming rights in rem over the land to the exclusion of their relationships with any other person.

Mr PISEK (Czechoslovakia) supported the views expressed by the Chairman of the Drafting Committee.

Mr MOONEY (United States of America) also agreed with the explanation given by the Chairman of the Drafting Committee although in his view the words “inter se” were not essential as the restriction of the application of the provision to conflicts between the lessor and another person asserting real rights over the land was clear from the text itself without the words whose deletion was proposed.

Ms DEBOYSER (Belgium) considered that the explanation of the Chairman of the Drafting Committee justifying the use of the words “inter se” in English applied equally to the use of the word “respectifs” in the French version.

Mr REBMANN (Federal Republic of Germany) insisted that Article 8 could not be read in isolation. It had to be considered in conjunction with Article 7(1) which enunciated the main rule asserting the validity of the lessor’s real rights against the creditors of the lessee. It was however possible that the lessee might itself be the owner of the land in which the equipment had been
incorporated and in these circumstances he was not satisfied by the explanation so far given for the need, or even the desirability, of retaining the words "inter se" which he saw as a source of potential misunderstanding.

The CHAIRMAN of the Drafting Committee agreed that at first sight there might appear to be some connection between Articles 7 and 8. It was however necessary to appreciate that whereas Article 7 was intended to preserve the lessor’s real rights against a range of unsecured creditors and their representatives, Article 8 laid down no rule at all, other than a conflict of laws rule selecting the law by reference to which a particular priority dispute between two parties, and them only, was to be resolved. Acceptance of the proposal to delete the words "inter se" could, he believed, bring about a significant difference in the substantive effect of Article 8.

Mr REBMANN (Federal Republic of Germany) recalled that the introduction of the new Article 4 attached increased importance to the question of fixtures and the incorporation of equipment in land. Article 4 provided that the provisions of the Convention should continue to apply even if the equipment became incorporated in land. This meant that for the purposes of Article 7 the lessor’s real rights in the equipment would be valid even if the equipment were to be incorporated in land and to safeguard the law of his country regarding rights in rem the contrary rule would be necessary. This result could be achieved by deleting the words “inter se”.

The CHAIRMAN of the Drafting Committee replied that Article 4 did not as such establish the lessor’s real rights. All that it did was to ensure that the Convention would not cease to apply when what was a chattel became, in a particular jurisdiction, land since concern had been expressed that otherwise such a chattel might no longer be considered to be equipment. Article 4 did not then provide that a lessor’s rights in the equipment would continue to be effective even though the equipment had become a fixture, a matter which was nowhere dealt with by the draft Convention save to the extent that Article 8 established a choice of law rule in favour of the lex rei sitae.

Mr MOONEY (United States of America) believed that there was general agreement within the Committee that the Convention was not to deal with conflicts of interest between the lessor and all of those persons who might be claiming real rights in the real estate. Those issues were left to the lex rei sitae. He wondered whether the concern of the representative of the Federal Republic of Germany could be met if the words “inter se” were to be deleted and the relevant wording of the provision reformulated to read "... and if so the effect on the rights between the lessor and persons having real rights in the land ...”.

Mr BERAUDO (France) expressed the view that the problem under discussion was an important one. Article 8 did not purport to lay down substantive rules governing the rights of persons in equipment which had become a fixture or had been incorporated in land. All it did was to establish a conflict of laws rule to the effect that in such cases the rights of the lessor and of a person having real rights in the land should be determined by the law of the State where the land was situated. In other words it had nothing to do with the lease and most certainly did not regulate the rights of the lessor and the lessee as some statements had suggested. The words “inter se” in the English text were confusing and should be deleted.

The CHAIRMAN noted that Article 8 had given rise to different interpretations. He recalled that the basic text had contained a provision corresponding to Article 8 but that it was only at a later stage, during the Conference itself, that Article 4, concerned with certain issues relating to the fixture of equipment, had been introduced. In these circumstances he wished to put two questions to the Committee. First, did Article 8 deal with issues which should appropriately be covered by the Convention and, second, since the choice of law rule laid down in Article 8 was that of the vast majority, if not all, legal systems, was it either useful or necessary to restate the rule in the Convention?

Mr BERAUDO (France) saw no difficulty in deleting Article 8 but if that were to be done then Article 4 should likewise be deleted for its retention in the absence of Article 8 could give rise to difficulties of interpretation.
The CHAIRMAN expressed doubt as to whether the two provisions were so broadly related since, unlike Article 8, Article 4 was directly relevant to the substance of the Convention, for example the question of whether the lessee should be obliged to pay rentals in relation to equipment which had been incorporated in land.

Mr MOONEY (United States of America) believed that there must be some misunderstanding as his perception of the function of Article 8 was the same as that of the representative of France. As he understood the situation, the Committee had decided in Article 4 that when goods became fixed to land the Convention would continue to operate but because of the content of Article 7, the point had to be made that the Convention was not interfering with the real rights of the lessor as they related to various claimants with real rights in the land. This was done in Article 8. The problem was probably only one of language in that the words "inter se" seemed to connote rights between the lessor and the lessee even though the language clearly stated that "inter se" referred to the rights between the lessor and third parties with an interest in the land.

The CHAIRMAN of the Drafting Committee fully agreed with the statement of the representative of the United States of America and with the explanation of the purpose of Article 8 given by the representative of France. The purpose of Article 8 was not to regulate relations between lessor and lessee but simply to identify a conflict rule in the event of a priority dispute between the lessor and a person claiming an interest in the land. That result was achieved in the English text by use of the words "inter se" which made it clear that what was contemplated was not a dispute between the lessor and the lessee but one between the lessor and a person claiming an interest in the land. If the words "inter se" were to be removed then Article 8 could become susceptible to the interpretation that it concerned disputes between the lessor and any other person and disputes between a person with an interest in the land and any other person.

Article 4 dealt with an entirely different issue and made it perfectly clear that the relations between the lessor and the lessee and the relations between either of them and the supplier as governed by the Convention would not be affected by the equipment becoming a fixture or being incorporated in land.

Mr OZSUNAY (Turkey) pointed out that Article 8 did not deal with the rights and duties of the parties (lessor/lessee/supplier) and he therefore proposed that it be removed from that chapter and relocated in Article 4 which was concerned with the problem of equipment becoming a fixture or incorporated in land. He also supported the deletion of the words "inter se" in Article 8.

Mr RICHARDS (Antigua and Barbuda) believed that since Article 4 dealt specifically with the application of the Convention to equipment which had become a fixture then of necessity the question arose of what happened when a third party who was not involved in the financial leasing transaction had an interest in the land in which the equipment was incorporated.

In his view the intention of Article 8 was to put it beyond doubt that the Convention did not govern the rights in the equipment of the lessor and a person not a party to the leasing transaction but with an interest in land in which the equipment had been incorporated.

The CHAIRMAN stated that the Committee had before it three proposals. First that of the Turkish delegation to relocate Article 8 in Chapter 1, second that of the delegation of the Federal Republic of Germany to delete the words "inter se" in the English text, and third the drafting suggestion of the United States delegation.

Mr CUMING (Canada) expressed support for the suggestion earlier made by the Chairman that Article 8 be deleted in its entirety.

The CHAIRMAN stated that this matter could also be put to a vote.

Mr FELSBERG (World Leasing Council) suggested that the difficulty stemming from the use of the words "inter se" was that they were being used in connection with real rights, which was contradictory in Latin because real rights were opposable *erga omnes* and not just *inter se*. The problem might perhaps be solved if the English version were to be aligned on the French text by the
use of such words as “the respective rights of the lessor and a person having real rights in the land”.

The CHAIRMAN of the Drafting Committee considered that the substitution of the words “inter se” by “the respective rights” would not achieve the desired result. If, on the other hand, Article 8 as a whole were to be deleted, the result would almost certainly be the same in almost all legal systems which would invariably apply the lex rei sitae in the case of land.

Mr JACOBSSON (Sweden) stated that the Turkish proposal to relocate Article 8 mirrored the proposal of his own delegation in CONF. 7/C.1/W.P. 31 where it was suggested that Article 8 be re-numbered as Article 4(2). The reason for the proposal was that Article 8 was merely a choice of law rule as opposed to one of substance and therefore belonged more appropriately in the general provisions of Chapter I.

The CHAIRMAN enquired first whether the Committee wished to delete Article 8. This not being the case he put to the vote the proposal by the delegation of the Federal Republic of Germany contained in CONF. 7/C.1/W.P. 29 to delete the words “inter se” in the English text and “respectifs” in the French.

*The proposal was rejected by twenty votes to eight, with two abstentions.*

The CHAIRMAN noted that in these circumstances it was no longer necessary to consider the drafting proposal formulated orally by the delegation of the United States of America.

He then put to the vote the proposal of the Swedish delegation in CONF. 7/C.1/W.P. 31 which had also been made orally by the representative of Turkey to relocate Article 8 as a new paragraph 2 of Article 4.

*The proposal was adopted by twenty-two votes to four, with one abstention.*

The CHAIRMAN put Article 8 to the vote, on the understanding that it would be transferred to Article 4 as a second paragraph of that article.

*Article 8 was adopted by twenty votes to none, with two abstentions.*

*The meeting rose at 4.10 p.m.*
in CONF. 7/D.C./1 Add. He recalled that the mandate of the Drafting Committee had been twofold, first to consider the possibility of reformulating paragraph 1 so as to bring about consistency with the language employed in Article 4, and second to indicate in paragraph 2 the mandatory provisions in such a way as to avoid declaring them to be mandatory twice.

The CHAIRMAN of the Drafting Committee stated that paragraph 5(1) had been amended with a view to conveying the idea that all three parties must agree to exclude the application of the Convention without there being any need for this to be done by a common agreement. The Drafting Committee had sought to achieve this by providing that the application of the Convention would be excluded only if the lessor, the lessee and the supplier each agreed to its exclusion.

In relation to paragraph 2, the Drafting Committee had, as regards the English version, slightly amended the proposal of the representative of Italy for purely stylistic reasons and had inserted the words “as stated” after the word “except” which were followed by a reference to the mandatory provisions, namely Article 9(3) and Article 14(3)(b) and (4).

Paragraph 1 (continued)

Mr GAVALDA (France) recalled that his delegation had earlier withdrawn its own proposal in relation to paragraph 1 in favour of the Belgian proposal to insert the word “ensemble” which he preferred to “chacun”.

Mr SAMSON (Canada) said that the Drafting Committee had felt that the words “consentir ensemble” might be taken as implying a joint meeting of minds at the same time in a specific place, whereas what had been intended was to allow the consent to be separate and for this reason it had chosen the words “ont chacun consenti”.

Mr BERAUDO (France) considered that the word “ensemble” did not give rise to such ambiguity. If, however, such a risk were perceived, then he suggested that “chacun” be replaced by “tous”.

Ms DEBOYSER (Belgium) recalled that there had been agreement within the Committee to refer both the English and the French versions to the Drafting Committee for possible amendment and the word “chacun” had been chosen as a translation of the English word “each”. The Drafting Committee had preferred the adoption of a passive, rather than a positive, formula so as to cover all cases, in particular that where one party had not expressed its opinion. She was of the view that the present text constituted an improvement over the earlier one in both English and French.

The CHAIRMAN of the Drafting Committee admitted that the use of the word “chacun” in the French version was not perhaps the most elegant of formulations but in view of the amendment to the English text he appealed to the French delegation to accept the word “chacun” which he believed to be unambiguous.

Mr BERAUDO (France) reminded the Committee that in its earlier discussion the formulas “d’un commun accord” and “ensemble” had been suggested, both of which had been fully acceptable to his delegation. The word “chacun” however did not reflect sufficiently clearly the idea that all three parties must agree to the exclusion of the application of the Convention and he reiterated his delegation’s proposal to employ the word “tous”.

Mr THIAM (Guinea) supported the French proposal.

Mr SAMSON (Canada) favoured retaining the expression “ont chacun consenti”.

Mr BERAUDO (France) recalled that the representative of Belgium had explained that the Drafting Committee had opted for the word “chacun” as a translation of the English word “each” which, perhaps, did not mean “tous”. Might it then not be possible in the English version to say “all agree”.

Mr MOONEY (United States of America) considered that the English language version pro-
posed by the Drafting Committee was perfectly satisfactory. If, however, a still greater degree of precision were called for then this could be achieved by a text which would provide that the application of the Convention would be excluded only if the lessor agreed to exclude it, the lessee agreed to exclude it, the supplier agreed to exclude it and, in addition, they all agreed to exclude it.

Mr KATO (Japan) expressed the opinion that the word “each” was preferable to “all” which would fail to cover the situation where there was agreement between the first and second parties and between the second and third parties, but not between the first and third parties to exclude the application of the Convention.

Mr BERAUDO (France) suggested that since the Committee had earlier voted in favour of the use of the word “ensemble” in the French text it abide by that decision.

The CHAIRMAN agreed that this was a possible solution but the fact should not be overlooked that the Drafting Committee had been requested to reformulate paragraph 1 so that the question of the use of the word “ensemble” might be seen in a different light.

Mr THIAM (Guinea) understood the intention as being that each of the parties could block the consent of the other two to the exclusion of the application of the Convention with the consequence that the consent of all three was required. If this was so, then the word “tous” would be preferable to “chacun” as it was broader in scope and more appropriate in view of the negative formulation of the sentence.

Mr DUARTE (Portugal) suggested that the English text might read “if each of the parties to the supply agreement and to the leasing agreement agrees to exclude it” and the French “si chacun des parties à chacun des contrats consent à son exclusion”.

The CHAIRMAN enquired of the Chairman of the Drafting Committee whether it would be appropriate in the English text to replace the word “each” by “all” and if it would be appropriate to refer in both texts to “each of the parties to the supply agreement and to the leasing agreement”.

The CHAIRMAN of the Drafting Committee considered that there was a definite need for the use of the word “each” in the English text whatever the formulation adopted. He found the suggestion of the representative of Portugal to be acceptable although he preferred the shorter formulation proposed by the Drafting Committee.

The CHAIRMAN asked whether the French-speaking delegations were of the belief that language to the effect proposed by the representative of Portugal for the French text would be satisfactory.

Mr THIAM (Guinea) enquired whether the intention of two parties to exclude the Convention was sufficient or whether that of all three was necessary. If the latter were the case, then the word “tous” would be preferable. In addition, he noted that the Portuguese proposal employed the conditional form, which would entail a restructuring of the remainder of the sentence.

The CHAIRMAN believed that such a restructuring would not be necessary.

Mr RICHARDS (Antigua and Barbuda) stated that the only possible reading of the text proposed by the Drafting Committee was that the consent of all three parties was necessary to exclude the application of the Convention.

Mr BERAUDO (France) stated that he understood the Portuguese proposal as meaning that the application of the Convention would be excluded only if each of the parties to each of the agreements so agreed. This formulation was clearer than that suggested by the Drafting Committee and he could accept it, although he would have preferred the simpler expedient of replacing the word “each” by “all”.

The CHAIRMAN suggested that since the proposal by the delegation of Portugal seemed to cover the point adequately it would be preferable to adopt it and thus to reach a consensus rather
than to prolong the discussion and possibly put the English and French versions to separate votes.

The CHAIRMAN of the Drafting Committee stated that in the circumstances he would be quite content if the Portuguese proposal were to be adopted by the Committee of the Whole.

Ms DEBOYSER (Belgium) suggested that in the interest of brevity one might speak of "each of the parties to the leasing transaction".

The CHAIRMAN feared that further discussion at this stage might complicate matters and proposed that the Committee accept the Portuguese amendment.

*It was so decided.*

*Paragraph 2 (continued)*

Mr KATO (Japan) pointed out that as a consequence of renumbering the reference to Articles 9 and 14 should be changed to Articles 8 and 13.

The CHAIRMAN thanked the representative of Japan for raising this point which would be attended to by the Drafting Committee.

In the absence of further comments on paragraph 2 he put to the vote Article 5 as a whole, as amended in accordance with the Portuguese proposal concerning paragraph 1.

*Article 5 was adopted by twenty-two votes to none, with one abstention.*

*Article 9*

The CHAIRMAN noted that two proposals had been made in relation to this article, one by Sweden concerning paragraph 2 (CONF. 7/C.1/W.P. 31) and the other by Canada (CONF. 7/C.1/W.P. 30) for the addition of a new paragraph 4. First, however, he asked the Chairman of the Drafting Committee to explain the revised text.

The CHAIRMAN of the Drafting Committee recalled that Article 9 corresponded to the former Article 7. The one substantive change in paragraph 1(a) had been the introduction of a causal connection between the act of the lessor and loss suffered by the lessee justifying the loss of the lessor's immunity from liability which had been absent from the original text. This had been achieved by providing that the loss must have been suffered by the lessee as a result of its reliance on the lessor's skill and judgment and the lessor's intervention in the selection of the supplier. If for example the lessor were to advise a step or in some way intervene in the selection of the supplier or the specification of the equipment but the lessee were to proceed on the basis of its own judgment or on that of a third party, the lessor's exemption from liability would remain. The situation would however be different if, in addition to the lessor's intervention, the lessee were to rely on the lessor's advice and to suffer loss in consequence. On the other hand the lessor's immunity from liability would not be forfeited if, for instance, the lessee were simply to select a supplier because it knew that the lessor regularly purchased equipment from that supplier and therefore assumed that the supplier was a reputable one without in any way requesting the lessor's advice and in the absence of any intervention by the lessor.

In paragraph 1(b) a provision had been inserted regarding death while sub-paragraph (c) remained unchanged. As to paragraph 2, the proposed text reflected the recommendation of the working group contained in CONF. 7/C.1/W.P. 27. Paragraph 3 was likewise based on a recommendation of that working group with a minor reformulation designed to bring its wording into line with similar language in other provisions.

*Paragraph 1*

Mr DUARTE (Portugal) stated that he saw a problem in the French version of Article 9, in
particular in paragraph 1(b) where the English text read "in its capacity of lessor" and the French "en sa qualité de crédit-bailleur". The term "lessor" as used in the Convention was somewhat ambiguous as sometimes it could be understood as referring to a "financial lessor" and on other occasions to a lessor in the more general sense. In his view what was contemplated by Article 9(2) was the "true lessor" which should be rendered in French as "bailleur" as no law to his knowledge imposed liability specifically upon a financial lessor as such.

Mr FELSBERG (World Leasing Council) recalled that in many legal systems there was no distinction between a lessor's liability in its capacity as lessor and its liability in any other capacity, such as that of an owner. The net result of sub-paragraphs (b) and (c) was to say that the lessor shall not be liable while the wording of sub-paragraph (c) was such that for some systems the above provisions would not govern such liability. This seemed to be contradictory and the contradiction could be removed by deleting from paragraph 1(c) the concluding words "for example as owner". The summary records might then provide some explanation as to what the other capacities could be.

The CHAIRMAN asked whether any delegation would wish to take up the suggestion by the observer of the World Leasing Council.

Mr DE PAIVA (Brazil) supported the suggestion to delete the words "for example as owner" at the end of paragraph 1(c).

Mr BERAUDO (France) saw the proposal as affecting a fundamental aspect of the Convention. He recalled that provisions similar to sub-paragraphs (b) and (c) of paragraph 1 had formerly been contained in the draft Factoring Convention. They had been deleted and he would have no objection to their being deleted from the Leasing Convention. If however they were to be maintained, then they should not be changed as it was necessary to impose a strict limit on the exemption of the lessor from liability, that was to say in its capacity as lessor and not in its capacity as owner.

The CHAIRMAN put to the vote the proposal to delete the words "for example as owner" at the end of Article 9(1)(c).

The proposal was rejected by twenty-five votes to one, with two abstentions.

The CHAIRMAN requested the Committee to revert to the proposal made by the representative of Portugal to replace the words "crédit-bailleur" by "bailleur" in the French text.

The CHAIRMAN of the Drafting Committee recalled that this was a question which had been discussed on many occasions in the past in Rome both by the study group and by the committee of governmental experts. In his view the wording of the English text was quite satisfactory. As far as the French text was concerned, he noted that in the context of the article nothing turned on maintaining the character of the lessor as a financial lessor, since the idea being conveyed was that the lessor did not incur a liability merely because it was someone who was agreeing to supply equipment under a lease and therefore in a sense notionally delivering possession.

Mr DUARTE (Portugal) agreed that there were no problems concerning the English text. His doubts regarding the French version however persisted since under the law of a number of States, including his own, the true lessor would incur liability in many more cases than would the financial lessor.

The CHAIRMAN enquired whether there was support for the Portuguese proposal.

Mr DUARTE (Portugal) stated that in the absence of support for his delegation's proposal he would withdraw it.

Mr KATO (Japan) suggested the insertion in paragraph 1(c) of the words "in its capacity of lessor" to bring about conformity with sub-paragraph (b) where they already appeared.
The CHAIRMAN of the Drafting Committee considered the distinction to be justified on the ground that the words were employed in the abstract in sub-paragraph (b) whereas what was being dealt with in sub-paragraph (c) was any liability of a specific lessor in any other capacity.

Mr KATO (Japan) withdrew his proposal.

*Paragraph 2*

The CHAIRMAN requested the representative of Sweden to introduce his delegation’s proposal as contained in CONF. 7/C.1/W.P. 31.

Mr JACOBSSON (Sweden) stated that while it had been accepted that the provisions of paragraph 2 would be almost entirely non-mandatory his delegation felt that there would be a lack of balance if the draft placed the whole burden of proof on the lessee. This seemed to be the case with the present wording of the end of the paragraph which stated that “where such title, right or claim is derived from an act or omission of any person other than the lessee”. He therefore proposed that the balance be redressed somewhat by replacing that language by the following: “where such title, right or claim is not derived from an act or omission of the lessee”.

The CHAIRMAN suggested that the Swedish proposal reflected part of the result of the deliberations of the working group on Article 7 and he enquired whether there was support for the proposal.

Mr REBMANN (Federal Republic of Germany) expressed support for the proposal of the Swedish delegation.

Mr MOONEY (United States of America) stated that he had no objections to the Swedish proposal although it was not clear to him that the burden of proof would in any way be affected by the proposed drafting change.

Mr PISEK (Czechoslovakia) supported the Swedish proposal as in his view it would, if adopted, require the lessor to prove the act or omission of the lessee.

Mr KATO (Japan) saw no necessity to amend the text in regard to the burden of proof and accordingly registered his opposition to the Swedish proposal.

The CHAIRMAN put to the vote the Swedish proposal as set out in CONF. 7/C.1/W.P. 31.

*The proposal was adopted by twenty-five votes to three, with four abstentions.*

Mr OZSUNAY (Turkey) drew attention to the fact that whereas paragraph 1 of Article 9 was concerned with the liability of the lessor, paragraphs 2 and 3 concerned the warranties owed by the lessor to the lessee. The article should therefore be split into two separate articles, paragraph 1 becoming the new Article 8 as a result of renumbering and paragraphs 2 and 3 recast as paragraphs 1 and 2 of Article 9.

The CHAIRMAN asked whether there was support for the Turkish proposal.

In the absence of such support Mr OZSUNAY (Turkey) withdrew his proposal.

*Paragraph 3*

Mr BERAUDO (France) stated that a proposed reservation to Article 9(3) had been submitted by the French and Mexican delegations in CONF. 7/C.1/W.P. 25.

The CHAIRMAN suggested that the Committee first consider the provisions of Article 9, after which it could revert to the proposed reservation clause. No objections being made to that procedure, and no other comments being made on paragraph 3, he invited the representative of Canada to
introduce his delegation's proposal for the insertion of a new paragraph 4 as contained in CONF. 7/C.1/W.P. 30.

Proposed new paragraph 4

Mr CUMING (Canada) stated that his delegation's proposal had been framed with a view to avoiding the inclusion in the Convention of a reservation clause in relation to Article 9. The aim of the new paragraph 4, which had already featured in the basic text as part of Alternative II of Article 7(3), was to ensure that any mandatory warranty of quiet possession provided by the applicable law would displace the more limited warranty of quiet possession specified in Article 9.

The CHAIRMAN enquired whether those delegations which favoured a reservation in respect of paragraph 3 would consider that their concern was met by the Canadian proposal for a new paragraph 4.

Mr BERAUDO (France) believed that while the Canadian proposal contained in CONF. 7/C.1/W.P. 30 would make Article 9 more acceptable to his delegation, it did not render the joint proposal for a reservation clause otiose. The proposed paragraph 4 would make it possible to apply the law governing the contract if it were more favourable to the lessee but this did not alter the fact that paragraph 3 would remain. It was a general rule of contract law that the parties may choose the law to govern their contract and if, for example, in a leasing contract between a party in France and one in Canada, the parties were to select Canadian law to apply to their contract, which contained a clause along the lines of paragraph 3, a French judge seized of the dispute would be obliged to uphold a clause excluding the lessor's liability for negligence even though such an exclusion would not be permitted by French law. If, on the other hand, a State were allowed to make a reservation concerning the application of paragraph 3 the French judge would be able to set aside the clause in the contract. The French delegation could in these circumstances accept the Canadian proposal but on the understanding that it was not a substitute for the joint proposal for a reservation clause submitted by his delegation and that of Mexico.

Mr SÁNCHEZ CORDERO (Mexico) supported the intervention of the representative of France.

Mr MOONEY (United States of America) stated that he too could support the Canadian proposal for a new paragraph 4 which would in his opinion, if adopted, dispense with the need for the proposed reservation clause. He was moreover surprised to hear that a French court would not respect the will of the parties as expressed in a choice of law clause and he failed to see how paragraph 3 would in any way affect the existing situation.

Mr DOUKOURE (Guinea) felt that the Canadian proposal raised a substantive problem with regard to the conformity of a Convention with the domestic public policy of the States that would have to apply its provisions. For these reasons he supported the French proposal for a reservation clause.

The CHAIRMAN noted that support had been expressed for the Canadian proposal in CONF. 7/C.1/W.P. 30 and after establishing that there were no objections to it, he put the proposal to the vote.

The proposal was adopted by nineteen votes to four, with four abstentions.

The CHAIRMAN asked whether there were further observations regarding Article 9 and having found that there were none he put to the vote Article 9, as amended in accordance with the Swedish proposal for paragraph 2 and including the new paragraph 4 proposed by the Canadian delegation.

Article 9 was adopted by twenty-four votes to three, with two abstentions.


Proposed reservation clause

The CHAIRMAN requested the representatives of France and Mexico to introduce their proposal in CONF. 7/C.1/W.P. 25.

Mr BERAUDO (France) stated that he had already described the reasons underlying the joint proposal when commenting upon the Canadian proposal for a new paragraph 4. The aim of the proposed reservation clause was to permit States not to apply paragraph 3, the effect of which was to allow lessors to exclude liability for breach of the warranty of quiet possession other than in cases of international acts or gross negligence, a solution unacceptable to his delegation and contrary to the law of many other States. He concluded that it would be a loyal gesture on the part of the majority which had voted in favour of paragraph 3 vis-à-vis the significant minority which had difficulties with it, to accept the inclusion of the proposed reservation clause.

Mr SÁNCHEZ CORDERO (Mexico) recalled that Article 9(3) had given rise to lengthy debate and he suggested that the acceptance of a reservation clause would have the effect of permitting a larger number of States to ratify the Convention.

Mr GOODE (United Kingdom) stated that he had the greatest difficulty in understanding the position of the French delegation. The purpose of the future Convention was to reflect a broad measure of agreement on a number of matters achieved through discussion and compromise and it had proved necessary for all delegations to compromise on one issue or another. Paragraph 3 was itself part of an article which constituted a specific compromise reached by the working group after hard bargaining. The Committee was not dealing with an earth-shattering problem of worldwide dimensions but rather with an interference with quiet possession, liability for which was regularly excluded by parties in their contracts and in respect of which provision had been made to deal with abuses arising from intentional or grossly negligent conduct. The Committee was moreover being asked to believe that a French court would, under its current law, disregard a choice of law clause applying the law of another country which would allow effect to be given to paragraph 3 because French law considered the matter to be of such overriding importance as to displace a bona fide choice of law clause. He could not understand such an approach and appealed to the representative of France to reconsider his position.

Mr SANTOS (Philippines) supported the joint proposal of the French and Mexican delegations in CONF. 7/C.1/W.P. 25 which would render the Convention more broadly acceptable.

Mr DOUKOURE (Guinea) stated that he could not imagine a better compromise than acceptance of the proposed reservation clause, which would allow a greater number of States to become Parties to the Convention.

Mr ZYKIN (Union of Soviet Socialist Republics) stated that he too had difficulty in understanding the proposal of the French delegation and wondered why a French court would consider the matter as being so serious as not to recognise the validity of a contractual clause governed by foreign law on grounds of public policy. As regards the text of the draft reservation clause as it stood, he queried whether its effect might not, having regard to Article 5(2), be to render the provisions of Article 9(3) non-mandatory in that the parties could include in their contract any provisions which they wished regarding the warranty of quiet possession.

The CHAIRMAN agreed with this analysis of the effect of the proposed reservation clause as worded which could operate not only to restrain freedom of contract in some States but to enlarge its scope in others. In the absence of further comments on the proposal to introduce a reservation clause in relation to Article 9(3), the Chairman put to the vote the joint proposal of the French and Mexican delegations contained in CONF. 7/C.1/W.P. 25.

The proposal was rejected by eleven votes to nine, with eleven abstentions.
Article 10

The CHAIRMAN invited the Chairman of the Drafting Committee to introduce Article 10.

The CHAIRMAN of the Drafting Committee recalled that Article 10 corresponded to Article 8 of the basic text. The Drafting Committee had followed the instructions of the Committee by making one change, suggested by the representative of Colombia, intended to ensure in paragraph 1 that the requirement of the normal use of the equipment would take into account the type of industry in which the equipment was used. The Drafting Committee had sought to accomplish this by substituting the words "reasonable use" for "normal use" so as to allow the court to have regard to all the relevant circumstances. Otherwise no changes had been made to the text of the article.

Paragraph 1

The CHAIRMAN enquired whether there were any comments on paragraph 1. Since this was not the case, he called for observations on paragraph 2.

Paragraph 2

Mr SANTOS (Philippines) recalled that during the first reading of the draft Convention he had drawn attention to the situation in which the equipment was modified during the term of the lease and he asked whether the Drafting Committee had considered this question during its deliberations.

The CHAIRMAN of the Drafting Committee stated that to the best of his recollection the matter had not been considered by the Drafting Committee although he did remember that in response to the earlier intervention of the representative of the Philippines he had expressed the opinion that the point was already covered by the text.

Mr MOONEY (United States of America) confirmed that the question had not been considered by the Drafting Committee.

The CHAIRMAN enquired whether the representative of the Philippines wished to submit a proposal.

Mr SANTOS (Philippines) suggested the addition of words such as "... and if modified, that it will be returned as modified at the end of the lease".

The CHAIRMAN recalled that the point raised by the representative of the Philippines had been deemed to be a question of drafting and had on that basis been remitted to the Drafting Committee. In these circumstances he suggested that the matter be referred once again to the Drafting Committee with instructions to reconsider whether the present text met the concern expressed by the delegation of the Philippines and, if not, to seek an appropriate formulation, bearing in mind the oral proposal made by the representative of the Philippines.

Mr SANTOS (Philippines) stated that this procedure was fully acceptable to his delegation.

Mr MOONEY (United States of America) considered the proposal of the representative of the Philippines to be one encroaching on substance and was distressed at the possible implication that the lessee enjoyed a right or ability to modify leased equipment and return it in an altered condition with impunity. This was a matter normally regulated by the parties in their contract and it was in his view unnecessary to address it in the Convention.

Mr SANTOS (Philippines) replied that his delegation’s proposal was concerned only with changes to the equipment that had been agreed by the parties.

The CHAIRMAN stated that he had understood the proposal of the representative of the Philippines in the manner he had just described. The proposal was not intended to be one going to
the substance of the provision and ought not to be interpreted as in any way authorising unilateral modification of the equipment by the lessee.

Mr REBMANN (Federal Republic of Germany) suggested that the problem could be resolved by the addition in paragraph 2 of the words "unless otherwise agreed in the leasing agreement".

The CHAIRMAN of the Drafting Committee proposed as an alternative the insertion at the end of the paragraph of the words "as modified by the agreement of the parties".

The CHAIRMAN expressed the view that it would be preferable to refer the matter to the Drafting Committee which should seek a solution that would meet the concern of the representative of the Philippines, taking account of the various proposals that had been made.

It was so agreed.

Mr DOUKOURE (Guinea) proposed that in the French text of paragraph 2 the language "contrat du crédit-bail" be amended to read "contrat de crédit-bail".

The CHAIRMAN noted that there were no objections to this proposal and in the absence of any further comments he suggested that Article 10 be put to the vote on the understanding that the Drafting Committee would consider the point raised by the representative of the Philippines and if necessary amend the text accordingly.

It was so decided.

Article 10 was adopted by twenty-nine votes to none.

Article 11

The CHAIRMAN of the Drafting Committee recalled that the new Article 11 corresponded to the former Article 9. As regards paragraph 1, an amendment had been made to take account of the suggestion of the representative of the Philippines that it should be expressly stated that the direct liability imposed on the supplier under Article 11 did not expose it to a double liability with respect to the same loss and this had been achieved by the inclusion of a new sentence which read: "However, the supplier shall not be liable to both the lessor and the lessee in respect of the same damage." The only change to paragraph 2 had been the addition at the end of the paragraph of the words "without the consent of the lessor" in accordance with a decision taken by the Committee of the Whole.

Paragraph 1

The CHAIRMAN called upon the representative of Sweden to introduce his delegation's comment on paragraph 1 contained in CONF. 7/C.1/W.P. 31.

Mr JACOBSSON (Sweden) stated that his delegation's difficulty with the newly added last sentence of paragraph 1 was one of a linguistic character in respect of which clarification would be welcome. As worded the provision ensured that the supplier would not be obliged to compensate the lessor and the lessee for the same damage; what it did not do however was to exclude the possibility of the supplier's being liable to the lessor and to the lessee in respect of the same default.

The CHAIRMAN of the Drafting Committee stated that this analysis reflected both the intention of the provision and its effect. The purpose of the decision taken not to expose the supplier to double liability was to ensure that it would not have to pay twice for the same loss, once by virtue of its contractual liability to the lessor and again by virtue of its independent liability under the Convention to the lessee. The Drafting Committee had not understood the decision of the Committee of the Whole as being to prevent a division of a claim according to the loss suffered by the lessor.
and the lessee in relation to their respective interests. If, for example, non-conforming equipment were to be supplied, the lessee could suffer loss because the equipment did not function as it should while the lessor might suffer a different form of loss on account of the diminution of the ultimate residual value of the equipment. In such cases the supplier would be liable for the same default but the damage suffered by the lessor and by the lessee would not be the same.

Mr JACOBSSON (Sweden) stated that he was satisfied with the explanation.

The CHAIRMAN enquired whether there were any further comments on paragraph 1.

Mr FERRARINI (Italy) raised a point concerning the law applicable to the supply agreement which was relevant to both Article 11 and Article 13. He wondered whether it might not be useful to refer specifically to the law applicable to the supply agreement and this for two reasons. First, because the remedies could be provided not by the supply agreement itself but by the law applicable to it and second because Articles 11 and 13 both relied to a certain extent on fictions which might induce a court to apply to the leasing agreement and to the remedies a law different from that applicable to the supply agreement. The situation could be clarified by amending paragraph 1 to read as follows: “The duties of the supplier under the supply agreement and under the law applicable to that agreement ...”.

The CHAIRMAN of the Drafting Committee stated that this question had been considered by the Drafting Committee and the view had prevailed that if the content of the obligations of the supplier to the lessee was determined by the supply agreement, that necessarily involved applying the law governing the supply agreement as in the absence of that agreement there would be no connection between the supplier and the lessee and there would be no other law capable of applying unless one were to assume the existence of independent remedies in tort which fell outside the scope of the Convention. It had therefore been considered unnecessary to make a specific reference to the law governing the supply agreement.

The CHAIRMAN enquired whether the representative of Italy was satisfied with the explanation provided by the Chairman of the Drafting Committee.

Mr FERRARINI (Italy) stated that he remained to be fully convinced that no difficulties would arise but he would not press the point if his concern was not shared by other delegations.

The CHAIRMAN asked whether there was support for the proposal to insert language in paragraph 1 referring not only to the supply agreement but also to the law governing the supply agreement and in the absence of such support he assumed that the Committee deemed the explanation offered by the Chairman of the Drafting Committee to be adequate and sufficient.

*It was so agreed.

*Paragraph 2*

The CHAIRMAN having found that there were no comments on paragraph 2, he put Article 11 as a whole to the vote.

*Article 11 was adopted by thirty-one votes to none.*

*Article 12*

The CHAIRMAN of the Drafting Committee stated that Article 12 corresponded to the former Article 4. It was possible in this instance that the Drafting Committee might have encroached somewhat on substance but if it had done so it had been with a view to giving effect to the intention of the original text. The purpose of the provision, which had provided that the supply agreement could not be varied without the consent of the lessee, had been to ensure that the lessee’s direct right
of action against the supplier could not be cut down by a variation of the supply agreement to which it was not a party but upon which its rights against the supplier were founded. The formulation of the former Article 4 had however been rather ambiguous as it was not clear whether a variation of the supply agreement without the consent of the lessee was totally void, whether it was effective as between the parties but not binding on the lessee or whether there was simply a breach of a duty giving rise to no particular sanction. The present text therefore of Article 12 reflected the idea that a variation could not be made which might adversely affect the lessee by providing that the lessee’s rights derived from the supply agreement under the Convention are not to be affected by a variation of any term of the supply agreement previously approved by the lessee unless it consented to that variation. The specific mention of a term previously approved by the lessee constituted a reference back to Article 1 under which the lessee’s approval of the terms of the supply agreement was built into the scope of the Convention.

The CHAIRMAN having found that there were no comments on the article, he put Article 12 to the vote.

*Article 12 was adopted by twenty-eight votes to none.*

*Article 13*

The CHAIRMAN noted a comment on Article 13 by the delegation of Sweden contained in CONF. 7/C.1/W.P. 31 and a proposal by the delegation of the Federal Republic of Germany in CONF. 7/C.1/W.P. 34. He invited the Chairman of the Drafting Committee to introduce Article 13.

The CHAIRMAN of the Drafting Committee stated that the new Article 13 corresponded to the former Article 10. The substance of the changes made was three-fold, namely to reformulate the article so as to bring it into line with the United Nations Sale Convention without setting out the relevant rules in detail, to clarify the position of the parties in relation to the effects of termination and to accommodate the suggestion of the Canadian delegation concerning methods of cure provided in the United Nations Sale Convention other than a fresh tender of non-conforming equipment. The new article was based essentially on the United Kingdom proposal contained in CONF. 7/C.1/W.P. 10 as adapted, while the Drafting Committee had sought to make it clear that the lessee’s rights under Article 11 against the supplier were not affected by any remedies it might have under Article 13.

The new Article 13(1)(a) followed the United Kingdom proposal in CONF. 7/C.1/W.P. 10 while paragraph 1(b), instead of referring to cure by a fresh tender of conforming equipment, used the more general formula, taken over textually from the United Nations Sale Convention, namely the words “has the right to remedy the failure to perform any of its duties”. Paragraph 2 followed the text contained in CONF. 7/C.1/W.P. 10 except that in the penultimate line the words “under the same terms as those of the supply agreement” had been used rather than “under the supply agreement” to reflect the fact that the lessee was not a party to the supply agreement. The new paragraphs 3 and 4 reflected revised versions of the Swedish proposals adopted by the Committee of the Whole. Paragraph 5 had been retained unchanged while paragraph 6 was entirely new and was intended to remove any doubt as to the maintenance of the lessee’s rights against the supplier.

*Paragraph 1*

The CHAIRMAN noted that there were no comments on paragraph 1.

*Paragraph 2*

The CHAIRMAN invited the representative of Sweden to present his delegation’s comment on paragraph 2 contained in CONF. 7/C.1/W.P. 31.

Mr JACOBSSON (Sweden) recalled that during the first reading of the article the representa-
tive of Hungary had suggested that paragraph 2 could be deleted in the light of the content of paragraph 1. He shared this view although he had no objection to the retention of paragraph 2 if such was the general wish.

The CHAIRMAN noted that there were no further observations on paragraph 2.

Paragraph 3

Mr PISEK (Czechoslovakia) drew attention to a seeming disparity between the right of the lessor under paragraph 1(b) to remedy its failure to perform any of its duties and that of the lessee to withhold rentals under paragraph 3 until the lessor tendered conforming equipment. In his view the right to remedy failure to perform was broader than the tender of equipment.

The CHAIRMAN of the Drafting Committee suggested that the discrepancy might be the result of an oversight by the Drafting Committee in failing to consider the need for an amendment to paragraph 3 consequent upon that to paragraph 1. This being said, it was not easy to make the provisions correspond entirely as the duties owed were not necessarily parallel. He suggested therefore that a minor drafting amendment might solve the difficulty.

The CHAIRMAN enquired whether the representative of Czechoslovakia would be satisfied if the Drafting Committee were to be requested to look into the matter once more.

Mr PISEK (Czechoslovakia) stated that such a solution would be quite satisfactory.

The CHAIRMAN established that there were no further observations on paragraph 3.

Paragraph 4

The CHAIRMAN noted that there were no comments on paragraph 4.

Paragraph 5

The CHAIRMAN found that there were no observations on paragraph 5.

Paragraph 6

The CHAIRMAN requested the representative of the Federal Republic of Germany to introduce his delegation’s proposal in relation to paragraph 6.

Mr REBMANN (Federal Republic of Germany) stated that his delegation’s proposal contained in CONF. 7/C.1/W.P. 34 regarding Article 13(6) had been framed incorrectly. What was intended was not the substitution of the original text by new language but rather the addition of a new sentence which would read as follows: “Once the lessor has terminated the leasing agreement, it may not invoke performance of the supply agreement”. Such a provision would be of assistance to practitioners as it would make it clear that the lessee’s claim against the supplier for performance of the supply agreement would cease once the lessee had terminated the leasing agreement.

Mr MOONEY (United States of America) feared that the proposal of the delegation of the Federal Republic of Germany would substantially undermine one of the principal objectives of the Convention, namely the granting of rights to the lessee against the supplier under Article 11. It had to be recalled that save for the limited rights of rejection and termination of the leasing agreement the lessee relied on the supplier alone with regard to the quality of the equipment. In typical cases where the lessee rejected non-conforming equipment and the lessor had not yet paid the supplier, the lessee would terminate the leasing agreement and could suffer very severe damage as a consequence of failure to deliver the specified equipment. As he understand the proposed amendment to paragraph 6 it would deprive the lessee of its right to sue the supplier.
Mr REBMANN (Federal Republic of Germany) stated that that was not the intention of his delegation's proposal. The point was that once the lessee terminated the leasing agreement it made it clear that it no longer wished to have the equipment and while it should be able to exercise any claim for damages for non-delivery or delivery of non-conforming equipment against the supplier it should not be entitled to exercise claims for delivery, diminution of the price or repair of defective equipment since the leasing agreement no longer existed.

Mr SÁNCHES CORDERO (Mexico) agreed with the representative of the United States of America that the proposal of the delegation of the Federal Republic of Germany seriously infringed the lessee's rights and had the effect of disturbing the delicate balance which had been established in respect of the rights of the parties.

The CHAIRMAN asked whether there was support for the proposal of the delegation of the Federal Republic of Germany.

Mr ADENSAMER (Austria) supported the proposal which was not connected with the rejection of the equipment but rather with the termination of the leasing agreement. He believed therefore that the arguments advanced by the representative of the United States of America were not fully apposite.

The CHAIRMAN of the Drafting Committee recalled that the lessee could not terminate the leasing agreement or reject the equipment without surrendering possession of it. The lessee would not be able to call for redelivery once the supply agreement had been ended as there would no longer by any agreement to which it could attach delivery obligations. It would therefore be necessary to qualify the proposal made by the representative of the Federal Republic of Germany to preserve the pre-existing rights accruing to the lessee prior to termination. This could involve complicated drafting and would only state a rule that followed as a matter of law that once the supply agreement was at an end no future obligations of delivery would arise under it. In these circumstances he believed the addition to be unnecessary.

Mr FELSBERG (World Leasing Council) considered that it might be useful to view the matter in the light of domestic transactions. In cases of non-delivery or of delivery of non-conforming equipment where both the supply and the leasing agreements had been entered into, it was usual for the leasing agreement to be terminated, thus allowing the lessee to deal directly with the supplier to obtain the right equipment or to claim damages. He saw no reason why domestic and international transactions should be treated differently.

Mr BERAUDO (France) believed that the proposed additional language would not be necessary for the French legal system but he appreciated that it might be useful to others and suggested that an appropriate formula which would avoid the difficulties alluded to by the representative of the United States of America would be the following: “Once the lessee has terminated the leasing agreement, it may not call upon the supplier for delivery of the equipment”.

The CHAIRMAN recalled that on a number of occasions the text of the draft Convention had been amended to meet the concern of certain delegations without causing difficulties to others but here he noted that some delegations had considered the proposed amendment to paragraph 6 as being harmful to the system established by Article 11.

Mr MOONEY (United States of America) pointed out that in cases of non-delivery or delivery of non-conforming equipment the lessee might wish to terminate the leasing agreement. Under Article 11 the lessee could claim against the supplier, perhaps for specific performance. If that right were to be removed the lessee would find itself in the situation of having to request the lessor to assign to it the supply agreement so as to permit the lessee to sue the supplier for the purpose of obtaining delivery which would place the lessee at the mercy of the lessor. He suggested therefore that the text of paragraph 6 be maintained as it stood, leaving it to the supplier to seek any protection it might require under the terms of the supply contract.
The CHAIRMAN enquired whether the representative of the Federal Republic of Germany would agree to the amendment to his delegation’s proposal tabled by the representative of France.

Mr REBMANN (Federal Republic of Germany) stated that he could accept the French amendment.

The CHAIRMAN put to the vote the proposal of the Federal Republic of Germany as so amended.

*The proposal was rejected by fifteen votes to seven, with four abstentions.*

The CHAIRMAN having established that there were no further comments on paragraph 6, he put Article 13 as a whole to the vote.

*Article 13 was adopted by twenty-eight votes to one.*

**Article 14**

The CHAIRMAN of the Drafting Committee stated that the new Article 14 corresponded to the former Article 11 and embodied five points of substance. First, it clarified that the lessor could recover damages for breach of the leasing agreement without first having to terminate the agreement; second, it ensured that on acceleration of rentals, including any acceleration relevant to the computation of damages, there could be a discount to allow for acceleration; third, it made it clear that the right to accelerate rentals was conditional on the presence of an express acceleration clause in the contract as well as on substantial default by the lessee; fourth, it stated that the duty to mitigate was a general duty applicable to Article 14 as a whole and not merely to damages, as was provided in paragraph 2(b) of the former Article 11, and finally it made restrictions on unreasonable penalty clauses mandatory. The revised text was based on that proposed by the United Kingdom delegation in CONF. 7/C.1/W.P. 14 as amended and throughout the article the word “compensation” had been replaced by “damages”.

As to the changes in the language of the article, the words “and damages” had been added in paragraph 1 while paragraph 2 referred to the “accelerated payment of the value of the future rentals” so as to indicate that what was meant was the present value after the discount had been taken into account. In the same paragraph, the phrase “where the leasing agreement so provides” was intended to make it clear that there was no independent right to accelerate rentals while the word “may” at the end of the *chapeau* had been omitted. The former paragraph 3 had been divided into two sub-paragraphs so as to ensure that the effect of the non-derogation clause was confined to the relevant part of the provision and a non-derogation clause had been added at the end of sub-paragraph (b). In the third part of paragraph 3 the word “disproportionate” had been replaced by the phrase “damages substantially in excess” so as to render explicit what had been implicit in the former text, namely that there must be a substantial divergence between the contractual claim for damages and the recoverable loss in order for a court to refuse enforcement and to make it clear that the provision was confined to excessive payments and did not allow the lessor to recover more money because the liquidated damages provision turned out to have been substantially inadequate.

The new paragraph 4 referred to the “value of such rentals”, i.e. as discounted, in accordance with the United Kingdom proposal contained in CONF. 7/C.1/W.P. 14, and also contained a non-derogation clause. Paragraph 5 had been subjected only to minor verbal changes while paragraph 6 made it clear that the duty to mitigate applied to the article as a whole.

*Paragraph 1*

The CHAIRMAN noted that there were no comments on paragraph 1 and invited observations on paragraph 2.
Paragraph 2

Mr RONCORONI (Switzerland) enquired why the words “défaillance substantielle” had been substituted by the expression “défaillance grave” in the French version while there had been no change in the English text.

The CHAIRMAN invited the Chairman of the Drafting Committee to answer the question.

The CHAIRMAN of the Drafting Committee stated that the word “grave” in the French text had the same meaning as “substantial” in the English text in reference to the nature of the default.

The CHAIRMAN asked whether the explanation was acceptable.

Mr RONCORONI (Switzerland) stated that he would not pursue the matter in view of the late hour.

The CHAIRMAN enquired whether there were any other comments on paragraph 2.

Mr SANTOS (Philippines) recalled that during the first reading of the article he had pointed out that under paragraph 2 the lessor could, in the event of substantial default, terminate the leasing agreement, recover possession of the equipment and be entitled to damages in the form of future rentals which would put it in the same position as if the lessee had performed the agreement in accordance with its terms. He recollected that the Chairman of the Drafting Committee had stated that this result was not intended but no change had been made to the text and he welcomed clarification.

The CHAIRMAN of the Drafting Committee considered that the remedies available under Article 14(2) posed no problems. The damages to which the lessor was entitled were those which would place it in the position it would have been in had the lessee performed in accordance with the terms of the leasing agreement. Had that happened the lessor would have received its rentals and, at the end of the lease, recovered the equipment or its residual value. If, on the other hand, the lessor were to recover the equipment and then sue for damages, then it had to give the lessee credit at least for the discounted value of the repossessed equipment for if it did not do so the result would be to put the lessor in a substantially better position than it would have been had the lessee performed its obligations under the leasing agreement. He believed therefore that there was no need to alter the drafting of paragraph 2(b) as the point raised by the representative of the Philippines was already dealt with adequately.

The CHAIRMAN stated that he assumed that the view of the Drafting Committee was that the matter was satisfactorily covered by the existing text.

Mr SANTOS (Philippines) expressed concern at the fact that there was no reference to “discount” in the provision.

The CHAIRMAN of the Drafting Committee considered that it was unnecessary to make such a reference in paragraph 2(b) as the point was already covered by the language “the position in which it would have been had the lessee performed the leasing agreement in accordance with its terms” which conveyed the idea that regard must be had to the fact that the lessor would obtain by the award of damages a sum of money earlier than it would have received payment of the rentals.

Mr SANTOS (Philippines) suggested that the text should make it clear what kind of damages were recoverable under Article 14(2)(b).

The CHAIRMAN believed that it would be extremely difficult to indicate the heads of damages and enquired whether the representative of the Philippines wished to submit a specific proposal.

Mr SANTOS (Philippines) recalled that under sub-paragraph (a) the lessor could recover possession of the equipment and under sub-paragraph (b) damages. He was concerned at the fact
that a court might interpret damages in the sense of future rentals not recovered by the lessor with the consequence that the lessee would be paying rentals in respect of equipment already repossessed by the lessor. He proposed therefore the introduction of a provision which would mitigate the extent of the lessee’s liability in the event of substantial default.

The CHAIRMAN of the Drafting Committee reaffirmed his conviction that the point raised by the delegation of the Philippines was satisfactorily settled by the present text and given the late hour and the substantial problems attendant upon a redraft of the provision he appealed to the representative of the Philippines not to press his delegation’s proposal.

Mr SANTOS (Philippines) stated that he would not insist on his proposal.

The CHAIRMAN thanked the representative of the Philippines for his cooperation and, in the absence of any specific proposal on paragraph 2, invited comments on paragraph 3.

*Paragraph 3*

The CHAIRMAN noted that there were no observations on paragraph 3.

*Paragraph 4*

Ms ASTOLA (Finland) asked whether the reference to “a term of that agreement” in the second line would include for instance a term of general conditions applied in the relations between the lessor and the lessee and whether the words “of that agreement” could be deleted.

The CHAIRMAN of the Drafting Committee replied that the point raised by the representative of Finland was covered by the present text for if a lease were granted on standard terms those terms would be incorporated in the leasing agreement.

The CHAIRMAN noted that a reference to the leasing agreement would also include modifications agreed by the parties and asked whether the explanation of the Chairman of the Drafting Committee was deemed to be sufficient.

*It was so agreed.*

*Paragraph 5*

The CHAIRMAN found that there were no comments on paragraph 5.

*Paragraph 6*

The CHAIRMAN noted that there were no observations on paragraph 6.

The CHAIRMAN put Article 14 as a whole to the vote.

*Article 14 was adopted by twenty-seven votes to none.*

*Article 15*

The CHAIRMAN of the Drafting Committee stated that no changes had been made to Article 15 which corresponded to the former Article 2.

*Paragraph 1*

The CHAIRMAN having found that there were no comments on paragraph 1, he invited observations on paragraph 2.
Paragraph 2

The CHAIRMAN established that there were no comments on paragraph 2 and accordingly put Article 15 as a whole to the vote.

*Article 15 was adopted by twenty-seven votes to none.*

*New Article F*

The CHAIRMAN noted that a proposal for a reservation clause had been submitted by the United Kingdom delegation in CONF. 7/C.1/W.P. 33 and called upon the representative of the United Kingdom to introduce the proposal.

Mr COOK (United Kingdom) recalled that his delegation had supported, and still did support, the inclusion of ships within the scope of the Convention as well as the specific reference to them in Article 7(3). It had however understood the discussion on the exclusion of ships to be one limited to the issue of exclusion, without prejudice to any delegation’s ultimate position on, in particular, mandatory provisions and the content of the final clauses. The United Kingdom delegation looked forward to the acceptance of the Convention by a substantial number of States and bearing in mind the fact that certain significant changes had been made to the text of the original draft as a result of the deliberations of the Committee of the Whole, his delegation now proposed the inclusion of a new Article F, the effect of which would be to allow Contracting States to declare that they would not be bound by any part of the Convention in respect of financial leasing transactions as described in Articles 1 and 2 if they related to the supply of ships. He insisted however that the introduction of such a clause should be seen as a protective measure and did not necessarily imply that the United Kingdom would avail itself of it in the event of its becoming a Party to the Convention.

Secondly, he recalled the present involvement of the United Nations Conference on Trade and Development (UNCTAD) in the field of maritime matters and more particularly in that of charter-parties. The United Kingdom accepted that financial leasing transactions might cover certain charter-parties although those had not been designed for the purpose of financing the acquisition of ships. The United Kingdom would not therefore wish to see the provisions of the Convention, especially the mandatory provisions, create a standard or precedent for any future regulation of charter-parties, any internationally agreed regime regarding which should be established in the context of a set of proposals specifically designed for them.

The CHAIRMAN enquired whether there was support for the inclusion of such a reservation clause and having ascertained that there was none he asked whether there were any objections.

Mr COOK (United Kingdom) stated that in the absence of support for his delegation’s proposal it would be withdrawn.

The CHAIRMAN thanked the representative of the United Kingdom for his cooperation and declared the second reading of the draft Unidroit Convention on international financial leasing to be completed. He expressed appreciation to the Drafting Committee and in particular to its Chairman, Mr Goode, for the excellent work it had accomplished under considerable pressure.

Mr MOONEY (United States of America) stated that he was speaking on behalf of all the members of the Committee of the Whole in congratulating Mr Sevón on the outstanding manner in which he had chaired the meetings of the Committee.

*The meeting rose at 11.45 p.m.*
FIFTEENTH MEETING

Thursday, 19 May 1988, at 4.15 p.m.

Chairman: Mr Sevón (Finland)

AGENDA ITEM 7: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FACTORING (Study LVIII – Doc. 33; CONF. 7/6 and Add. 2; CONF. 7/C.1/W.P. 35-37)

The CHAIRMAN proposed that the Committee of the Whole turn its attention to the draft Unidroit Convention on International Factoring. He invited general comments on the draft, after which the Committee might discuss Articles 1 to 11 thereof in numerical order together with any proposals for the addition of new articles. It ought also to consider Article X and the preamble, although the title should be reserved for consideration by the Final Clauses Committee.

After noting that there were no general observations on the draft Convention he drew attention to a proposal by Japan in CONF. 7/6 to divide the Convention into three chapters, a proposal which he thought might best be left to the Drafting Committee.

Mr KATO (Japan) agreed to this suggestion.

Article 1

Paragraph 1

The CHAIRMAN indicated that a number of written proposals had already been made in relation to Article 1(1)(a) and he called upon the representative of Spain to introduce the amendment contained in CONF. 7/6.

Mr GUITARD (Spain) stated that the proposal was in line with that made by his delegation in regard to the draft Leasing Convention. An affirmative form of wording would avoid unnecessary ambiguity and he therefore moved that the reference in Article 1(1)(a) to the sale of goods bought for personal, family or household use be replaced by one to goods bought for business purposes.

Mr BERAUDO (France) supported the Spanish proposal, principally on the ground that only advantages could flow from the language of the Leasing and Factoring Conventions being the same in this connection.

The CHAIRMAN stated that he understood the proposal by the Swedish delegation in CONF. 7/C.1/W.P. 37 as relating to the same question.

Mr JACOBSSON (Sweden) confirmed that this was the case. His delegation also wished to exclude consumer transactions from the scope of the Convention but this should preferably be done in an article on scope rather than in one on definitions since many factoring transactions were concerned with consumer contracts. It was for this reason that he suggested that the language proposed by his delegation which reproduced that now to be found in the corresponding provision (Article 1(4)) of the draft Leasing Convention should be included in a special article or paragraph.

Mr GUITARD (Spain) stated that he could support the Swedish proposal although he thought that it might usefully be amended to read: “This Convention applies to a factoring transaction in relation to receivables arising from contracts of sale of goods ...”, the remainder of the text following the language proposed by the representative of Sweden.
Mr JACOBSSON (Sweden) found the suggestion to be quite acceptable.

Mr GOODE (United Kingdom) expressed agreement with previous delegates who had called for an affirmative form of wording to bring the text into line with the corresponding provision of the draft Leasing Convention although he was not fully sure that the language of the amendment under discussion identified with sufficient clarity the particular supply transaction under consideration. It was moreover his understanding that, unlike the draft Leasing Convention, the Factoring draft had always contained a positive formulation on this point and it might therefore be sufficient to refer the matter to the Drafting Committee.

Mr KATO (Japan) agreed with the interventions of the previous speakers.

The CHAIRMAN stated that there seemed to be support on the one hand for the exclusion of consumer transactions from the scope of application of the future Convention and on the other for the adoption of affirmative language to express that idea. If this were the view of the Committee and if there were no other proposals regarding paragraph 1(a) he suggested that the provision be referred to the Drafting Committee for consideration in the light of the preceding discussion.

It was so decided.

The CHAIRMAN called upon the representative of Italy to introduce his delegation’s proposals relating to Article 1(1)(b) which were contained in CONF. 7/C.1/W.P. 36.

Mr DE NOVA (Italy) explained that the first proposal was aimed at clarifying the language “maintenance of accounts (ledgering)” which he found to be too broad as the factor did not as a rule maintain all the supplier’s accounts. It would be more precise to speak of “maintenance of accounts (ledgering) with regard to the receivables”. The second proposal was addressed to the words “protection against default in payment by debtors” which also seemed to be too wide. It was therefore necessary to clarify the provision in the sense that the factor’s undertaking covered only the risk of the debtor’s financial inability to make payment and not any default on its part.

Mr REBMANN (Federal Republic of Germany) asked why it was necessary to introduce additional language restricting the provision in question to the debtor’s financial inability to pay as the factor might well accept other risks associated with non-payment.

Mr KOLLERT (Czechoslovakia) agreed with the statement by the representative of the Federal Republic of Germany since in his view the more general wording of the existing text was in closer conformity with existing factoring practice.

Mr RÉCZEI (Hungary) enquired why it was necessary to limit the maintenance of accounts to receivables only.

Mr GOODE (United Kingdom) expressed his support for the proposals of the Italian delegation. In almost all standard factoring contracts the factor restricted its risk to that of the insolvency or inability to pay of the debtor and such contracts contained a warranty by the supplier that the debt was undisputed and if there were to be a dispute resulting in non-payment by the buyer the factor would be entitled to debit back the price of the receivable and require it to be repurchased.

Mr REBMANN (Federal Republic of Germany) agreed in substance with the interpretation of the new language proposed but he remained unconvinced of the need for it since it was not apparent that the buyer would be in default if it refused to pay for goods in respect of which it was in dispute with the supplier. The factor should not assume the risk in cases where the buyer was entitled to withhold payment.

Mr DE NOVA (Italy) conceded that perhaps his second proposal raised a question not only of drafting but also of factoring practice, although he had to affirm that in the practice with which he was familiar the factor did not assume the risk of, for example, the debtor’s non-payment due to defects in the goods. If however default in payment meant only non-payment due to financial
inability to pay then the problem was perhaps solved but he was not sure that the existing language adequately expressed this idea.

As to the query of the representative of Hungary, he recalled that Article 1(1)(b) laid down certain conditions for the application of the Convention. If these were to be phrased too broadly, as was the case with the language "maintenance of accounts (ledgering)", there was a risk that some transactions might be excluded from the application of the Convention.

Mr GOODE (United Kingdom) believed that there was a consensus to restrict the scope of the Convention to agreements under which the factor assumed a credit risk but not others. In his view the issue was essentially one of drafting and while he personally found the existing text to be adequate he favoured the referral of the provision to the Drafting Committee. The words "inability to pay" might however be too narrow as they would not cover cases of the debtor's totally unjustified unwillingness to pay.

Mr SOMMER (Factors Chain International) stated that most factors assumed responsibility only for the ledgering of accounts receivable, although in some cases they might extend their activity to the ledgering of other things. What was however important was to ensure that recognition that such unusual situations existed should not have the effect of restricting the Convention's scope of application by their inclusion as a condition for such application.

Mr REISMAN (United States of America) agreed with the observations of the representatives of Italy and of the United Kingdom to the extent that the matter was more of drafting than of substance. What was however important was to avoid language in Article 1(1)(b) which would limit the scope of application of the Convention by contemplating services which a factor would not normally provide, although of course the incorporation of narrower language would not result in the exclusion from the Convention of those cases where the factor did provide additional services. He suggested therefore that the question be referred to the Drafting Committee.

Mr JACOBSSON (Sweden) felt that the text should not be complicated by more detailed language as it was already adequate to meet the concern of factors. If a factor wished to provide protection against other risks, this should not affect the application of the Convention.

The CHAIRMAN noted that the thrust of the Italian delegation's proposals was to avoid certain transactions being excluded from the scope of application of the Convention by reason of the use of broad language in Article 1(1)(b), when the original intention had been to include them. To the extent therefore that the proposals could be viewed as being of a drafting character and that they would not restrict the Convention's scope of application, he suggested that they be referred to the Drafting Committee for consideration.

*It was so decided.*

The CHAIRMAN drew attention to the fact that the Japanese delegation had submitted in CONF. 7/6 a proposal for the deletion of the words "in writing" in Article 1(1)(c), together with a subsidiary proposal that if that provision were to be retained unchanged then the question should be considered in relation to Article 7(1)(a). As he understood it, a Swedish proposal in CONF. 7/C.1/ W.P. 37 to delete Article (1)(c) addressed the same issue. In addition, the United States delegation had submitted a redraft of the provision in CONF. 7/6 Add. 2.

Mr KATO (Japan) stated that he had no objection to the requirement that written notice be given to the debtor but he doubted whether it was necessary to include such a requirement in a provision on scope of application. He would have preferred to see the Convention apply to any factoring transaction requiring notice to be given to the debtor, provided that notice was actually given in writing.

Mr JACOBSSON (Sweden) was of the same view. Even if sub-paragraph (c) of Article 1(1) were to be deleted the debtor would still be protected under Article 7 if it were to receive no written
notice to pay. He also found it to be unnatural for the requirement of written form to be included in a provision on the definition of a factoring contract.

Mr GOODE (United Kingdom) stated that it had from the outset been the intention that the Convention be confined to notification factoring to the exclusion of such transactions as non-notification invoice discounting. The reason for this was that many provisions of the draft Convention had been predicated on the assumption that notice of assignment must be given to the debtor and if the requirement of notice were to be dispensed with then the whole character of the Convention would be altered. The same would be true if notice were not required at the time of the conclusion of the contract for if that were to be the case then the application of the Convention would be entirely dependent upon the factor's decision whether or not to give notice of the assignment to the debtor. It was therefore important to distinguish notice in writing to the debtor from the timing of such notice and to insist on the fact that the requirement of written notice be contemplated by the parties at the time of the conclusion of the factoring contract.

Mr KATO (Japan) wondered whether there was not some misunderstanding regarding his delegation's proposal. He agreed that for the debtor to be obliged to pay under Article 7 there must be written notice; what he was questioning was not that the factoring contract should contemplate the giving of notice to the debtor, but that such notice must already at the time of the conclusion of the factoring contract be agreed to be in writing. This seemed to be too demanding and would narrow the scope of application of the Convention.

Mr BRENNAN (Australia) saw notice in writing as being a key element of the Convention. In its absence the Convention could be extended to a number of other banking operations such as invoice discounting which would considerably complicate the work of the Committee. The provision as drafted did not address the question of when written notice should be given to the debtor but simply posited the rule that it be required by the factoring contract so as to bring that contract within the scope of application of the Convention. He therefore supported the text of the provision as it stood.

Mr GUITARD (Spain) insisted that notice in writing constituted a part of the definition of the factoring contract and that it was also essential in the context of Article 7. If the other elements referred to in Article 1 were also present then the Convention should apply.

Mr RÉCZEI (Hungary) noted that whereas in some legal systems notice in writing was necessary for the validity of an assignment, in others it served more as an element of proof. If the principal aim of the Conference was that of unification then he had to argue in favour of the requirement of written notice and of the retention of Article 1(1)(c) as presently conceived.

Mr BERAUDO (France) stated that his delegation also favoured retaining paragraph 1(c) as it stood in so far as written notice was a condition for the application of the Convention. The time factor need not be mentioned in a provision on scope of application since what was essential was that notice be given before the factor requested payment from the debtor.

Mr SANTOS (Philippines) drew attention to the fact that, as presently worded, Article 1 enumerated three parties to the factoring transaction. This number might however be increased to four if there were to be an assignment of a receivable by an export to an import factor, with the consequence that the concepts in sub-paragraphs (a) and (b) would be affected. Sub-paragraph (c) referred to the giving of notice in writing of the assignment by the factor to debtors and he wondered whether this contemplated only notice by the export factor or also the giving of notice of the assignment by the export factor to the import factor.

Mr KOMAROV (Union of Soviet Socialist Republics) supported the existing text for the reasons advanced by the representative of Hungary.

Mr REISMAN (United States of America) stated that what was important under Article 1 was that the factor should be authorised by the contract to give notice and, so as to ensure the broadest
possible scope of application of the Convention, he believed that it should be possible for the factor to give notice at any time, even if it were to be given only upon default.

Mr CUMING (Canada) supported the views expressed by the representatives of Japan and of the United Kingdom. Notice was an essential part of the definition of the type of transaction dealt with by the Convention (i.e. notification factoring) but he could not accept the idea that the factoring contract must state that the notice be in writing as this would have the effect of restricting the scope of application of the Convention. The rest of the Convention stated that the notice must be in writing and the consequences of the notice's not being in writing. In these circumstances the words "in writing" should be deleted from sub-paragraph (c).

Mr JACOBSSON (Sweden) agreed with the observations of the Canadian representative and amended his proposal in CONF. 7/C.1/W.P. 37 so as to restrict it to the deletion of the words "in writing".

Mr GOODE (United Kingdom) stated that he could support the comments of the Canadian and Swedish delegations. It had not been the intention of the Unidroit committee that the factoring agreement itself must expressly provide for notice in writing since the result would be to take most factoring agreements outside the Convention. It would therefore in his opinion be desirable for the Drafting Committee to consider an improvement of the existing language of sub-paragraph (c).

Mr REBMANN (Federal Republic of Germany) supported the proposal that the words "in writing" be deleted in Article 1(1)(c). The requirement of writing was irrelevant here although it was of course of importance in other connections such as Article 7. Nor did he see the need for the introduction of language to the effect that notice may be given at any time.

Mr RICHARDS (Antigua and Barbuda) was not in favour of the deletion of the words "in writing" since he felt that it could create problems in determining who had priority when there were numerous creditors.

Mr REBMANN (Federal Republic of Germany) recalled that questions of priority were not covered by the Convention.

The CHAIRMAN pointed out that since a proposal to include a provision on priorities had already been made it would be unwise to assume that the issue was finally settled. He then asked whether the United States delegation might wish to elaborate on its proposal in CONF. 7/6 Add. 2.

Mr REISMAN (United States of America) insisted that notice had to be authorised at some time under the factoring contract to bring the contract within the scope of application of the Convention. Once the contract had been executed it was irrelevant whether the notice was given one month or one year thereafter. The requirement that the notice be in writing was a distinct issue and was intended principally to protect the debtor. The problem was in his view essentially one of drafting to be left to the Drafting Committee.

The CHAIRMAN disagreed with the suggestion that the proposed deletion of the words "in writing" was one merely of a drafting character as their removal would affect the scope of application of the Convention.

Mr CUMING (Canada) strongly supported the Chairman's remarks. The inclusion in Article 1(1)(c) of the words "in writing" constituted a significant issue of substance and amounted in his delegation's view to a mischievous attempt to exclude the application of the Convention in many cases where it should apply.

Mr KATO (Japan) reiterated his belief that the question was one of drafting and that if the explanations of the United Kingdom representative were to be accepted then the words "in writing" could be deleted.
The CHAIRMAN suggested that the problem could be dealt with in two ways: either by a series of votes on the many proposals which had been made or by the constitution of a small working group to be entrusted with the elaboration of a broadly acceptable solution.

Mr RÉCZEI (Hungary) stated that on reflection it was immaterial to him whether the words “in writing” were maintained in Article 1(1)(c) as their real importance related to Article 7.

Mr GOODE (United Kingdom) reaffirmed his view that the presence of the words “in writing” in sub-paragraph (c) caused unnecessary difficulty and that they should be deleted. A slightly amended formulation would no doubt solve some of the problems which had been encountered. What was sought was to exclude transactions where from the outset it was the intention that notice should not be given or, if so, only in certain circumstances.

Mr REBMANN (Federal Republic of Germany) supported the statement made by the representative of Canada. The requirement of notice was essential for Article 1, but not its form as the need for written notice with a view to protecting the debtor was dealt with elsewhere in the Convention. In these circumstances he saw no need for a working group.

The CHAIRMAN asked whether there was a consensus for deleting the words “in writing” in Article 1(1)(c).

Mr GUITARD (Spain) opposed the deletion of the words.

Mr AGYEKUM (Ghana) supported the setting up of a working group.

The CHAIRMAN proposed the constitution of a working group which would take into consideration the discussions on the matter including the intervention of the representative of the Philippines. He suggested that the group be composed of the delegations of Ghana, Japan, the Philippines, Sweden, the Union of Soviet Socialist Republics and the United States of America and that it be chaired by the Chairman of the Drafting Committee.

Mr BASIALA (Zaire) asked whether it would be possible for the French-speaking States to be represented on the working group and, in response to a suggestion by the Chairman that Zaire serve on the group, he proposed that France be included within its membership.

Mr BERAUDO (France) stated that his delegation would be willing to serve on the working group.

The CHAIRMAN declared the working group to be duly constituted.

The CHAIRMAN drew attention to the fact that the Cuban delegation had also submitted a proposal in CONF. 7/C.1/W.P. 35 relating to sub-paragraph (c) and he requested the working group to consider that proposal.

Mr GOODE (United Kingdom) wondered whether it might not be possible already at this stage to clarify an issue raised by the representative of the Philippines, namely that of the application of the Convention in cases where there was an assignment of receivables by an export to an import factor. His reading of the existing text and in particular of Article 10(1)(a) was that once a factoring transaction met the requirements of the Convention in terms of scope of application, it was no longer necessary for a refactoring operation to satisfy those same requirements.

The CHAIRMAN suggested that the delegation of the Philippines might wish to reflect on this statement and revert to the question, if it thought it necessary, in the working group.

Paragraph 2

The CHAIRMAN observed that there were no proposals in relation to this provision.
Paragraph 3

The CHAIRMAN noted that proposals had been submitted in connection with the paragraph by Spain and Cuba concerning the need for signature and by Sweden advocating the deletion of the provision.

Mr GUITARD (Spain) withdrew the Spanish proposal contained in CONF. 7/6.

Mr JACOBSSON (Sweden) explained that his delegation's proposal in CONF. 7/C.1/W.P. 37 was based on the belief that the existing text was unsatisfactory because it did not solve the problems raised and in particular those related to electronically transmitted messages. He understood from the Unidroit Secretariat's Explanatory Report on the draft Convention that the Secretariat might suggest a new formulation of the provision but in the absence of an improved text his delegation would move for the deletion of paragraph 3 so that the interpretation of "writing" would be left to the applicable law.

Mr REBMANN (Federal Republic of Germany) opposed the Swedish proposal. The certainty necessary for international business transactions would be compromised if the matter were to be left to national law while any requirement of signature would be contrary to the usual practice. It must at least be made clear that a signature was not essential in this connection.

Mr DE NOVA (Italy) agreed with the remarks of the representative of the Federal Republic of Germany.

The SECRETARY-GENERAL stated that the Unidroit Secretariat had abstained from making proposals for a redraft of paragraph 3 pending a decision on the requirement of signature. It would however submit a proposal to the Committee of the Whole for its next meeting if so requested.

Mr KATO (Japan) agreed with the view expressed by the representatives of the Federal Republic of Germany and of Italy who were opposed to the requirement of a signature, recalling in this regard that it was common practice for a stamp to be affixed on an invoice.

The CHAIRMAN asked whether in the light of the statement of the Secretary-General it might be acceptable to revert to the question at a later stage when the Secretariat text would be available.

It was so decided.

Proposed new paragraph 4

Mr REISMAN (United States of America) stated that his delegation was withdrawing the proposal contained in CONF. 7/6 Add. 2.

Article 2

Paragraph 1

Mr PELICHET (Hague Conference on Private International Law) reiterated what he had said during the sessions of the Unidroit committee of governmental experts concerning the international character of the transaction in question. In his view it was surprising that the application of a Convention dealing with international factoring should depend upon the places of business not of the parties to the factoring contract but of those to the contract of sale. The Convention would in consequence apply even if the parties to the factoring agreement had their places of business in the same State. It would therefore be preferable if the precedent of the draft Leasing Convention were to be followed and the international character of the transaction determined on the basis of the places of business of the parties to the factoring contract.
Mr GOODE (United Kingdom) recalled the realities of the business world in which the term "international factoring" was generally used to describe those transactions where the receivables arising under an international sale contract were assigned by the supplier to an export factor in its own country and then by that factor to an import factor in the country of the purchaser. Cases of direct assignment by the supplier to an import factor were rare and he therefore urged that the international character of the sale, as opposed to that of the factoring agreement, be retained for the purposes of the application of the Convention.

Mr KOHNSTAMM (Factors Chain International) confirmed the statement of the United Kingdom representative.

Mr EL KATTAN (Egypt) suggested that the chapeau of paragraph 1 end with the word "and" so as to conform to the language of the corresponding provision of the draft Leasing Convention.

The CHAIRMAN noted that no governmental delegation had expressed support for the proposal of the observer of the Hague Conference. This being the case he suggested that the proposal of the representative of Egypt be submitted to the Drafting Committee for consideration.

It was so decided.

Paragraph 2

Mr GOODE (United Kingdom) recalled the discussion on the corresponding provision of the draft Leasing Convention and the difficulties that had been caused by the existing formulation. What was intended was that the reference to a place of business was directed only to the chapeau and to sub-paragraph (a).

The CHAIRMAN proposed that paragraph 2 be referred to the Drafting Committee which should consider the statement of the United Kingdom representative in the light of the decision taken in connection with the language of the corresponding provision of the draft Leasing Convention.

It was so decided.

Mr BERAUDO (France) asked whether the Chairman now intended to call for discussion on the reservation to Article 2(1)(b) contained in Article F.

The CHAIRMAN stated that he would do so at the opening of the next meeting of the Committee of the Whole.

The meeting rose at 6.05 p.m.

CONF. 7/C.1/S.R. 16
24 May 1988

SIXTEENTH MEETING

Friday, 20 May 1988, at 9.15 a.m.

Chairman: Mr Sevón (Finland)

AGENDA ITEM 7: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FACTORING (Study LVIII – Doc. 33; Study LVIII – Doc. 34; CONF. 7/6 and Add. 2; CONF. 7/7; CONF. 7/C.1/W.P. 35-36, W.P. 38, W.P. 40 and W.P. 43)
Article F

The CHAIRMAN stated that two proposals had been made in relation to Article F of the draft final clauses, the first by the Permanent Bureau of the Hague Conference on Private International Law in CONF. 7/7 and the second by the delegation of Finland in CONF. 7/C.1/W.P. 38. He called upon the observer of the Hague Conference to introduce his proposal.

Mr PELICHE T (Hague Conference on Private International Law) indicated that his proposal was identical to that which the Permanent Bureau had made concerning Article F of the draft Leasing Convention and he did not intend to repeat all the arguments he had advanced in that connection. He recalled that Article F had been proposed by the Unidroit Secretariat in a document on the final clauses submitted to the diplomatic Conference, that it had not been discussed at the meetings of the committee of governmental experts in Rome and that the only justification for the article seemed to be that it was in line with Article 95 of the United Nations Sale Convention and Article 28 of the Geneva Agency Convention. Article 95 of the Sale Convention had been interpreted in different ways by the doctrine and the difficulties would be aggravated in a situation involving tripartite relationships since one State could on its own paralyse the application of the Convention to the whole of the triangular relationship even in situations where the parties to the main agreement, namely the supply contract, had their places of business in States that had not made the reservation under Article F. Such extraterritorial effect was exorbitant and scarcely compatible with the general principles of treaty law. The scope of application of the draft Convention was already very limited under Article 2 and to restrict it still further could raise doubts as to the value of the exercise in unification in which the Conference was engaged.

In conclusion, he drew attention to the realities of factoring transactions. Factors dealt with large numbers of invoices daily and it was necessary for the parties to know quickly and with certainty whether or not a given transaction was subject to the Convention. This would be even more difficult to establish if the situation were complicated by the existence of the reservation. The Permanent Bureau of the Hague Conference therefore suggested that the article be deleted as had already been done in the context of the draft Leasing Convention.

Ms ASTOLA (Finland) proposed the deletion of Article F for the reasons advanced by the observer of the Hague Conference.

Mr BERAU D (France) likewise found the arguments of the Hague Conference to be persuasive and he suggested that the triangular nature of factoring transactions called for the same solution to be reached in this connection as in regard to the draft Leasing Convention with the consequence that Article F should be deleted.

Ms REIN SMA (Netherlands), Mr RÉCZEI (Hungary), Mr BRENNAN (Australia) and Ms ZHANG (China) supported the proposal to delete Article F.

Mr KOMAROV (Union of Soviet Socialist Republics) stated that he would not repeat in detail the reasons which had led his delegation to favour the retention of the corresponding provision of the draft Leasing Convention. Its position had not changed and he would simply draw attention to the fact that the idea of achieving a Convention which was more universal in terms of geographical application was no less a priority than that of striving to maintain its integrity from the standpoint of legal purity as had clearly been demonstrated by the roll-call vote on a proposed reservation to the draft Leasing Convention.

The CHAIRMAN put to the vote the proposal to delete Article F.

The proposal was adopted by nineteen votes to none with two abstentions.

Article 3

The CHAIRMAN noted that a number of proposals and comments had been made on the

Mr REBMANN (Federal Republic of Germany) stated that his delegation would be submitting a proposal to delete paragraph 2.

At the request of the Chairman, Mr PELICHET (Hague Conference on Private International Law) submitted the proposal by the Permanent Bureau of his organisation relating to Article 3. His comments were essentially similar to those which had been made on the draft Leasing Convention. The wording of the article was paradoxical and illogical since it offered the parties the option either of excluding the Convention as a whole or of choosing to apply it but then to derogate or vary its provisions, apart from those which were declared to be mandatory. Such a formula could cause especial difficulty to judges in the event of the parties deciding in the first instance to exclude the application of the Convention and then to incorporate certain provisions in their contract but ignoring the mandatory character of some of those provisions. To overcome this difficulty the Permanent Bureau proposed that Article 3 be redrafted along the following lines: "In their relations with each other [alone], the supplier and the factor, on the one hand, and the supplier and the debtor, on the other, may exclude the application of this Convention or derogate from or vary the effect of any of its provisions".

Mr SOMMER (Factors Chain International) recalled that factors were called upon to deal with hundreds of invoices every day. Practical problems and uncertainty would be created if derogations were permitted from one provision or another of the future Convention. Greater flexibility was possible in connection with leasing transactions but in factoring a certain legal and contractual standardisation was necessary.

Mr GOODE (United Kingdom) agreed with the analysis of the observer from Factors Chain International. One difference between leasing and factoring transactions was that whereas the former were essentially one-shot transactions, the latter involved a continuous flow of receivables and it was not possible to conceive a situation in which the factor would have to establish in each individual case whether the Convention applied and, if so, which of its provisions. It was for this reason that the authors of the draft Factoring Convention had contemplated the possibility of its being excluded only in its entirety. As to the problem raised by the observer of the Hague Conference, he remarked that it was always possible for parties which had excluded the application of an international commercial law convention to incorporate within their contract such of its provisions as they wished, although those provisions would then of course enjoy only contractual force and not that of the Convention.

Mr REBMANN (Federal Republic of Germany) also expressed his agreement with the observer from Factors Chain International that the parties to a factoring contract should not be allowed to derogate from single provisions of the Convention, many of which related to the protection of the debtor. Nor should it be possible for a contract adversely to affect the position of a third party. As regards other provisions, such as Articles 4 and 5, there seemed to be no interest for the parties to the factoring contract to derogate from them, all the more so as they were permissive in the sense that they simply allowed the parties to do certain things, such as to effect a global assignment of receivables.

Mr KATO (Japan) associated himself with the remarks of the observer of the Hague Conference. Although the Convention must be a standardised one, the present text did not prevent derogation from its provisions when such derogation was agreed to by all the parties.

Mr BERAUDO (France) agreed that it was necessary to appreciate the differences between financial leasing transactions, which concerned only three parties, and factoring transactions where many more parties might be involved, given the large number of suppliers which might be factoring receivables to a single factor. He could see no need for those suppliers being called upon to consent to the exclusion of the Convention.
Paragraphs 1 and 2 moreover constituted a delicate balance, the latter provision in particular having been the subject of negotiations which it would be unwise to reopen. Nor could he agree with the observer from the Hague Conference that there was a paradox in the approach adopted by the authors of Article 3. The proposed solution differed in no way from the general mechanism of conflicts of law in the sense that once parties, for example, to an international contract of sale elected to submit their agreement to a given law to the exclusion of others, they nevertheless had to accept the mandatory rules of the legal system in question.

Finally, the adoption of a solution permitting the parties to pick and choose among the provisions of the Convention and to combine them with the domestic rules of one or more systems of law would lead to a total lack of coherence with possibly injurious consequences given the triangular relationship under consideration. In these circumstances he could fully accept the general approach reflected in Article 3 of the draft Convention.

The CHAIRMAN noted that the intervention of the representative of France seemed to have touched on the substance of the proposals submitted by the Swedish delegation in CONF. 7/C.1/ W.P. 40 and he therefore invited the representative of that delegation to introduce its paper.

Mr JACOBSSON (Sweden) stated that his delegation had difficulties with Article 3 since, as it stood, the debtor could never be sure which rules would govern its relations with the factor. On the one hand, the debtor might believe that the Convention would be applicable but afterwards the supplier and the factor would exclude its application, while on the other the debtor might exclude its application in its agreement with the supplier only to find out subsequently that the Convention would be applicable because the factoring contract had not excluded its application and the factor had not received notice in due time of the exclusion under the sale contract.

It was perhaps true that few debtors would wish to exclude the application of the Convention but the fact remained that they simply would not know in many cases whether it was applicable or not, which seemed to his delegation to be unreasonable. It had therefore suggested two alternatives, one of which was that the debtor must be given notice of the exclusion of the Convention or alternatively that the Convention must be excluded by the joint agreement of all three parties. He took the point that the giving of joint notice was not as easy in factoring transactions as in leasing transactions but if this were to be a rare situation in that few factors would wish to exclude the application of the Convention the practical problems could easily be handled. If on the other hand factors would frequently wish to exclude the application of the Convention then a serious difficulty for debtors would arise which should be addressed by the Convention in one way or another.

Mr REBMANN (Federal Republic of Germany) found the meaning of Article 3(1) to be very clear; it permitted the parties to the factoring contract to exclude the application of the Convention. Paragraph 2 on the other hand struck him as being extremely academic. If, for example, someone were to buy a car or a television, he would usually have no idea as to what would happen to the receivables resulting from the sale, whether there was a factor and, if there were, who the factor might be. The only question which could be of interest to the debtor would be whether the receivable was assignable at all, a matter dealt with by Article 5.

He agreed with the representative of Sweden that the debtor would as a rule have no knowledge at the time of the conclusion of the sale contract whether the future Convention would be applicable and that it would only become aware of this possibility when it received notice of the assignment under the factoring contract. By that time however the assignment would have been perfected and the receivable transferred to the factor so that it would be too late for the debtor to exclude the application of the Convention by giving notice to the factor. Apart from these considerations, he wondered what interest a buyer could have in excluding the Convention, many provisions of which were primarily designed to protect debtors. Nor could he see reasons for the factor to exclude the Convention. He would therefore suggest that paragraph 1 be retained and that paragraph 2 be deleted on the ground that it was academic and responded to no practical need.

Mr JACOBSSON (Sweden) stated that the purpose of his delegation’s proposal was not to extend the possibility for the debtor to exclude the application of the Convention but rather to
permit it to know which rules should apply since he agreed with the representative of the Federal Republic of Germany that it would usually be to the benefit of debtors that the provisions of the Convention should apply.

The CHAIRMAN enquired whether any delegation would wish to reply to the question which had been posed of what would be the effect of a provision in a contract falling under the Convention but excluding the application of one or more of the articles. Thereafter the Committee might take a decision on paragraph 1.

Mr REISMAN (United States of America) recalled that some of the provisions of the Convention were intended to benefit the supplier, others the factor and yet others the debtor. If certain articles could be selectively excluded, for example by the factor in the factoring contract, those would most certainly be the articles which sought to protect the debtor, for instance those relating to its right of set-off or to the requirement of notice. The purpose of providing that the Convention could only be excluded in toto was in effect in the interest of the debtor for in that case the factor would also have to exclude those provisions which conferred benefits on it such as Articles 4 and 6 which were of no concern to the debtor.

The CHAIRMAN stated that his understanding of the answer to the question which had been raised of the effect of a purported derogation in a factoring contract from certain provisions of the Convention, for example those relating to the rights of the debtor, was that it would be ineffective as regards the debtor unless the Convention had been excluded in its entirety.

Mr KATO (Japan) stated that even though the present text prohibited the exclusion of certain provisions only of the Convention, there was no way of preventing the parties from concluding an agreement excluding the Convention but incorporating some of its provisions and he did not see why in such circumstances the contractual provisions of the parties should be invalidated.

Mr GOODE (United Kingdom) saw considerable force in the observations of the representative of Japan. The concern expressed in some quarters was to avoid partial exclusion of the terms of the Convention affecting all parties or derogations by agreement between two parties adversely affecting the third party. There would appear therefore to be no objection to a provision along the lines of that contained in the draft Leasing Convention which would permit the factor and the supplier in the factoring contract or the supplier and the debtor in the supply contract to derogate from or vary the terms of the Convention in their mutual relations provided that this had no adverse effect upon the third party, namely the debtor or the factor as the case might be.

Mr PELICHERE (Hague Conference on Private International Law) noted that the statement of the representative of the United Kingdom seemed to endorse the principle which the Permanent Bureau of the Hague Conference had put forward in CONF. 7/7.

The CHAIRMAN suggested that the Committee first take a stand on the existing text of Article 3(1) and then on the Swedish proposal, after which it might proceed to discussion of paragraph 2, the proposal of the Federal Republic of Germany to delete that provision and then the comments made by the Italian delegation. It might also be useful to consider the proposal of the Permanent Bureau of the Hague Conference and the statement by the representative of the United Kingdom which seemed to be along the same lines, before beginning the debate on Article 3(2).

Mr BRENNAI (Australia) sought clarification of the precise intention behind the drafting of Article 3. Was it possible for the parties to the factoring contract to exclude by virtue of paragraph 1 the application of the Convention to the factoring contract, while maintaining its application to the supply contract which had not been excluded under paragraph 2 of Article 3, or was it the intention that the Convention could be excluded only when the parties to both contracts had agreed to do so.

Mr GOODE (United Kingdom) stated that the intention of the authors of the draft Convention had been to allow the parties to the factoring contract to exclude the application of the Convention altogether in respect of all three parties. If therefore it were to be so excluded, then the Convention
would not apply in relation to the contract of sale.

Mr REBMANN (Federal Republic of Germany) made a plea for simplicity. He could see no reason why the parties to the factoring contract should wish to derogate from certain provisions of the Convention in their dealings with each other and he had yet to hear of any practical example where they might so decide. Admittedly, the possibility for them to agree to derogate from any provision of the Convention could be contemplated from a purely theoretical standpoint but in his view the matter was an academic one.

Mr KATO (Japan) asked what would be the view of the representative of the Federal Republic of Germany as to the consequences of two parties concluding a contract differing only in matters of detail from the provisions of the Convention. Would the contract be invalid and if so on what grounds? If, on the other hand it were held to be valid, what would be its effect as regards the Convention?

Mr SOMMER (Factors Chain International) agreed with the representative of the Federal Republic of Germany on the need for a simple and practical solution. It was in the best interests of factors for their contractual relations to be clearly defined. The factor should therefore be able to agree with the supplier whether or not their contract should be subject to the Convention but once they had so decided it would be most unfortunate if a contract were to contain clauses some of which would be valid under the Convention and others invalid.

The CHAIRMAN proposed that the Committee first deal with the Swedish proposal, then that of the Hague Conference and lastly that it consider the existing text of paragraph 1.

Mr JACOBSSON (Sweden) suggested that if the Committee were to retain Article 3(2) along the lines of Article 5(2) of the draft Leasing Convention then his delegation’s proposal for Article 3(1) would be alternative (b) as set out in CONF. 7/C.1/W.P. 40, namely the replacement of paragraphs 1 and 2 by one paragraph providing that: “The application of this Convention may be excluded only if the supplier, the debtor and the factor all agree to exclude it”.

The CHAIRMAN considered that it would be difficult to settle the text of paragraph 1 if this were to depend on a later decision on the content and language of paragraph 2.

Mr GOODE (United Kingdom) expressed his agreement with the remarks of the representative of the Federal Republic of Germany. There was in principle no reason why the parties to a factoring contract should not be able to derogate from the provisions of the Convention in their mutual relations but the practical effect of recognising such freedom of contract would be nil as the draft Convention contained no provisions regulating the relations between the supplier and the factor apart from those concerning the transfer of the receivable which were in any event permissive. Nor did the Convention seek to regulate the terms of the supply agreement so once again there was in reality nothing from which the parties could derogate.

Mr RICHARDS (Antigua and Barbuda) was of the opinion that Article 3(1) was not entirely free from problems of interpretation as it could be read as meaning that the parties to the factoring contract could exclude the application of the Convention only in relation to the factoring contract. It had further to be recalled that there was no privity of contract between supplier, factor and debtor in the factoring contract and it ought therefore to be made clear whether the parties to the factoring contract could also exclude the application of the Convention in relation to the supply contract.

Mr GOODE (United Kingdom) agreed that the drafting of Article 3(1) could be improved so as to clarify the intention that the parties to the factoring contract should be allowed to exclude the application of the Convention in relation to both contracts and to all three parties. As regards the amendment to paragraph 1 proposed by the delegation of Sweden, the concern underlying it appeared to be that in the absence of some form of notification the debtor would not know whether the parties to the factoring contract had excluded the application of the Convention or not. In his view this would not usually be a matter of consequence except in relation to the debtor’s duties.
under Article 7 since by virtue of Article 5 the debtor could be required to make payment to the factor notwithstanding a prohibition against assignment in the supply contract. He suggested however that this difficulty might be overcome if language previously contained in Article 7 to the effect that notice of assignment should actually advise the debtor that the transaction was subject to the Convention were to be reintroduced, this being the only article where the debtor's lack of knowledge of the contents of the factoring contract would affect it.

The CHAIRMAN enquired whether the representative of Sweden would be prepared to withdraw his proposal relating to Article 3(1) and to consider submitting another amendment in connection with Article 7.

Mr JACOBSSON (Sweden) stated that the United Kingdom proposal would not meet his difficulty as the crucial time for the debtor to know whether or not the Convention would apply arose at the time at which he entered into the supply contract or even before then. He wished therefore to maintain his proposal to insert language in paragraph 1 corresponding to that to be found in paragraph 2, namely the words "... only in respect of receivables arising from supply agreements entered into at or after the time when the debtor has received notice in writing of such exclusion".

Mr GOODE (United Kingdom) regretted that he could not accept the proposed Swedish amendment to Article 3(1) on grounds of practicability since it was quite possible that at the time the supply contract was made the supplier might have entered into no factoring contract and indeed might do so only many years later. It seemed strange therefore to insist that parties to every supply contract insert some provision in their general conditions relating to or excluding the application of the Factoring Convention when no factoring contract might have been concluded or even contemplated.

The CHAIRMAN asked whether there was support for the Swedish proposal. Having noted that there was none he enquired whether the representative of Sweden wished his proposal to be put to the vote.

Mr JACOBSSON (Sweden) requested a joint vote on the two Swedish amendments set out in CONF. 7/C.1/W.P. 40.

The CHAIRMAN invited delegations to indicate whether they could support either of the proposals of the Swedish delegation relating to Article 3(1).

The proposals were rejected by twenty-one votes to three with two abstentions.

The CHAIRMAN asked whether the representative of the United Kingdom wished to take up the proposal submitted by the observer from the Permanent Bureau of the Hague Conference contained in CONF. 7/7.

Mr GOODE (United Kingdom) stated that while agreeing in principle with the proposal he had been persuaded by the intervention of the representative of the Federal Republic of Germany that it would have no practical effect as there was no substantive article in the Convention to which it could be of relevance. He therefore preferred the retention of the existing text.

Mr KATO (Japan) asked whether the representative of the United Kingdom would wish to reply to the question which he had already put to the representative of the Federal Republic of Germany, namely whether the effect of the parties to a factoring contract embodying in it provisions differing only slightly from those of the Convention would render such a transaction invalid.

Mr GOODE (United Kingdom) considered that the parties to the factoring contract were always free to stipulate any terms which varied those of the Convention and this would be effective as a matter of contract. The point was that it was not possible to identify any article in the Convention from which those parties might wish to derogate as no article affected the relations between the supplier and the factor with the exception of that concerning the transfer of receivables
which was itself permissive. If the parties to the factoring contract wished therefore to purport to vary the terms of the Convention in their mutual relations they could do so but the exercise would be meaningless.

Mr REBMANN (Federal Republic of Germany) repeated that the debate was a rather academic one but he wished nevertheless to answer the question posed by the representative of Japan. If a clause in the factoring contract deviated slightly from the provisions of the Convention, then it would be a question for the court to decide as a matter of interpretation of an individual contract. Either the judge would consider the deviation to be so important that the parties had excluded the Convention or else it would be viewed as so slight that the Convention should be deemed to apply.

Mr KATO (Japan) believed that if the reading of the representative of the United Kingdom were the correct one then paragraph 3 of Article 3 could be redrafted to reflect the parties’ freedom of contract.

Mr BERAUDO (France) reiterated his support for the maintenance of the existing text of Article 3 and stated that he would have difficulties with the amendment suggested by the Hague Conference.

The CHAIRMAN noted that no delegation had yet taken up the amendment proposed by the Hague Conference. He enquired therefore whether there was any objection to sending Article 3(1) as it stood to the Drafting Committee on the understanding, as suggested by the representative of the United Kingdom, that the correct interpretation of the paragraph was that the parties to the factoring contract could, by agreement, exclude the application of the Convention not only to their own contract but also in relation to the supply contract, and thus to third parties. A matter of drafting had been raised by the representative of Antigua and Barbuda and, in the absence of objections, this question also should be considered by the Drafting Committee.

It was so decided.

The meeting was adjourned at 10.30 a.m. and resumed at 11 a.m.

Article 3 (continued)

Paragraph 2

The CHAIRMAN enquired whether there was support for the proposal by the delegation of the Federal Republic of Germany to delete Article 3(2).

Ms REINSMA (Netherlands), Mr DE PAIVA (Brazil) and Mr BRENNAN (Australia) stated their support for the proposal.

Mr BERAUDO (France) opposed the proposal. In his view paragraph 2 achieved a balance of interests among factors, their customers and buyers. Deleting the provision would entail a return to the law which would ordinarily be applicable, in which connection he recalled that under the law of many States the purchaser of goods could, in the supply contract, effectively stipulate that a receivable arising thereunder could not be assigned while in other legal systems, for example under the United States Uniform Commercial Code, an assignment made notwithstanding such a provision would be enforceable.

Article 3(2) thus set out a uniform law rule which maintained a balance between both the different legal systems and the interests of the different parties to the transaction. In effect it provided that the exclusion of the application of the Convention in the supply contract would operate only in respect of receivables arising at or after the time when the factor had received notice in writing of such exclusion so that it would in practice be sufficient for the exclusion of the application of the Convention to a receivable to appear in the contract of sale under which the buyer purchased the goods from the supplier.
Mr GOODE (United Kingdom) supported the comments of the French delegation. The essential part of the balance struck by the Convention lay in the fact that on the one hand Article 5(1) provided, for very good reasons, that the assignment of a receivable by the supplier to the factor would be effective notwithstanding any agreement between the supplier and the debtor prohibiting such assignment, a rule which was intended to encourage receivables financing since it would, *inter alia*, be impossible for a factor to examine every supply contract to establish whether there was a prohibition against assignment. On the other hand, the debtor might wish to exclude the application of the Convention as it would not want to be bound by such a rule, preferring to deal with the supplier alone and not with a factor. The effect of Article 3(2) was therefore that the debtor could achieve this result on condition that due notice was given to the factor who would thus not be required to examine every sale contract concluded between its customer and that debtor. The balance of interests guaranteed by Article 3(2) should therefore be maintained.

Mr THIAM (Guinea) stated that he could fully support the arguments advanced by the French delegation in favour of the retention of Article 3(2).

Mr SANTOS (Philippines) said that he too was opposed to the deletion of Article 3(2) for the reasons already stated.

Ms ZHANG (China) also supported the retention of paragraph 2. Paragraph 1 of the article referred only to the possibility for the parties to the factoring contract to exclude the application of the Convention and a similar faculty should be accorded to the parties to the contract of sale. Since, therefore, three parties were involved in factoring transactions, more flexibility should be given to the debtor, especially when the assignment was not permitted under domestic law.

Mr REBMANN (Federal Republic of Germany) considered that what was essentially at issue was the question of the assignability of receivables, and that since that matter was addressed by Article 5 it should not be dealt with indirectly in Article 3(2). It seemed to him that the effect of adopting that provision would be to foreclose discussion on Article 5 as debtors dissatisfied with the principle laid down in paragraph 1 of that article could effectively frustrate its purpose by excluding the Convention as a whole by virtue of Article 3(2). Moreover, the fact should not be overlooked that the same result could be achieved by way of the reservation clause contemplated by Article 5(2). He therefore suggested that discussion on Article 3(2) be deferred until such time as Article 5 had been considered.

Mr BERAUDO (France) did not see why Article 3, which dealt with the non-application of the Convention, should be discussed at the same time as Article 5 which was concerned with the assignability of a receivable. To establish such a relationship between the two provisions suggested that a prohibition on the assignment of a receivable somehow had the indirect effect of taking a transaction outside the Convention, a line of reasoning which would to him seem to be valid only if the principles contained in Article 5 were inverted, in other words that the possibility of a reservation became the general rule and the general rule relegated to the status of a reservation. The matters dealt with by Article 3(2) and by Article 5 were distinct issues and could be considered separately.

Mr REISMAN (United States of America) believed that there were provisions of the Convention other than Article 5 to which a debtor might take exception, such as the limitation on the defences available to it. As he saw it, Article 3 established a fair balance among the interests of the three parties and while fully prepared to accept that Article 3 (2) be considered in conjunction with Article 5 he agreed with the representative of France that the two issues were different.

The CHAIRMAN expressed the view that two distinct questions were indeed before the Committee. He recalled however that the Conference had hitherto been sympathetic to requests by a delegation that a decision on a given issue be postponed until such time as a later article had been considered even though other delegations had not shared the same concern. He wondered therefore whether in the circumstances there was any objection to postponing discussion of Article 3(2) until after that on Article 5.
Mr CUMING (Canada) stated that he could not agree to the proposed procedure. Article 5 was a provision of a highly charged, emotional and controversial character and he feared that discussion of the content of Article 3(2) would be lost if that provision were to be considered together with Article 5. Moreover, Article 3 addressed questions associated with the scope of application of the Convention whereas Article 5 contained a substantive rule. He had therefore to insist that the two articles be discussed separately.

The CHAIRMAN concluded that in these circumstances discussion on Article 3(2) should continue.

Mr THIAM (Guinea) reiterated his opposition to the deletion of Article 3(2), the spirit and content of which differed from that of Article 5(1) which stipulated that an assignment would be effective notwithstanding any agreement between the supplier and the debtor prohibiting such assignment. The thrust of Article 5(2) was on the other hand that the debtor should be free to decide with whom it wished to conduct its affairs. Only if the rule contained in Article 5 were to be reversed would the necessary balance of interests which Article 3(2) sought to achieve be realised.

Mr SOMMER (Factors Chain International) supported the proposal to delete Article 3(2). Although it was clear that adequate protection should be accorded to the debtor it was doubtful whether the best protection would be offered by Article 3(2) since one practical consequence of its inclusion in the Convention would be that the factor would exclude future financing of accounts receivables from such debtors.

Mr RÉCZEI (Hungary) recalled that the Convention addressed the debtor’s right on the one hand to exclude the Convention as a whole and on the other to exclude the assignment of receivables arising under a given supply contract. If there were to be no assignment of the receivable then clearly the Convention would not apply and he could not therefore understand why the debtor should in addition be allowed to exclude the application of the Convention in respect of supplier/factor relations with which it was not concerned. Even if Article 3(2) were to be deleted then the debtor would retain the right to exclude assignment of the receivable under domestic law. The necessary balance was therefore maintained by the Convention and Article 3(2) could be deleted.

Mr REBMANN (Federal Republic of Germany) agreed with the observations of the representative of Hungary. The debtor should not be able to exclude the application of the Convention with regard to relations between the supplier and the factor which were of no concern to it. It had to be borne in mind that suppliers who had recourse to factoring were usually small and medium-sized enterprises requiring credit facilities and it seemed to him to be unjustifiable to permit debtors to deprive suppliers of the credit facilities offered by factoring.

Mr GOODE (United Kingdom) stated that he saw a certain inconsistency between the position of the delegation of the Federal Republic of Germany regarding Article 3(2) and its earlier attitude to other articles of the draft Convention in respect of which it had suggested that the supplier/factor relationship was in no way affected by the Convention. If this were so then it seemed that any attempt by the parties to the supply agreement to exclude the application of the Convention would be of no practical effect.

Mr REBMANN (Federal Republic of Germany) reiterated his view that Article 3(2) was a purely academic provision and as such he was opposed to it. At the time of the conclusion of the supply contract the parties thereto might not have contemplated the factoring of receivables arising thereunder and he was therefore not impressed by arguments based on the consideration that the provision established a balance between the interests of the parties. In these circumstances he had to maintain his proposal that Article 3(2) be deleted.

Mr SÁNCHEZ CORDERO (Mexico) supported the proposal of the Federal Republic of Germany.

Mr JACOBSSON (Sweden) stated that if he had correctly understood the intervention of the
representative of the United Kingdom then a clause in the supply agreement prohibiting the assignment of a receivable would not be valid by virtue of Article 5(1). If, however, the Convention were to be excluded then the clause prohibiting assignment might be valid, which from the standpoint of legislative technique he found it difficult to accept.

The CHAIRMAN put to the vote the proposal to delete Article 3(2).

The proposal was rejected by seventeen votes to ten with three abstentions.

The CHAIRMAN invited the representative of Italy to present his delegation’s comments, contained in CONF. 7/C.1/W.P. 36, which suggested that it might be necessary to determine when the receivables “arise” or when “they come into existence”.

Mr DE NOVA (Italy) stated that he would not press his delegation’s observations in relation either to Article 3(2) or to Article 4(a) and (b), since he believed that any difficulties could be solved by reference to the applicable law.

The CHAIRMAN suggested that not all applicable laws might provide an answer to the questions raised by the Italian representative. If, however, no proposal was being made and no other delegation wished to take the floor on the matter he would take it that the text should remain unchanged.

He further noted that the vote on the Swedish proposal in CONF. 7/C.1/W.P. 40 seemed to have resolved the question raised in relation to paragraph 2 and in the absence of further comments or proposals he suggested that the paragraph be submitted to the Drafting Committee for consideration.

It was so decided.

Paragraph 3

The CHAIRMAN recalled that the Japanese delegation had raised a question concerning the partial exclusion of the Convention and enquired whether it wished to make a proposal in relation to Article 3(3).

Mr KATO (Japan) stated that his delegation had made no proposal regarding the provision. It had merely sought clarification but if it was correct, as had been suggested, that the Convention did not deal with the supplier/factor relationship then the concern he had expressed did not seem to reflect any difficulties in practice, being more of a theoretical nature relating to the language of the text.

The CHAIRMAN drew attention to an observation by Cuba in CONF. 7/C.1/W.P. 35 which suggested that the meaning of the words “may be made only as regards the Convention as a whole” was not entirely clear. He personally believed this to be a drafting question which could be referred to the Drafting Committee.

It was so decided.

Mr BRENNAN (Australia) asked whether the reference in paragraph 3 to “the preceding paragraphs” meant that the Convention must be excluded under one or the other of those two paragraphs, or whether it had to be excluded by both.

The CHAIRMAN stated that this question raised a matter of substance but he recalled that an explanation of the intention of the authors of the draft had been given by the representative of the United Kingdom. He had heard no objection to that explanation and if this were so the question could be regarded as addressing only the drafting of the provision and therefore dealt with by the Drafting Committee.
After noting that this suggestion seemed to be acceptable to the Committee he proposed that Article 3 as a whole be referred to the Drafting Committee which would seek to clarify the text in the light of the drafting amendments proposed and the requests made for clarification.

*It was so decided.*

**Article 4**

The CHAIRMAN drew attention to an observation by the Italian delegation contained in CONF. 7/C.1/W.P. 36 but in the light of the fact that that delegation had not pursued a similar question in relation to Article 3(2) on the understanding that the matter could be settled by the applicable law he took it that the same solution could be contemplated in this connection.

Mr DE NOVA (Italy) indicated that this was the case.

The CHAIRMAN called upon the representative of the United States of America to introduce his delegation’s proposal contained in CONF. 7/6 Add. 2.

Mr REISMAN (United States of America) stated that the language of Article 4 was technically speaking inaccurate. The effects of the provision were said to be restricted to the relations between the parties to the factoring contract whereas in fact an assignment conforming to Article 4 could also be binding on the debtor under Article 7. Moreover, his delegation viewed Article 4 as being so important that it should be binding also on third parties in the absence of any provision to the contrary in the Convention or under the applicable domestic law. It was therefore proposed that a new paragraph 2 be included in Article 4 to the effect that “[t]he provisions of paragraph 1 of this Article shall also be effective as to third parties unless such provisions are not enforceable as to such third parties under other Articles of this Convention or the domestic law applicable under the rules of private international law”.

Mr GOODE (United Kingdom) said that his delegation would have difficulty in supporting the United States amendment to Article 4. He was not entirely clear as to its consequences but what was certain was that it would have the effect of introducing a rule on priorities which the committee of governmental experts had sought to avoid throughout its work. In addition, he doubted the practical value of the proposal since on the one hand the present draft contained no rules on priorities with which the suggested rule could enter into conflict while on the other it did no more that state that the applicable law would be applicable which did not seem to be particularly helpful and would leave the situation exactly as it was under the existing text.

Finally, in connection with the situation of the debtor, he recalled that Article 7 already established detailed rules regarding the conditions under which the debtor should be obliged to make payment to the factor in pursuance of the assignment of the receivable and it seemed to his delegation that these were the rules which should determine the circumstances in which the assignment had effect in relation to the debtor.

The CHAIRMAN ascertained that there was no support for the proposed amendment to Article 4.

Mr REISMAN (United States of America) stated that his delegation would withdraw its proposal.

Mr DE NOVA (Italy) suggested that the language of sub-paragraph (a), which referred to “a contractual provision” should be aligned on that of sub-paragraph (b) which spoke of “a provision in the factoring contract”.

Mr GOODE (United Kingdom) believed that although the proposal by the Italian delegation would narrow the effect of sub-paragraph (a), it would reflect the intention of the authors of the draft Convention as a reference to contractual provisions could scarcely refer to the provisions of another contract. He therefore found the proposal in principle to be acceptable.
The CHAIRMAN expressed the opinion that from a formal standpoint the amendment proposed by the representative of Italy raised a matter of substance. If however there were no objections to sub-paragraph (a) being redrafted in terms consistent with the language of sub-paragraph (b) the matter would be referred to the Drafting Committee as indeed could the whole of Article 4 as no other proposals or comments had been made in relation to it.

It was so decided.

Article 5

The CHAIRMAN proposed that since no comments had been made on paragraph 1 alone the Committee could proceed to a discussion of the article as a whole in conjunction with Article X to which it was closely related.

Mr BERAUDO (France) agreed with this suggestion as Article 5 did indeed form a whole. He announced that the delegations of Mexico, the Philippines and France had prepared a joint proposal, which would soon be available to the Committee, the thrust of which was that the exception to the rule in Article 5(2) would become the rule and that presently contained in paragraph 1 the exception. In other words, the assignment of a receivable by the supplier to the factor would not be effective against the debtor when such assignment had been prohibited by the contract of sale of goods. The assignment might however be effective notwithstanding any agreement to the contrary when the debtor had its place of business in a Contracting State which had made a declaration under Article X of the Convention.

The CHAIRMAN considered that although the written text of the proposed amendment to Article 5 had not yet been distributed its intention was sufficiently clear to permit discussion of the proposal to begin. He noted however that a compromise formula had been submitted by the United States of America in CONF. 7/6 Add. 2 and he accordingly invited the United States representative to introduce his delegation's proposal.

Mr REISMAN (United States of America) stated that the amendment announced by the representative of France raised a number of basic issues. As a general rule a clause prohibiting the assignment of receivables was included in a contract of sale at the insistence of a buyer who wished to improve its bargaining position with the supplier. Such a situation presupposed that the buyer was already the stronger party economically and it was evident that this position might be affected if it had to deal not with the supplier but with a factor in the event of a dispute arising.

Furthermore, it was important to distinguish a prohibition on the assignment of performance of a contract from a prohibition on the assignment of a right to payment, which latter impeded international finance. Moreover he believed that it could impose an intolerable burden on factors if in respect of every invoice which passed through their hands they had to check to see whether the sales contract contained a prohibition on assignment, a task which would be even more difficult if not impossible when international transactions were involved.

The Convention on International Factoring which the Conference was called upon to conclude could scarcely do a service to the transaction it was supposed to promote at international level if it were to confirm the bargaining power of the stronger party and effectively hinder the development of international factoring. For these reasons he could not accept the proposed amendment to Article 5, the effect of which was to transform into a general principle a rule that had only in the final stages of the work in Rome been admitted as a possible reservation.

Mr GOODE (United Kingdom) supported the statement of the representative of the United States. There were compelling reasons for the maintenance of Article 5(1) in its present form, the first of which was that it was impossible for factors to investigate the terms of all individual sale contracts giving rise to receivables passing through their hands so as to establish whether those contracts contained a prohibition on assignment. As had been pointed out, the presence of such a prohibition already demonstrated the fact that the debtor was in a stronger, and often a much
stronger, economic position than the supplier. In effect, a supplier might request that the debtor provide security for payment which would be refused. It might then request the issuance of a letter of credit which could again be refused. It might then suggest that it cover itself against the eventual credit risk by assigning the receivable arising from the sale contract. The effect of the French proposal would in principle be to deny the supplier even that last resort and it was precisely such unreasonable behaviour on the part of debtors, coupled with the practical difficulties for factors to study in detail every single supply contract and the desirability of avoiding interference with the international payment process, which dictated the need to maintain Article 5(1) as it stood and, if paragraph 2 were to be admitted at all, then only as an exception to the general rule.

Mr REBMANN (Federal Republic of Germany) considered the discussion on Article 5 to be pointless once the principle had been accepted in Article 3(2) that the debitor could in certain circumstances exclude the application of the Convention as a whole, as it could thereby defeat the purpose of Article 5(1).

Mr BERAUDO (France) believed that it was necessary to distinguish clearly between Article 3(2) which was designed to exclude the application of the Convention and Article 5 which was concerned with the effect of a prohibition in a contract of sale on the assignment of a receivable arising under that contract.

It had to be recalled that in almost all Civil Law systems, and in most legal systems in general, the contractual freedom of the parties was respected and this was true also in respect of clauses in supply contracts prohibiting the assignment of receivables arising thereunder. Such clauses, he insisted, had their justification. A buyer might decide to enter into commercial relations with a seller, perhaps on an ongoing basis. Very often the conditions under which the price would be determined would be very flexible as the seller would not wish to lose its customer and the buyer might wish to give satisfaction to the seller by making payment on an instalment basis. If the receivables arising under such a contract were assigned to a factor, notwithstanding the agreement of the parties to the sale contract that such an assignment should not be permitted, the buyer would no longer find itself dealing with a merchant, but rather with a professional financier, often a bank, whose sole aim would be the recovery of the receivables and the factor would be more severe in its dealings with the buyer than would the seller who might be thinking of a long-term commercial relationship with the buyer. The factor would moreover insist on the strict application of the terms of the contract so that the buyer could expect no facilitation of payment which it might have hoped to obtain from the seller.

It had been suggested that practical problems could arise for factors if the rule contained in Article 5(1) were to be reversed. He wished however to point out that if a contract were to contain a clause prohibiting assignment then it would be for the factor and the seller as its customer to take account of this fact in their mutual relations as an honest seller would not assign the receivables in such circumstances. Moreover, if, notwithstanding such a prohibition, the supplier did assign the receivable to the factor then it would have committed a breach for which the buyer should not be held responsible. For these reasons the proposed amendment was limited to stating that an assignment would be without effect against the debtor if it was made notwithstanding a clause in the sale contract prohibiting such assignment; in other words it would not affect the relations between the supplier and the factor arising out of the factoring contract, the rigidity of which should not be permitted to overlap into the contractual relations of the parties to the supply contract.

Finally, if the proposed amendment to Article 5 were to be accepted then factoring companies would be able to adapt to it quite easily given the widespread computerisation of the handling of invoices which could, where necessary, indicate that a particular receivable was the subject of a prohibition on assignment. He saw therefore no practical problems arising from the joint proposal before the Committee, all the more so as its content had already been accepted in Rome in the form of a reservation.

Mr KohnSTAMM (Factors Chain International) strongly disagreed with the views advanced by the representative of France who had portrayed factoring companies as being solely interested in
recovering receivables as quickly as possible. On the contrary, factoring companies clearly distin-
guished themselves on the one hand from banking institutions and on the other from collection
agencies by operating with the greatest respect for the commercial relations between their cus-
tomers and buyers. The last thing factors wished to do was to undermine the relationship between
the seller and the buyer as this would imply failure to provide the seller with the service it had
expected when entering into the factoring contract. There was moreover no rigidity in the factoring
contract unless this was specifically requested by the customer.

Mr SANTOS (Philippines) could not accept Article 5 as it stood since under the general
principles of law in his country the agreement of the parties must be respected. If the supplier did
not like the terms of an agreement containing a prohibition on assignment it should not enter into it.
As it stood, Article 5(1) would permit a supplier who had concluded such an agreement subsequently
to breach the terms of that agreement by assigning the receivable, perhaps acting in bad faith. Such
a solution was unacceptable to his delegation.

Mr SÁNCHEZ CORDERO (Mexico) strongly supported the reasoning of the representative of
France.

Mr RÉCZEI (Hungary) stated that he too supported the approach proposed by France, Mexico
and the Philippines to the effect that the general rule should be that of respect of the freedom of
contract of the parties to the supply contract. The rule at present contained in Article 5(1) should
therefore be the exception, perhaps to be formulated as a reservation clause.

Mr GOODE (United Kingdom) stated that reference had been made to the parties’ freedom of
contract as though it were some universal requirement. It should therefore be borne in mind that in
the twentieth century there were innumerable examples of exceptions to the principle of party
autonomy in order to prevent abuse of power, to maintain a fair balance between the interests of the
parties and to ensure the business efficacy of transactions. Such exceptions were to be found in
consumer protection legislation, in international transport conventions and in many other conven-
tions. The unfettered application of the principle of freedom of contract regardless of practicability
and of the bargaining power of the parties might have belonged to the nineteenth century but it had
no place at the end of the twentieth.

The representative of France had moreover painted a picture of a supplier acting fraudulently
by transferring a receivable in breach of a prohibition on assignment and of a simple computer
system which would record an entry by the supplier indicating whether the contract under which the
receivable arose contained a prohibition on assignment. The facts of real life were however totally
different. Standard terms of supply were often long and complicated and many sellers would be
unaware of whether a supply contract contained a prohibition on assignment as they would not read
the whole of the contract and might very well assign the receivable in perfect good faith. Further-
more, many contracts of sale were cast in the form of standard term contracts and a model contract
would be signed only once, after which it would govern all future contractual relations between the
parties. There would then be a series of orders on standard terms previously established, maybe
even years before, so that the parties would not be looking at an individual contract concerning all
the terms of supply. In consequence it was quite possible for neither the factor nor the supplier to be
conscious of whether a particular agreement contained a prohibition on assignment or not.

Finally, it had to be recalled that factors were not dealing with a single major transaction but
with a constant flow running into hundreds and thousands of transactions so that the object of the
Convention was to facilitate those transactions to the benefit of all parties. There must therefore be
a regime which would be fair and practicable, for otherwise the Convention would be of no interest
to any of the parties. It was for this reason that the United Kingdom took the position as strongly as
it could that it was of vital importance to retain paragraph 1 as presently formulated as the main
rule.

Mr RICHARDS (Antigua and Barbuda) supported the reasoning of the representative of the
United Kingdom in favour of the maintenance of Article 5(1) as it stood. Evidently, contractual
obligations should be honoured but in this case he believed that considerations of public policy and business efficacy should prevail.

Mr REISMAN (United States of America) recalled that if the supplier were to be in breach of its obligations under the supply contract by assigning a receivable in violation of a clause prohibiting such assignment, the supplier would still be liable to the debtor for any defect in performance or failure to perform the contract. Moreover, under the terms of Article 7, which had yet to be discussed, the debtor had various defences and rights of set-off which would likewise be unaffected by an assignment of the right to payment.

As had been pointed out by the representative of the United Kingdom, factors handled literally thousands of transactions and if in every case the factor had to read each contract of sale to see whether there was a prohibition on assignment then there would be considerable and unnecessary delay in processing the invoices. Nor would a simple computer entry suffice because the factor would not rely on a statement by the supplier that the contract did not contain a prohibition on assignment. The factor must rather be able to assume, unless it knew that the debtor had its place of business in a State which had made the reservation contemplated by Article 5(2), that the right to payment was assignable in the absence of any information to the contrary.

Attention had also been drawn to the differences in the approach of the domestic law in Common and Civil Law systems to the question of prohibitions on assignment. What the Convention was dealing with however were international transactions. It did not purport to change in any way the domestic law of any country applicable to internal transactions but was simply creating a rule of law to expedite the use of a new method of financing in international trade. This might require abandoning archaic concepts and a recognition of the difficulties caused by the application of certain national rules of law to international transactions. He was seriously concerned that if the proposed amendment to Article 5 were to be adopted then one of the primary purposes of the Convention, namely the expansion of international factoring, would be defeated because of a failure to recognise economic realities.

The CHAIRMAN noted that the joint proposal of France, Mexico and the Philippines had now been distributed as document CONF. 7/C.1/W.P. 43 and he proposed that the discussion on Article 5 continue after the adjournment.

The meeting rose at 12.30 p.m.

CONF. 7/C.1/S.R. 17
26 May 1988

SEVENTEENTH MEETING

Friday, 20 May 1988, at 2.25 p.m.

Chairman: Mr Sevón (Finland)

AGENDA ITEM 7: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FACTORING (Study LVIII – Doc. 33; CONF. 7/6 and Add. 2; CONF. 7/C.1/ W.P. 35, W.P. 37, W.P. 39 and W.P. 43)

Article 5 (continued)

Mr REBMANN (Federal Republic of Germany) saw the principal idea behind the joint proposal of France, Mexico and the Philippines as being the defence of the concept of freedom of contract. If however he were to analyse the situation in his own country, it was most often the case
that those which had recourse to factoring facilities were young, middle-sized enterprises with openings to few forms of financing. Buyers on the other hand varied considerably as regards their bargaining strength. Some were small concerns which were as a rule obliged to accept the general conditions imposed by their suppliers and such conditions would be most unlikely to contain a clause providing for a prohibition on the assignment of receivables. The situation was quite different when the buyer, such as a large chain of stores or a state owned or operated enterprise, could itself impose its standard contract terms on suppliers and it was noticeable that in recent years there had been an increase in the inclusion by such buyers in their terms of clauses prohibiting the assignment of receivables.

The question of how far such clauses should be given legal effect was the subject of an ongoing debate in his country but what was undeniable was that such prohibition clauses worked to the advantage of powerful corporations which could impose their general conditions on small or weaker suppliers and thus effectively frustrate recourse by those suppliers to factoring as a means of financing. Such clauses could be seen as constituting a misuse of bargaining power since, in a real sense, they deprived the supplier of the element of choice otherwise open to it to select its method of financing and thereby undermined its freedom to enter into contracts.

He agreed with the representative of France that the rule contained in Article 5(1) was contrary to the domestic law of a large majority of legal systems, including that of the Federal Republic of Germany. It was not however the principal aim of his delegation to return home with a text representing the law of its country for if that were to be the case the Convention could be of little or no interest to commercial circles. The present text of Article 5 had to be seen in terms of the objective of encouraging international factoring and it enjoyed the support of his delegation even if it ran counter to its domestic law. Debtors enjoyed wide protection under the draft Convention and the provisions of Article 5 scarcely seemed to cause them any substantial prejudice, all the more so as paragraph 2 permitted States to enter a reservation the effect of which was to afford special protection to debtors with their place of business in those States. It was therefore important not just to speak of general principles such as party autonomy but to look behind them to the practical realities of factoring transactions and to ways of ensuring that the interests of all the parties be respected.

Ms REINSMA (Netherlands) stated that her delegation could not accept the rule contained in Article 5(1), which was in total contradiction with the basic principles of her country's law. Reference had been made to the practical problems arising from the adoption of the proposed amendment to Article 5 and to possible misuse of bargaining power but they had not convinced her delegation of the need to derogate from the fundamental principle of freedom of contract in one particular case, namely that of factoring transactions. In these circumstances she would associate herself with those who had supported the joint proposal which had been introduced by the French delegation.

Mr THIAM (Guinea) saw the Convention as being directed towards medium-sized and large enterprises and to achieving a balance between the different interests present. He supported the proposed amendment to Article 5 which left the parties free to determine their contractual relations, especially in the perspective of an ongoing relationship. Any attempt in the Convention to place restrictions on that freedom would in his view be exorbitant.

Mr KOMAROV (Union of Soviet Socialist Republics) stated that, although sympathetic to the view that the Convention in general, and Article 5 in particular, should seek to promote international factoring, his delegation was reluctant to accept a provision the effect of which would be that the relations between the supplier and the factor would interfere excessively with those of the parties to the supply contract.

Mr SANTOS (Philippines) stated that the proposal presented by his delegation in conjunction with those of France and Mexico was not simply directed to the maintenance of domestic rules of law or to the upholding of the principle of freedom of contract. It was above all aimed at the preservation of good faith in international transactions and the avoidance of deceitful conduct on the
part of the supplier which might lead the factor into the mistaken belief that the supply contract contained no clause prohibiting assignment of the right to payment. In his view therefore the proposed amendment would promote, rather than impede, international factoring by stressing the importance of good faith in commercial dealings.

Mr DE PAIVA (Brazil) believed that although it was self-evident that a supplier which had undertaken not to assign a receivable should not be able to do so in breach of an agreement with the purchaser, this principle should be expressly stated in the future Convention. If such an assignment were however to be made, then a clear statement should be made of the supplier's liability to those persons whose interests had been prejudiced by breach of its contractual obligations. As to the joint proposal submitted by the delegations of France, Mexico and the Philippines, he stated that he had been impressed by the arguments advanced by the French representative who had drawn attention to the wish of debtors to continue privileged relations which they had enjoyed for some length of time with particular suppliers. Given however the wide divergences which existed between the views so far expressed and the need for the future Convention to enjoy wide acceptance he wondered whether the most appropriate solution might not be the deletion of Article 5 altogether.

Ms ASTOLA (Finland) stated that her delegation was in sympathy with the arguments that had been advanced in favour of the principle of freedom of contract which underlay the proposal by France, Mexico and the Philippines. The aim of the Conference was however to adopt a Convention which would promote and facilitate international factoring. The text of Article 5 as it had emerged from the deliberations of the committee of governmental experts in Rome seemed to strike a satisfactory balance between that aim and respect for the autonomy of the parties and although it did not correspond to Finnish law as it now stood her delegation believed that it should be maintained.

Mr KATO (Japan) noted that the philosophy underlying the joint proposal contained in CONF. 7/C.1/W.P. 43 was in line with the Civil Law tradition and as such it also reflected the present situation in Japan. He had however to acknowledge that adoption of the amendment would impose greater burdens and risks on factors and could impede the expansion of international factoring. With a view to seeking an acceptable compromise he suggested adding to the last sentence of the proposed amendment to Article 5 (1) the following language: "except in cases where the factor takes the assignment in good faith".

Mr RONCORONI (Switzerland) stated that although the content of the proposed amendment to Article 5 (1) corresponded to the domestic law of his country, he supported the initial text of that provision which was of the greatest importance for the balance of the draft Convention as a whole. If, however, that balance were to be substantially altered or destroyed then his delegation would be prepared to review its position.

Mr SOMMER (Factors Chain International) stated that he was speaking on behalf of the factoring industry as a whole and of the many small and medium-sized enterprises which had recourse to factoring in strongly supporting the solution reached in Rome by the Unidroit committee of governmental experts. The idea of the committee had been to develop the international trading possibilities of enterprises of the kind to which he had referred by removing some of the obstacles to factoring which derived from the various ways of assigning receivables in different countries and from the insertion in supply contracts of clauses prohibiting the assignment of receivables. The present text of Article 5 would be of great assistance in achieving that aim but if the proposal submitted by France, Mexico and the Philippines were to be adopted then there was a strong likelihood that prohibition clauses would become an ever more common feature of contracts of sale and he had the gravest doubts whether any State would be prepared to adopt a reservation clause of the kind contained in the joint proposal to amend Article 5.

Mr GOODE (United Kingdom) saw the issue before the Committee as one of the utmost importance and in these circumstances he wondered whether the wisest course of action might not be to defer further consideration of Article 5 until such time as delegations had been able to reflect on the different statements made and in particular on the words of wisdom of the representatives of
the Philippines and of Brazil who had laid stress on the need to ensure the observance of good faith.

As Article 5 now read, it could be interpreted as suggesting that a party to a supply contract who acted in breach of a provision in that contract prohibiting the assignment of a receivable was acting legitimately. One solution to the problem might lie in stating expressly in the text that a supplier would not be absolved from any liability it might incur to the debtor arising out of breach of its contractual undertaking not to assign the receivable.

Mr BERAUDO (France) believed that every effort should be made to avoid tension regarding this article and the danger of over-estimating its importance. It had above all to be recalled that in very few jurisdictions did a rule exist similar to that contained in the text of Article 5 (1) as approved by the committee of governmental experts and this fact did not seem to have inhibited the growth of factoring.

He had moreover noted with particular interest the statement of the representative of Switzerland. Since both proposals before the Committee involved the inclusion of a reservation clause and since it was sometimes the case that such clauses were considered after all the substantive articles had been dealt with, he wondered whether it might not be preferable to defer further discussion of Article 5 until such time as all delegations had been able to evaluate the general balance of the Convention and in that light determine their final attitude towards Article 5.

The CHAIRMAN believed that it would indeed be useful if delegations were to be given the necessary time to consult with each other on the provisions of Article 5, the content of which might well affect the views of a number of Governments on the Convention as a whole. He therefore suggested that a working group be formed with the task of considering Article 5 in the light of the amendment submitted by the delegations of France, Mexico and the Philippines, of the proposals of the Brazilian and Japanese delegations and of the comments by the representative of the Philippines insisting on the need for the observance of good faith in international trade which would hopefully permit a text to be prepared that would be capable of broad acceptance.

Mr YUAN (China) stressed the importance of the working group's reaching a compromise between the present text of Article 5(1) and the joint proposal of the delegations of France, Mexico and the Philippines.

The CHAIRMAN proposed that the working group be composed of the delegations of Australia, Brazil, Cameroon, China, France, Japan, Mexico, the Union of Soviet Socialist Republics and the United Kingdom.

Mr DE PAIVA (Brazil) agreed with the suggested membership of the working group but felt that other delegations which wished to participate in its work should be permitted to do so.

The CHAIRMAN agreed with this suggestion and asked whether the representative of the Union of Soviet Socialist Republics would be prepared to act as convener of the working group which should, he added, address not only Article 5 but also Article X.

Mr KOMAROV (Union of Soviet Socialist Republics) stated that he would make the necessary arrangements for the holding of the group's meetings.

Mr JACOBSSON (Sweden) stated that he was somewhat troubled from a technical and ethical point of view by the interplay between Articles 3 and 5 which did not constitute an acceptable way of informing businessmen of how their relations were regulated. Some debtors would soon appreciate the possibility offered to them of excluding the application of the Convention by virtue of Article 3 (2). Others would not, but even those who did might be perplexed at the notion of having to exclude the Convention when by inserting in the supply contract a provision prohibiting assignments they thought that they had in any event prevented the right to payment of their debt being assigned to a factor.

He understood from the previous interventions that a number of delegations had, while expressing support for Article 5(1), also spoken in favour of Article 3(2) which seemed to imply a
willingness to give up the supplier's right to assign the receivables if the factor had been notified of the exclusion of the Convention. Might it therefore not be preferable to spell out expressly in Article 5 the principle that a clause prohibiting assignment would be effective against the factor only if it received written notice of the prohibition before receiving notice of the receivables?

The CHAIRMAN recalled that the Committee had already taken a decision on Article 3 but if the working group found it necessary to suggest amendments to that article in the light of its proposals regarding Article 5 it should be free to do so.

*On this understanding, Articles 5 and 6 were referred to the working group.*

**Article 6**

The CHAIRMAN drew attention to a Spanish proposal in CONF. 7/6 and to an observation by Cuba in CONF. 7/C.1/W.P. 35 according to which separate acts should always be necessary to complete an assignment.

Mr GUITARD (Spain) stated that his delegation's proposal was to add at the end of Article 6 the words "provided that it satisfies the relevant conditions as to form of the law of the principal place of business of the debtor". The reason underlying the proposal was that under the domestic law of his country certain formal requirements were necessary if benefits arising from a contract of sale were to be validly transferred, and this even in the restricted relation of the parties to a factoring contract.

Mr GOODE (United Kingdom) saw the Spanish proposal as raising a problem in that the intention of Article 6 was to give automatic effect to the provisions of a factoring contract which transferred all or any of the supplier's rights deriving from the sale of goods with or without a new act of transfer and thereby to facilitate international factoring. He feared that if Article 6 were to be modified in such a way as to subject the rule contained therein to the formalities of transfer of the applicable law then the purpose of the provision would be frustrated.

Mr GUITARD (Spain) insisted that his delegation wished to place no obstacles in the way of the transfer of receivables under factoring contracts but it was necessary to bear in mind that a number of transfers described in Article 6 as well as other transfers granting security interests would be ineffective under Spanish law if certain formal requirements were not complied with.

The CHAIRMAN established that there was no support for the proposal of the Spanish delegation.

Mr GUITARD (Spain) declared that his delegation would withdraw its proposal.

Given that no other proposals had been made regarding Article 6, the CHAIRMAN suggested that the article be referred to the Drafting Committee.

*It was so decided.*

**Article 1 (continued)**

**Paragraph 3 (continued)**

The CHAIRMAN recalled that the Secretariat had, as requested by the Committee of the Whole, submitted a proposal, to be found in CONF. 7/C.1/W.P. 39, concerning the definition of "writing" in Article 1(3).

THE DEPUTY EXECUTIVE SECRETARY stated that before framing its proposal the Secretariat had studied similar definitions to be found in other international texts and in particular
Article 13 of the United Nations Sale Convention which defined “writing” for the purposes of the Convention as including telegram and telex. That definition had seemed unduly restrictive and for this reason the Secretariat had proposed adding a reference to “any electronic means of communication”. This broad language was intended to cover all new technical methods of communication while avoiding the possible limiting effect of an express reference to certain specific techniques or wording such as that to be found for example in the Uniform Rules of Conduct for the Interchange of Trade Data by Tele-transmission (UNCID), prepared by the International Chamber of Commerce, which spoke of systems for the electronic exchange of commercial information by tele-transmission.

As to the concluding words of the Secretariat proposal “whether or not signed”, she explained that they had been included in square brackets so as to indicate to the Committee that they might not be appropriate in the light of the remainder of the Secretariat proposal.

The CHAIRMAN recalled that a proposal had been made by the Swedish delegation in CONF. 7/C.1/W.P. 37 to delete the paragraph so that the definition of “writing” would be left to the applicable law and that the Spanish proposal contained in CONF. 7/6 had been withdrawn.

Mr JACOBSSON (Sweden) stated that his delegation was withdrawing its proposal to delete the provision. That of the Secretariat was broadly speaking acceptable although it should be amended in such a manner as to indicate that the message must have some permanence, in the sense that it could for example be stored in the internal memory system of a receiving computer as opposed to being merely flashed up on a screen before disappearing.

Mr RICHARDS (Antigua and Barbuda) had difficulty with the words “electronic means of communication” which seemed to include both oral and written communications and he too felt that the provision should provide that the information must be conveyed in writing or in some other way guaranteeing permanence.

Mr REBMANN (Federal Republic of Germany) agreed that the electronic means of communication must be capable of producing some tangible record as evidence of notice.

Mr DE NOVA (Italy) believed that it was important to maintain the concluding language of the Secretariat proposal and that the square brackets around the phrase “whether or not signed” should be deleted.

Mr KOMAROV (Union of Soviet Socialist Republics) supported the Secretariat proposal with the exception of the words in square brackets.

Mr KATO (Japan) seconded the proposal of the representative of Italy as it was customary practice in factoring to have recourse to stamps on invoices without signature to provide evidence of the origin of the notice.

Mr BERAUDO (France) endorsed the proposal of the Italian delegation to delete the square brackets around the words “whether or not signed” since they dispensed with the need for signature and broadened the notion of “writing”.

He also seconded the observation of the representative of the Federal Republic of Germany that consent to a transaction given by electronic means should be capable of reproduction in some permanent form. He therefore suggested that the words “producing some tangible record” should be inserted at the end of the Secretariat proposal with the consequence that writing on a computer printer or a fax machine would constitute proof that consent had been given.

Mr GOODE (United Kingdom) endorsed the Secretariat proposal, subject to the deletion of the square brackets as the requirement of a signature could be a source of major interference to factoring transactions. He noted however that there seemed to be a consensus that the electronic communication should be available or manifested in some permanent form, in which connection he drew attention to a formulation currently under study in UNCITRAL.
Mr SOMMER (Factors Chain International) stated that in Europe the normal way of communicating notice of the assignment of a receivable was by telefax, which provided a hard copy. The phrase “electronic means of communication”, without any qualification, was too vague and was capable of covering transmission of information which could not be retrieved in the sense that it appeared only momentarily on a screen whereas both factors and debtors required a more permanent record of such communications.

Ms ESSOMBA (Cameroon) supported the arguments invoked by the representative of France as what was important here was to specify the content of the writing and to take into account modern means of communication without unduly widening the scope of those means.

It was moreover her opinion that it was not absolutely necessary to retain the phrase “whether or not signed” since it was her understanding that the document did not have to be authenticated. The phrase would only be relevant if it were a condition for the notice to be valid. She therefore proposed that Article 1(3) be reworded as follows: “For the purpose of this Convention, “writing” includes any communication producing some tangible record”.

The CHAIRMAN recalled that the language to which reference had been made by the representative of the United Kingdom as having been developed within UNCITRAL was “any means of communication which preserves a record of the message”, a formulation which would present the advantage of avoiding any mention of “writing”. It would also correspond to the proposal of the representative of Cameroon, as it included any communication recorded in the memory of an automatic data processor that could be reproduced either on a screen or on paper. In the light of developments in electronic communication it might however be dangerous to refer expressly to writing and the difficulties could perhaps be overcome if the UNCITRAL formula or one similar to it were to be employed.

Mr RÉCZEI (Hungary) suggested that the point might be met by the addition of the words “provided that in cases of doubt it can be evidenced”.

Mr GOODE (United Kingdom) agreed with the French proposal, subject to drafting, since it made it clear that what was essential was that whereas in its dispatch and transit the communication need not be in permanent form, it must be one which, after receipt, could be retained or recorded in permanent or traceable form.

The CHAIRMAN noted that a consensus seemed to have emerged in favour of the ideas underlying the French proposal and if this were so then he suggested that the Committee vote on the question of whether the words “whether or not signed” which appeared in square brackets in the Secretariat proposal (CONF. 7/C.1/W.P. 59) should be retained.

The Committee decided by eighteen votes to five, with five abstentions, to retain the words “whether or not signed”.

Mr REBMANN (Federal Republic of Germany) stated that it was his understanding of the language “whether or not signed” that there was no need for an authorised signature of the communication giving notice of an assignment but that such communications should clearly indicate the origin of the notice.

The CHAIRMAN found that there were no objections to the interpretation given by the representative of the Federal Republic of Germany and that what was being referred to was a signature in the technical sense of a hand-written signature.

In these circumstances he proposed that Article 1(3) be referred to the Drafting Committee with instructions that the language in square brackets be retained and that the communication by electronic means must be capable of being reproduced or traced after transmission, one way of achieving that result being to employ the language used by UNCITRAL in a similar context.

It was so decided.
Article 7

The CHAIRMAN noted that a reference had been made to Article 7 in the Japanese comments on Article 1 (CONF. 7/6). No proposal had however been made and he ascertainment from the representative of Japan that it was not his intention to table an amendment to Article 7.

Paragraph 1

The CHAIRMAN called upon the representative of Spain to explain his delegation's proposal in CONF. 7/6 to add the words "and signed" after "writing".

Mr GUITARD (Spain) stated that his delegation was withdrawing its proposal as a consequence of the withdrawal of its proposal regarding Article 1.

The CHAIRMAN requested the representative of the United States of America to introduce his delegation's proposal in CONF. 7/6 Add. 2.

Mr REISMAN (United States of America) believed the point to be one of drafting. As his delegation saw it, the words "is given" in sub-paragraph (a) could be construed as meaning "sent" whereas what was intended was that the debtor should actually receive notice of the assignment in order for the rights and obligations flowing from notice to come into play. The language of the provision should be clarified to reflect that intention.

Mr GOODE (United Kingdom) proposed that the words "is given to" should be replaced by language such as "is received by".

Mr GUITARD (Spain) supported the proposed amendment.

The CHAIRMAN suggested that in the absence of any objections the United States proposal should be submitted to the Drafting Committee.

It was so decided.

Hearing no further observations on sub-paragraph (a), the CHAIRMAN called for comments on sub-paragraph (b).

Mr GUITARD (Spain) suggested the addition of language in sub-paragraph (b) which would require identification not only of the factor but also of the supplier.

Mr GOODE (United Kingdom) believed that concern already to be met by the existing text of the provision since it was essential for the debtor to know which of its obligations had been transferred, which implied knowledge of the supplier.

The CHAIRMAN stated that he viewed the matter as one of drafting which should be referred to the Drafting Committee.

It was so decided.

Mr SAMSON (Canada) enquired whether the expressions "droit préférable" in French and "superior title" in English should be interpreted as referring to a right in competition with that of the assignee mentioned in Article 7(1) or to any priority right in general.

Mr BERAUDO (France) considered that the French text conveyed the idea of competition amongst various rights and that the superior title referred to therein must be stronger than the others. If therefore the debtor knew of a right stronger than that of the factor, for example if the factor had reassigned the receivable, the debtor would obviously have to make payment to the second assignee and not to the first.
Mr GOODE (United Kingdom) was of the opinion that the English version should be interpreted in the same manner as that suggested by the representative of France in regard to the French text.

Mr SAMSON (Canada) stated that he found the answers to his question to be satisfactory.

The CHAIRMAN noted that there were no further observations on sub-paragraph (b) and drew the attention of the Committee to the Cuban proposal set out in CONF. 7/C.1/W.P. 35 to delete the words “at or” in sub-paragraph (c) on the ground that they were redundant in view of the fact that the contract of sale was always concluded before the giving of notice of assignment of the receivable.

Mr REISMAN (United States of America) stated that cases did arise in practice where notice of the assignment of the receivables was already to be found in the supply contract itself and he expressed a preference for the existing text.

Mr AGYEKUM (Ghana) suggested that, as in Article 7(1)(a), the words “given to” be replaced by “received by” in sub-paragraph (c).

The CHAIRMAN requested the Drafting Committee to consider this point in relation to subparagraphs (a) and (c) as well as to reflect on the need to require the identification of the supplier in sub-paragraph (b).

Paragraph 2

Mr RONCORONI (Switzerland) sought confirmation of his delegation’s belief that the language “[i]respective of any other ground on which payment by the debtor to the factor discharges the debtor from liability ...” included set-off.

Mr GOODE (United Kingdom) stated that the purpose of Article 7(2) was to ensure that any mode of payment which constituted payment under the applicable law was preserved and that the wording to which the representative of Switzerland had referred would therefore cover payment by exercise of a right of set-off.

Mr BRENNAN (Australia) suggested that the Latin words pro tanto be replaced by an English term which would convey in a satisfactory manner the idea that payment by the debtor to the factor would be effective to the extent that the debtor would have discharged that liability by making payment to the supplier.

Mr GOODE (United Kingdom) stated that his delegation would not oppose this suggestion although reliance could always be placed on the well known maxim id certum est quod certum reddi potest.

The CHAIRMAN proposed that the Drafting Committee consider the possibility of rendering the words pro tanto in the English and French texts in an appropriate manner and, hearing no further comments on paragraph 2, he asked whether Article 7 as a whole could be referred to the Drafting Committee.

It was so decided.

The meeting rose at 4.00 p.m.
EIGHTEENTH MEETING

Monday, 23 May 1988, at 9.40 a.m.

Chairman: Mr Sevón (Finland)

AGENDA ITEM 7: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FACTORING (Study LVIII - Doc. 33; CONF. 7/6 and Add. 2; CONF. 7/C.1/ W.P. 42 and W.P. 44 – 45)

Article 8

Paragraph 1

The CHAIRMAN noted that two observations had been made by Japan in respect of the article in CONF. 7/6 and he invited the Japanese delegation to comment on its proposal as it related to paragraph 1.

Mr KATO (Japan) recalled that Article 8(1) provided that a debtor may set up against the factor all defences of which the debtor could have availed itself under a contract of sale of goods if a claim for payment had been made by the supplier. The provision could be interpreted as meaning that the debtor might not set up against the factor any defences which were not stipulated in the contract of sale of goods, but of which the debtor could, under the applicable law, have availed itself with regard to the contract. He proposed therefore that the words “under that contract” be replaced by such language as “concerning that contract”.

Mr GOODE (United Kingdom) believed that the intention, and in accordance with English law the effects, of the words “under that contract” would allow the debtor to benefit from all defences available to it under the law applicable to the contract. If then, for example, a major breach of contract by the supplier were to entitle the debtor to withhold payment this should be regarded as a defence arising out of the contract even if it had not been referred to specifically in the contract.

The CHAIRMAN enquired whether paragraph 1 could be referred to the Drafting Committee on the understanding that the point raised by the Japanese delegation was one of drafting.

It was so agreed.

Paragraph 2

The CHAIRMAN invited the representative of Japan to introduce his delegation’s proposal in CONF. 7/6 concerning Article 8(2).

Mr KATO (Japan) suggested that it might be inferred from the language “[t]he debtor may also assert against the factor any other defences, including any right of set-off” that there were defences other than the right of set-off ..." It was highly unlikely that there would be such defences so that the text might be considered to be misleading. His delegation therefore proposed that the wording formerly contained in the provision, namely “any right of set-off” should be reintroduced.

Mr GOODE (United Kingdom) stated that his delegation could accept the deletion in Article 8(2) of the reference to “defences” given the reference in paragraph 1 to “all defences”. The reason for the introduction of the words “any other defences” in paragraph 2 at the last session of the Unidroit
committee of governmental experts had been a desire to address a terminological difficulty arising for example under the law of the United States of America where certain rights of set-off were viewed as constituting a defence. He hoped that this being so, those defences would be encompassed within the words “right of set-off” so as to avoid the confusion to which the representative of Japan had drawn attention.

Mr REISMAN (United States of America) stated that the problem involved in using only the words “any right of set-off” was that in the United States legal system they applied basically to a monetary defence. There might be other types of defences to performance of a contract such as illegality, frustration and the equitable doctrines of laches and estoppel which were not rights of set-off. It was for these reasons that at its last session the Unidroit committee of governmental experts had amended the wording of Article 8(2) but since in his view there was no basic disagreement as to what the provision should say the matter could be referred to the Drafting Committee.

Mr JACOBSSON (Sweden) stated that he had difficulty with Article 8(2) from a linguistic point of view. In particular he enquired whether the words after the second comma, “in respect of claims”, related to the word “set-off” or to the word “defences”. He was also in doubt as to whether the word “available” referred to “claims” or to “defences” and he requested clarification on the matter.

Mr GOODE (United Kingdom) believed that the problem had arisen out of the reference to “any other defences” in Article 8(2). The types of defence to which reference had been made by the representative of the United States of America would also be encompassed within paragraph 1 which had been designed precisely to deal with the question of defences. Paragraph 2 was directed rather to rights of set-off and its scope was therefore restricted to rights of set-off available to the debtor at the time it received a notice of assignment so as to exclude rights of set-off for subsequently accruing cross-claims.

As now drafted the intention was that the words after “set-off” governed both defences and rights of set-off and he experienced the same difficulties as the representative of Sweden in relation to the reference to “any other defences”. He therefore expressed the hope that those words could be deleted and he suggested that the matter be reviewed by the Drafting Committee.

The CHAIRMAN stated that he hesitated at this stage to refer the provision to the Drafting Committee as a matter simply of drafting since he was not satisfied that the language “any other defences” had no substantive content. If however the matter were simply one of drafting then the words in question could be deleted as superfluous.

Mr BERAUDO (France) recalled that the respective rights of the parties under Article 8 had already been carefully weighed in arriving at the present text and it was therefore preferable to retain the existing language. There was however a divergence between the French and English versions, the latter being capable of the interpretation that it referred only to judicially recognised rights whereas the French text clearly contemplated rights arising directly from the act itself. Paragraph 2 could therefore give rise to differing interpretations between Common lawyers and Civil lawyers and especially for those Civil Law jurisdictions which might have regard principally to the English language version. He wondered therefore whether it would not be possible to retain the English text with the reference only to “claims” or whether it might not be preferable to find a broader language, or yet again to state in the summary records that the word “claims” covered not only those rights arising before legal proceedings but also those judicially recognised after such proceedings.

Mr REBMANN (Federal Republic of Germany) noted that if the language of Article 8(1) were to be changed from “under that contract” to “concerning that contract” as proposed by the representative of Japan, he would have difficulty in understanding what would be the “other defences” referred to in paragraph 2 of that article. His delegation saw paragraph 2 as contemplating only the right of set-off, all other defences including that of retention of payment by the debtor being encompassed within the language “under that contract” in paragraph 1. The words “any other
defences” should therefore be deleted.

Mr RICHARDS (Antigua and Barbuda) believed that paragraphs 1 and 2 of Article 8 were concerned with two different matters. Paragraph 1 stated that if a claim were made by the factor, then the debtor would be entitled to set up all defences which would have been available to it had the claim been made by the supplier; paragraph 2 on the other hand laid down the principle that in respect of claims of the debtor vis-à-vis the supplier the debtor was, in its relations with the factor, entitled to raise all defences, whatever they might be.

Mr EL-KATTAN (Egypt) suggested that Article 8(2) might be redrafted as follows: “The debtor may also assert against the factor any other defences relevant to the factoring contract and the supply contract”.

The CHAIRMAN noted that originally paragraph 2 had mentioned only set-off and in that context it seemed to be useful also to refer to those rights existing and available at the time the debtor received notice of the assignment but if paragraph 2 were to be expanded to cover other defences of a kind which it was difficult to ascertain then the question might be raised as to whether it made any sense to require that those defences should also have been available at that time as this could limit the use of paragraph 2 in respect of those other defences. He enquired whether the Chairman of the Drafting Committee would wish to comment on the question.

Mr GOODE (United Kingdom) believed that it was the phrase “any other defences” which was causing difficulty. The purpose of the two paragraphs had been to distinguish between on the one hand the substantive defences available to the debtor which meant that it had no obligation to pay, because for example of non-performance by the supplier, illegality or the application of any other rule of law, and on the other those cases where the debtor was under an obligation to pay but could set against that obligation a countervailing claim which it had against the supplier. It was however necessary to restrict such claims to those existing against the supplier at the time the debtor received notice of the assignment for otherwise the debtor would thereafter be able, by continuing its relations with the supplier, to create fresh cross-claims which could reduce the rights of the factor as assignee. In the view of his delegation the deletion of the words “any other defences”, which it was impossible to reconcile with the words “all defences” in paragraph 1, would have the result that Article 8 would contain two paragraphs which would match the law of most national jurisdictions in that whereas paragraph 1 would address the substantive defences not limited in time inherent in the contractual relationship, paragraph 2 would be concerned with rights of set-off arising through cross-claims which were however not necessarily related to the contract.

As regards the meaning of the English text, it was his understanding that the word “claims” effectively meant “rights” that had accrued even though payment was not yet due: in other words paragraph 2 also covered the case of a debitum in presenti solvendum in futuro.

Mr REISMAN (United States of America) believed that the most common situation in which Article 8 would be applicable was that where there would be two supply contracts. The intention of paragraph 1 was that the debtor could avail itself of any defences under the supply contract from which the receivable arose, whether the facts that gave rise to the defence occurred before or after the assignment, since the receivable fell under that contract with the consequence that the debtor should not be obligated to pay sums under the particular contract simply because the supplier’s breach took place after the debtor received notice of the assignment. It was therefore difficult for him to accept the Japanese proposal regarding paragraph 1 as it would cover any defences available under the law and not just those related to the individual contract.

As to paragraph 2, he understood that the words “any other defences” covered those defences which could arise from unrelated transactions and it was in consequence necessary that they arise before notice of assignment was given to the debtor. Indeed the word “other” clearly indicated that certain defences were referred to in paragraph 1 and others in paragraph 2, including the right of set-off which, under the procedural law of his country, was a defence and there might be many other defences based on tort or on a statutory right. In this connection he stated that the words “claims”
and "available" in paragraph 2 related both to the right of set-off and to the other defences.

In conclusion, he expressed the opinion that the Committee was not faced with a question of substance. The use of the phrase "any other defences" was justified on the ground that the language was broad enough to address the law of all jurisdictions which might or might not recognise set-off as an exclusive defence whenever it did not relate to the supply contract from which the receivable arose.

Mr BRENNAN (Australia) agreed with the representative of Antigua and Barbuda that there was a difference between the content of paragraphs 1 and 2 since paragraph 1 was governed by the words "if such claim had been made by the supplier". To that extent there might indeed be a question of substance and, if these words were the governing words, then perhaps that would not have quite the same impact on the words "any other defences" in paragraph 2. For this reason his delegation had up to now been able to accept the language of Article 8 as a whole. To test however whether the Committee was faced with a question of substance or one of drafting, as had been suggested by more than one delegation, he advanced the proposition that since paragraph 2 employed the broad term of defences and then the narrower one of set-off, and since that latter term could be too restrictive, consideration might be given to the possibility of replacing the words "other defences, including any right of set-off, in respect of claims" in paragraph 2 by the one word "rights".

Mr BERAUDO (France) supported the proposal of the representative of Australia regarding the English text which would confirm his understanding that the word "claims" included "rights", in which case he proposed that the French text of Article 8(2) also be amended, the word "à" being replaced by "tel qu'un" so as to make it clear that the reference to set-off was offered merely as an example.

Mr GOODE (United Kingdom) believed that the difficulties experienced by the representative of the United States of America arose from the use of the words "under that contract" in paragraph 1. On reflection he found the phrase to be needlessly limiting and indeed altogether unnecessary. If it were to be deleted then paragraph 1 would cover all substantive defences, whether they arose directly under the contract or in any other manner, and paragraph 2 could be restricted, as originally intended, to rights of set-off which in all jurisdictions were limited to rights or claims existing at the time at which the debtor received notice of the assignment of the receivable.

Mr REBMANN (Federal Republic of Germany) supported the solution proposed by the United Kingdom delegation.

Mr REISMAN (United States of America) saw some difficulties with the amendment proposed by the representative of the United Kingdom. In effect, paragraph 1 was intended to deal only with defences connected with the contract under which the receivable arose and the result of deleting the words "under that contract" would be that the provision would permit the debtor to assert any defences that it could have asserted against the supplier. If that were the case then there would be inconsistency between the two paragraphs of Article 8, since paragraph 2 expressed the narrower rule that the debtor could only invoke such defences as it could have asserted before the time at which it received notice of the assignment. It would therefore be necessary to introduce some qualifying language in paragraph 2 such as "[n]otwithstanding paragraph 1".

He could on the other hand support the amendment proposed by the representative of Australia to speak in paragraph 2 of "rights" rather than of defences.

Mr HAGSTROM (Brazil) recalled that the two paragraphs of Article 8 dealt with different kinds of defences, the first with defences connected with the receivable and the second with defences unrelated to the receivable and this fact had to be borne in mind.

The CHAIRMAN felt that many of the interventions so far made on Article 8 touched more on drafting than on substance. It was however his understanding of the discussions that the feeling was that the defences available to the debtor should not be reduced by the fact that there was an
assignment, except for the right of set-off where a time factor limited the claims which the debtor might invoke. If this were so then the matter could be seen essentially as one of drafting and indeed reference had been made to the placing of the commas in paragraph 2, to what exactly in paragraph 2 the word "available" referred and to the question of whether the word "claims" in that provision was too limited, a point originally raised in respect of the English text, and expanded in the course of discussion to cover certain problems relative to the French text.

He recalled that two main proposals had been made to overcome the difficulties, the first by the Australian delegation to replace in paragraph 2 the words "other defences, including any right of set-off, in respect of claims" by "rights" and the second by the United Kingdom to delete the words "under that contract" in paragraph 1. It was his assumption that it was the intention of the Committee that paragraphs 1 and 2 of Article 8 should deal with different issues and that the defences available to the debtor should not be limited by the process of redrafting. If the Committee agreed with his reading of the situation then the article as a whole might be referred to the Drafting Committee to give effect to the intention of the Committee of the Whole.

Mr BERAUDO (France) stated that he shared the difficulties of the representative of the United States of America with the amendment proposed by the United Kingdom delegation in relation to Article 8. He feared that it could have the effect in certain legal systems of enlarging considerably the defences open to the debtor in respect of cross-claims totally unrelated to the contract under which the receivable had arisen and he did not believe that it was justifiable to aggravate the problems facing factors in such a manner. Furthermore, the effect of adopting the United Kingdom proposal would be that paragraph 1 would become still even more broad in scope than paragraph 2, which had not been the original intention.

The CHAIRMAN considered that the concerns expressed by the representative of France had been encompassed within his summary of the discussions. Undoubtedly the mission of the Drafting Committee was simply to translate the wishes of the Committee of the Whole. If, in accomplishing that task, it felt that questions of substance were involved then naturally it would have to refer back to the Committee of the Whole for fresh instructions. He therefore repeated his suggestion that Article 8 be referred to the Drafting Committee.

It was so decided.

Article 9

Paragraph 1

The CHAIRMAN noted that two proposals had been made in relation to Article 9(1), the first by the delegation of the United States in CONF. 7/6 Add. 2 and the second by the Italian delegation in CONF. 7/C.1/W.P. 42. He invited the representative of the United States of America to introduce his proposal.

Mr REISMAN (United States of America) stated that his proposal concerned more a question of form than one of substance. He believed the present language of paragraph 1 to be technically inaccurate since the debtor's claim against the factor would be for recovery not of the purchase price but of the money paid to the factor. The final words of the provision "for recovery of the price" should be replaced by the words "for recovery of the money paid to the factor".

The CHAIRMAN thought that the proposal could be seen as having an impact on the substance of Article 9(1) even though it might in fact be more in accordance with what had initially been intended. He enquired therefore whether there were any objections to asking the Drafting Committee to consider the views put forward by the representative of the United States of America. After noting that no such objections had been made, he called upon the representative of Italy to speak to his delegation's proposal.
Mr DE NOVA (Italy) recalled that, in accordance with Article 9(1), in the event of non-performance by the supplier, the debtor would not be entitled to recover money paid to the factor if the debtor had a claim against the supplier for recovery of the price, which meant that if the debtor had no such claim against the supplier it would be entitled to recover money paid to the factor. A debtor could however lose its claim against the supplier in many ways, for example by prescription. It appeared from the Explanatory Report on the draft Convention that it was not intended to cover all cases where the debtor had no claim against the supplier but only the special case where under the applicable law the debtor had been deprived by the assignment of its claim against the supplier. It was for this reason that he proposed the replacement in paragraph 1 of the words “if the debtor has a claim against the supplier for recovery of the price” by such language as “if the debtor has not been deprived by the assignment of his claim against the supplier for recovery of the price”.

Mr GOODE (United Kingdom) considered that if the Explanatory Report did contain the statement alluded to then it was in error for under the law of all legal systems with which he was acquainted an assignment could not, as a matter of contract law, deprive the debtor of any rights against the supplier. He saw no difficulty with the present wording of Article 9 (1) which was intended not to improve the debtor’s position as a result of the assignment by giving it a right to sue two parties instead of one. There was therefore a general immunity of the factor against a restitutionary claim which was qualified by paragraph 2 so that if the factor had not already paid the supplier or committed itself to pay the supplier then the debtor could recover a payment made to the factor. Paragraph 1 was intended to prevent the factor having to make a double payment, first to the supplier and then to the debtor and, provided the debtor intimidated its right of recovery to the factor before the factor paid the supplier, the factor could protect itself by withholding payment to the supplier and covering its right to do so by way of an express term in the factoring contract. This was, he believed, the purpose of the article and as such it should meet the concern expressed by the representative of Italy.

Mr DE NOVA (Italy) stated that he was satisfied with the explanation given by the representative of the United Kingdom and withdrew his proposal.

Paragraph 2

No further comments being made on paragraph 1, the CHAIRMAN requested the representative of the United States of America to introduce his proposals regarding paragraph 2 which were contained in CONF. 7/6 Add. 2.

Mr REISMAN (United States of America) suggested in the first instance that the words “such a claim” should be replaced in the first line of paragraph 2 by the words “a valid claim”.

Secondly, the language of paragraph 2 should be clarified so as to indicate that a debtor which had such a valid claim against the supplier should nevertheless be entitled to recover money paid to the factor if it had a claim against the supplier for the recovery of such money, thus making it clear as a first condition for recovery by the debtor from the factor that it would have had the same right to recovery from the supplier, had the money been paid to the latter.

Of more importance, however, in the light of the nature of factoring and of the scope of the Convention was his delegation’s proposal in regard to sub-paragraph (a) according to which the first circumstance under which recovery by the debtor from the factor was possible, namely that the factor had not paid the purchase price of the receivable to the supplier, seemed not to contemplate the possibility of the assignment of the receivables being made by way of security as opposed to an outright purchase. It was however his understanding that such assignments did fall within the Convention provided that the provisions of Article 1 were satisfied. Sub-paragraph (a) might therefore not be fully applicable if a purchase were not involved and it was suggested that this situation be dealt with by a new sub-paragraph (b) which would amplify the present sub-paragraph (b), the effect of which would be that the debtor with a valid claim against the supplier would be entitled to recover money paid to the factor to the extent that the factor had made payments to the
supplier under the factoring contract after receiving such money from the debtor and with knowledge of the debtor’s claim at the time of payment to the supplier. In these circumstances it would do so at its own risk, a rule which accorded with existing commercial practice.

The CHAIRMAN drew attention to the proposal by Sweden in CONF. 7/C.1/W.P. 44 which also related to Article 9(2)(b) and he enquired whether the proposal made by the United States representative met the concern of the Swedish delegation.

Mr JACOBSSON (Sweden) stated that he was troubled by the language of the present text which seemed to imply that the factor could argue that although aware of the existence of a claim by the debtor he did not think it was well-founded and would therefore be entitled to make payment to the supplier. He did not find this to be acceptable. Once the factor had notice of the claim it must stop payment to the supplier or make payment at its own risk. He was not sure whether the United States proposal met all his difficulties.

Mr GOODE (United Kingdom) stated that as a matter of drafting he understood the proposal of the United States delegation as broadening the scope of Article 9 to cover cases where the factoring was by way of loan against the security of the receivables and not by way of outright purchase. If this was the case it accorded exactly with the redraft of Article 1. The question was therefore simply one of drafting.

The comments of the representative of Sweden were helpful as it was necessary to distinguish the word “claim” as used elsewhere in the draft Convention in the sense of a valid claim from notice of a claim which was notice of a claim whether or not the factor believed the claim to have any foundation. He was not however sure whether any change in drafting was necessary for if the claim were not valid then the factor would continue to enjoy immunity, but if it were, and the factor had notice of its existence, the factor would be affected by the operation of the paragraph. This point too was in his opinion therefore one of drafting.

The CHAIRMAN enquired of the Committee whether the use of the word “claim” in the chapeau of Article 9(2) was intended to signify a “valid claim” and whether, in the absence of any objections, this idea could be suitably reflected in the drafting if the Drafting Committee found the existing text to be unsatisfactory.

*It was so agreed.*

Mr REISMAN (United States of America) wondered whether the Committee might not wish to entertain a suggestion which had already been made in connection with Article 8, namely the replacement of the word “claim” by “right” so as to avoid any ambiguity.

The CHAIRMAN considered this to be a drafting matter which could be submitted to the Drafting Committee.

He then asked whether it was the wish of the Committee that the scope of paragraph 2 be broadened so as to correspond to the language of Article 1 and whether this too could be deemed to be a question of drafting.

Mr BERAUDO (France) wondered whether the matter might not best be settled by a reference to the discussions in the summary records. If the text were to be amended so as to make it clear only in this article that the debtor must have a valid or legitimate claim then it would be necessary to qualify those words by the same adjectives elsewhere in the Convention, for example in Article 8. Moreover it was his impression that lawyers in all countries would understand a reference in a legal text to a right as being to a valid right or to a claim as to a legitimate claim.

The CHAIRMAN stated that it had been precisely for that reason that he had suggested that the Drafting Committee be instructed to consider whether the present text was satisfactory in this regard.

Mr REBMANN (Federal Republic of Germany) stated that he could support the proposal to
broaden the scope of Article 9(2) so as to cover all kinds of factoring envisaged by Article 1.

The CHAIRMAN concluded that it was the wish of the Committee of the Whole to instruct the Drafting Committee to revise the language of Article 9(2) in such a way that its scope of application would correspond to that of Article 1.

Mr REBMANN (Federal Republic of Germany) believed that the proposal by the United States of America in relation to Article 9(2)(a) went too far by referring without any limitation to the outstanding obligation of the factor to make future payments to the supplier under the factoring contract. In the view of his delegation the debtor was concerned only with payments relating to such outstanding obligations as were connected with the obligation of the debtor.

The CHAIRMAN enquired of the representative of the United States of America whether that had been the intention behind his proposal.

Mr REISMAN (United States of America) agreed with the suggestion of the representative of the Federal Republic of Germany to narrow the scope of the proposed United States amendment to Article 9(2)(a) in relation to the outstanding obligation of the factor to make future payments to the supplier.

Ms ASTOLA (Finland) suggested that one consequence of accepting the United States proposal regarding Article 9(2) might be that the debtor would not receive from the factor the same sum that it could under the existing text of sub-paragraph (a) as the factor would not have to pay back the commission to which it might be entitled under the factoring contract either to the supplier or to the debtor. Under the present text however the debtor was entitled to recover the whole of the purchase price.

Mr REISMAN (United States of America) believed that a consensus was forming around the idea that a debtor who had a valid claim against the supplier should be entitled to recover money from the factor under Article 9(2)(a) to the extent that the factor had an outstanding obligation to make future payments to the supplier for receivables due from that debtor but this was, he felt, a question of drafting which could best be left to the Drafting Committee.

The CHAIRMAN concluded that the representative of the United States of America did not see any additional points of substance as having been raised by the comments on his proposal and he therefore asked the representative of Italy whether the matter his delegation had referred to in CONF. 7/C.1./W.P. 42 was taken care of satisfactorily by the preceding discussion.

Mr DE NOVA (Italy) considered that his concern had not yet been touched on in the discussion although it might turn out to be no more than a drafting point. He was, in effect, not sure whether the word “paid” in Article 9(2)(a) included all forms of performance of the factor’s obligations and in particular the right of set-off between suppliers and factors. It was possible that the term was not sufficiently wide, in which case the question might be referred to the Drafting Committee with a view to finding broader language.

The CHAIRMAN enquired whether the Committee viewed the question raised by the Italian delegation as being one of substance or of drafting.

Mr BERAUDO (France) stated that, in the French Civil Code at least, “paiement” was a general term, which included set-off, as well as any other means by which a debtor might discharge its obligations, whether that obligation be one to pay a sum of money or to perform an act.

The CHAIRMAN noted that in the opinion of the French representative the existing text covered the point raised by the Italian delegation with the consequence that it would not require amendment.

Mr RONCORONI (Switzerland) recalled that there were other codes drafted in French where the word “paiement” did not have such a general significance and covered only payment of money.
Mr GOODE (United Kingdom) stated that in Common Law jurisdictions "payment" included any mode of discharge of a monetary obligation. If therefore Swiss law required more specific language then this was perhaps a matter that could be referred to the Drafting Committee.

Mr REISMAN (United States of America) suggested that if the original text of Article 9(2)(a) were to be retained then the point raised by the Italian delegation could be valid in a commercial sense since most factors spoke of payment as being an expenditure of money to a supplier as opposed to a right of set-off against a credit balance which might satisfy a payment obligation. He believed however that the United States proposal to introduce some such language into paragraph 2(a) as an "obligation to make future payments" could resolve the problem of whether the word "paid" comprehended rights of set-off.

The CHAIRMAN summed up the position as being that the Drafting Committee was called upon to consider three points, the first of which, given the intention in the chapeau of Article 9 to deal only with "valid" claims, was how best to reflect this in view of the fact that there were a number of references elsewhere in the draft Convention to "claims". The second point was that it was intended in paragraph 2(a) to cover not only payment of money but also other means of discharging obligations. It was therefore necessary to find language which would encompass set-off and the Drafting Committee should bear in mind the differences in terminology from one legal system to another. Lastly, the Drafting Committee should amplify the scope of paragraph 2(b) so as to ensure correspondence with the scope of application of the Convention as reflected in Article 1. The Drafting Committee should take as a basis for its deliberations the United States proposal, while having due regard to the views expressed within the Committee, and in particular those of the representatives of the Federal Republic of Germany and of Finland, that the actual language of that proposal went too far, and to the need for the substance of those two interventions to be reflected in any new text.

Mr GUITARD (Spain) drew attention to the fact that whereas Article 9(1) set out the main rule which prevented the debtor recovering sums paid to the factor in the event of non-performance, defective performance or late performance, the exception in paragraph 2(b) referred only to non-performance. He wondered therefore whether the latter provision ought not to be extended to cover defective or late performance.

Mr GOODE (United Kingdom) stated that it was his understanding that the intention of Article 9(2)(b) was to encompass any failure of performance of the supplier mentioned in paragraph 1 of that article and to that extent the question raised was one of drafting.

Mr STAUDER (Switzerland) requested clarification regarding the fact that whereas paragraph 2(a) contained the words "to the extent", which seemed to cover the case of partial payment or payment on an instalment basis, this idea was lacking in sub-paragraph (b). In the view of his delegation that provision should be amended to bring it into line with sub-paragraph (a).

The CHAIRMAN stated that he had understood the Chairman of the Drafting Committee as having suggested that it had been the intention of the Unidroit committee of governmental experts that sub-paragraph (b) extend to all cases of failure of performance mentioned in sub-paragraph (a), in which case the questions raised by the Spanish and Swiss representatives could be seen as matters of drafting.

Mr GOODE (United Kingdom) considered the point alluded to by the representative of Switzerland as being well taken and that it should be dealt with by the Drafting Committee.

The CHAIRMAN suggested that the questions to which attention had been drawn by the delegations of Spain and Switzerland should, together with the points he had himself mentioned, be referred to the Drafting Committee with the consequence that, unless any other issues were raised regarding Article 9, the article as a whole could be referred to the Drafting Committee.
It was so decided.

The meeting was adjourned at 11.10 a.m. and resumed at 11.40 a.m.

Article 10

Paragraphs 1 and 3

The CHAIRMAN invited the Committee to consider the amendment to Article 10(1)(a) proposed by the Japanese delegation in CONF. 7/6.

Mr KATO (Japan) believed that there was an error in the cross-referencing in paragraph 1 which should be directed to “Articles 4 to 9” and not “Articles 3 to 9” as Article 3 was not relevant to the content of Article 10.

Mr GOODE (United Kingdom) agreed with the proposal as it corrected an error which had crept into the text at the last session of the committee of governmental experts in Rome as a result of the renumbering of certain articles.

The CHAIRMAN found that there were no objections to the Japanese proposal and he invited the representative of Sweden to introduce his proposal in relation to sub-paragraph (a) contained in CONF. 7/C.1/W.P. 44.

Mr JACOBSSON (Sweden) recalled that while Article 10(3) provided that the Convention should not apply to an assignment prohibited by the terms of the factoring contract, it did not purport to invalidate such an assignment permitted by the applicable national law. The consequence was that if there were to be a chain of transactions then one in the middle of the chain might not be governed by the Convention whereas those preceding or subsequent to it would fall within its scope. Such a situation could result in confusion and if the intention of Article 10(3) was that the rules contained in Article 5 should not apply to subsequent assignments then it would be preferable as an alternative to that provision that Article 5 be excluded from the application of Article 10(1)(a).

Mr GOODE (United Kingdom) stated that he was unclear as to the effects of the Swedish proposal. If Article 5 were to be excluded from the application of Article 10(1)(a) then as he understood it the initial assignment would be effective despite the prohibition and any further assignment would be effective even if no reference were made to Article 5 in Article 10(1)(a) and he did not see in what way the proposed amendment would alter the situation under the existing text. If however that amendment were to be accepted then there was a danger that future readers of the Convention would look for some special significance in the exclusion of Article 5 which did not exist.

Mr JACOBSSON (Sweden) considered that it was undesirable to encourage exclusion in the first factoring contract of other assignments but even if Article 5 were not to apply and the domestic law were to validate the assignment then the Convention should still apply.

The CHAIRMAN suggested that it might be preferable to postpone further discussion on the Swedish proposal until such time as the content of Article 5 had been determined.

Mr THIAM (Guinea) supported the Chairman’s proposal.

Mr REBMANN (Federal Republic of Germany) stated that he had difficulties with the Swedish proposal which also referred to Article 10(3) and which might be based on a misunderstanding. Article 10(3) referred not to a prohibition on assignment in the supply contract, as did Article 5, but to one in the factoring contract and he saw paragraph 3 as being addressed for example to cases where the factor might in that contract impose limits upon the amount of the receivables which could be factored by the supplier in respect of any one debtor. If this were so, then the question of Article 5 should be addressed only in paragraph 1 of Article 10 and not in relation to paragraph 3.
which was in no way concerned with the relations between supplier and debtor.

The CHAIRMAN expressed the view that the last intervention was entering into the substance of the question raised by the Czechoslovak delegation in CONF. 7/C.1/W.P. 45 and he invited the representative of that delegation to introduce its comments.

Mr KOLLERT (Czechoslovakia) believed that it was necessary to clarify the meaning of Article 10(3) which had been simplified at the final session of the committee of governmental experts in Rome in a manner which was perhaps not fully satisfactory. For this reason his delegation could concur with the proposal of the Japanese delegation in CONF. 7/6 to the effect that the word “assignment” be preceded by the adjective “subsequent” in that provision.

Practice had shown that it was often the wish of the supplier to insert in the factoring contract a clause prohibiting subsequent assignments. There was sometimes a difficulty from the practical point of view in that an export factor would not necessarily be involved in the transaction. If then there was a direct relation between the supplier and the import factor (“direct factoring”) it would be the second and any subsequent assignment to which effect should not be given whereas if an export factor were involved (“classical factoring”) it would be the third and any subsequent assignment that would be the subject of the prohibition.

The CHAIRMAN invited the representative of Japan to explain the proposal made by his delegation in CONF. 7/6 in relation to Article 10(3).

Mr KATO (Japan) stated that his delegation’s proposal to add the word “subsequent” before “assignment” in Article 10(3) was intended to clarify the intention of the provision in the manner suggested by the representative of Czechoslovakia.

Mr BERAUDO (France) drew attention to the fact that the Japanese proposal to add the word “subsequent” before the word “assignment” would bring the English text into line with the French version which already referred to a “cession successive” and that it would also seem to meet the concern expressed by the delegation of Czechoslovakia. He recalled that it was often desirable and indeed necessary for the supplier to require that the factoring contract limit the possibility of assignment to a second or subsequent assignee, depending on whether the supplier was dealing directly with an import factor or whether an export factor was also involved.

With regard to the proposal by the Swedish delegation to exclude Article 5 from the application of Article 10(1)(a) he agreed with the representative of Guinea that Article 5 was a most important element of the Convention as a whole, and he therefore believed that whatever the content of that article which would ultimately be approved reference should be made to it in Article 10(1)(a).

Mr JACOBSSON (Sweden) stated in response to a question from the Chairman, that he would, in the light in particular of the observations of the representative of the Federal Republic of Germany, be prepared to withdraw the proposal contained in CONF. 7/C.1/W.P. 44.

The CHAIRMAN assumed that in these circumstances there was no outstanding problem regarding the reference to Article 5 in Article 10(1)(a).

He also noted that the discussion so far had indicated no objections in substance to the Japanese proposal to bring the language of the English version of Article 10(3) into line with the French and, if that were the case, he asked whether the refinement suggested by the representative of Czechoslovakia in CONF. 7/C.1/W.P. 45 could be deemed to be a matter of drafting.

Mr GOODE (United Kingdom) saw the Czechoslovak proposal as raising two points of substance. As he understood it, the suggestion was that whilst Article 5, in whatever form, but for the sake of argument in its present shape, would continue to apply to assignments by the export factor to the import factor, the prohibition on assignment would remain effective at the point where the import factor reassigned the receivable. In other words, the representative of Czechoslovakia would be satisfied with the continued application of Article 5 to subsequent assignments until such time as the import factor reassigned, at which stage he was however anxious to ensure that the prohibition against assignment would be given full effect.
If that were so, the second question was whether effect should be given to that prohibition by following the existing language of paragraph 3 which stated that the Convention should not apply to an assignment which was prohibited by the terms of the factoring contract or whether the intention was that the Convention should apply except for Article 5(1) as presently drafted.

Mr KOLLERT (Czechoslovakia) believed that the first observation of the representative of the United Kingdom was correct in that the intention of his delegation was to prevent a further assignment by the import factor since such a prohibition was reasonable in factoring transactions. It corresponded to actual practice and in the considerable experience of Czechoslovak suppliers no import factor had ever refused to accept in the factoring contract a prohibition against subsequent assignments. On the second point, it was difficult for him to comment without knowledge of the final text of Article 5. It had to be recalled that there were two legal relationships, that between the debtor and the factor and that between two factors.

The CHAIRMAN suggested that, in the light of the discussion, further consideration of the precise language which might be employed to reflect the proposal of the Czechoslovak delegation be postponed until after agreement had been reached on the text of Article 5.

It was so decided.

Paragraph 2

Ms REINSMA (Netherlands) recalled that the purpose of paragraph 2 was set out in paragraph 52 of the Explanatory Report which stated that "... the absence of notice regarding the first assignment would not have the effect of excluding it ... from the application of the Convention...". At present, paragraph 2 provided that: "[n]otice to the debtor of the subsequent assignment may also constitute notice of the assignment to the factor" and she wondered whether the language reflected with sufficient clarity the intention behind the provision. She had no specific proposals to make but perhaps some of the problems were caused by the words "may also".

Mr GOODE (United Kingdom) stated that two points were meant to be dealt with by paragraph 2 reflecting the fact that it was very common that where there was a double assignment, notice was given to the debtor only of the second assignment. The first was to avoid the total exclusion of the entire Convention by reason of the fact that notice had been given only of the second assignment and the second to validate the existing practice in export factoring whereby notice of the second assignment was made to fulfil the function of two notices, namely notice of both the first and the second assignments. He admitted however that the language of paragraph 2 did not perhaps satisfactorily reflect the intention of its authors and the word "may" might therefore be replaced by "shall" so as to achieve the desired result.

Mr SAMSON (Canada) agreed that the existing text of Article 10(2) did not adequately reflect the purpose of the provision as described in paragraph 52 of the Explanatory Report and he suggested that the intention might be more appropriately conveyed by language such as: "The absence of notice of the first assignment shall not have the effect of excluding the application of the Convention to that assignment or to any subsequent assignment".

Mr BRENNAN (Australia) stated that his delegation could support the proposal to replace the words "may also" by the word "shall".

Mr BERAUDO (France) considered that replacing a word expressing possibility "may" by the imperative word "shall" would go beyond the needs of practice. His recollection was that paragraph 2 had been inserted at the request of factors and that it was intended to reflect the fact that the debtor often received notice only from the last assignee. It was therefore useful for the Convention to contain a provision to the effect that notice of a subsequent assignment constituted notice for the purposes of the application of the Convention. In his view paragraph 2 reflected this intention and corresponded to practical needs although he saw no objection to its being redrafted if this were felt
by others to be necessary so as to avoid the fiction that notice of a successive assignment be deemed to constitute notice of the first assignment.

The CHAIRMAN noted that the issue of substance to be settled regarding paragraph 2 was whether the application of the Convention should be excluded if notice were to be given of the second assignment but not of the first. His impression from the discussion so far was that this was not the wish of the Committee and, if this were so, then the question arose as to whether the intention behind the drafting of paragraph 2 could not be reflected in a more satisfactory manner, which matter he proposed be referred to the Drafting Committee.

As regards the remainder of Article 10, he suggested that the Committee revert to its formulation once the text of Article 5 was available, with the exception of the decision that Article 10(1)(a) should refer to "Articles 4 to 9".

Mr BRENNAN (Australia) sought clarification as to whether the rule set out in Article 10(1)(a) should refer not only to Articles 4 to 9 but to Article 10 itself and perhaps also to Articles 11 and X.

Mr SANTOS (Philippines) agreed that paragraph 2 should be referred to the Drafting Committee but as he understood the Czechoslovak proposal it contemplated the possibility of a subsequent assignment beyond the import factor. If therefore the Committee were to accept the Czechoslovak proposal then it might be necessary to reconsider the language of paragraph 2 which seemed to assume that there would be only two assignments, one by the supplier to the export factor and the other by the export factor to the import factor, so that regard could be had to the possibility of notice of a third or later assignment constituting notice of any earlier assignment. This was perhaps a matter which could be addressed by the Drafting Committee.

The CHAIRMAN stated that it might in these circumstances be desirable for the Drafting Committee to consider paragraph 2 only after a decision had been taken regarding the text of paragraph 3.

Mr GOODE (United Kingdom) explained that Article 10 contemplated the possibility of any number of assignments being made. It was definitely not restricted to one reassignment by the export factor to the import factor and if this was implied by the existing text, then certainly its language should be amended. As he understood the proposal of the Czechoslovak delegation it was not to prevent such reassignments but rather to validate a prohibition on any reassignment whether it be contained in the factoring contract between the supplier and the factor or in any agreement between the export and the import factor.

Mr SANTOS (Philippines) agreed with the observations of the representative of the United Kingdom and suggested that Article 10(2) be reworded as follows: "Notice to the debtor of any subsequent assignment shall also constitute notice of any assignment to any factor".

The CHAIRMAN proposed that the Committee revert to the discussion on Article 10 once it had finalised the text of Article 5. He also suggested that the Drafting Committee pay attention to the observations of the delegation of the Philippines since it appeared that the references in paragraph 2 to "the subsequent assignment" and in paragraph 1(b) to "the subsequent assignee" might be at the root of some of the difficulties.

Mr KOLLERT (Czechoslovakia) stated that he was in full agreement with the observations on, and interpretation of, Article 10 by the representative of the United Kingdom.

Mr JACOBSSON (Sweden) drew attention to the suggestion of his delegation in CONF. 7/C.1/W.P. 44 to the effect that consideration be given to referring in Article 10(1)(b) also to Article 9 so that the latter provision would apply as if the subsequent assignee were the factor.

Mr GOODE (United Kingdom) saw the Swedish proposal as postulating the situation where a debtor had made payment to the second, rather than to the first, factor with the consequence that Article 9 would apply to recovery by the debtor from the second factor and for that reason he could support the proposed amendment.
Mr BERAUDO (France) also expressed support for the Swedish proposal as he saw no justification for debaring a debtor from recovery of a sum which ought not to have been paid to a subsequent assignee.

The CHAIRMAN enquired whether there were any objections to the proposal of the delegation of Sweden and, finding that there were none, he suggested that it be referred to the Drafting Committee with a direction that Article 10(1)(b) be amended accordingly.

*It was so decided.*

*The meeting rose at 12.30 p.m.*

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**NINETEENTH MEETING**

Monday 23 May 1988, at 2.30 p.m.

*Chairman: Mr Sevón (Finland)*

**AGENDA ITEM 7: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FACTORING (Study LVIII – Doc. 33; CONF. 7/6 Add. 2; CONF. 7/C.1/W. P. 39 and W.P. 46)**

**Article 11**

The CHAIRMAN noted that although no proposals had been made regarding Article 11, an amendment had been adopted in relation to paragraph 2 of the corresponding article of the draft Leasing Convention, Article 6, concerning the problem of gap filling in the event of the absence of general principles on which the Convention was based. If there were no objections he would take it that the Committee of the Whole would wish to see Article 11 amended along the same lines as Article 6 of the draft Leasing Convention and the Drafting Committee instructed to that purpose.

*It was so decided.*

**Proposed new Article 2**

The CHAIRMAN invited the representative of the United States of America to introduce his delegation’s proposal, contained in CONF. 7/6 Add. 2, which recommended the inclusion of an additional article in the future Convention dealing with the question of priorities.

Mr REISMAN (United States of America) recalled in the first instance an extract from paragraph 10 of the Unidroit Secretariat’s Explanatory Report on the draft Convention as prepared by the committee of governmental experts in which it was stated that as regards “the problems relating to priorities between the rights of the factor and those of third parties in the receivables, it is on account of their extreme complexity that the committee decided not to deal with them, by way either of a substantive rule of law or of a conflicts rule, and this notwithstanding the widely expressed regret that the Convention failed to regulate an aspect of the question which created very great difficulties at international level”.

It was against this background that his delegation had proposed a new article dealing with certain aspects of the problem of priorities, in the light moreover of the suggestion made by the Chairman of the committee of governmental experts at its last session in Rome that consideration of
any limited rules on priorities should be deferred until the diplomatic Conference for adoption. His delegation's proposal for a new Article Z had initially envisaged two paragraphs, the second of which was related to the resolution of issues of conflict of laws but on reflection it had been decided to withdraw that second paragraph.

The remaining paragraph was in a sense addressed to the problems alluded to in Article 7 of the draft Convention of a potential conflict arising when a debtor received notice of more than one assignment of a receivable. Under Article 7 the debtor was protected if it made payment to an assignee with a superior right in the receivable but how could it know which was the superior right? Experience suggested that in such cases the debtor would pay no one and that it would only be after lengthy legal proceedings, taking maybe some years, that the dispute would be settled.

What his delegation was therefore proposing was a simple rule which, it believed, would solve many of the problems, both existing and potential, deriving from priority conflicts in the field of international factoring. The rule was that if the supplier's place of business were located in a State which made provision for a recording requirement that determined the order of priority, that rule would govern priority between factors who had received an assignment of the same receivable from the same supplier; if, on the other hand, the supplier was located in a State which had no recording requirement then the first factor giving notice to the debtor in accordance with the terms of the Convention would enjoy priority. He stressed that the proposed new article was concerned only with relations between factors to which the Convention applied; it would have no effect upon the rights of third parties such as governments, trustees in bankruptcy, tax authorities or judgment creditors.

In conclusion he stated the conviction of his delegation that the introduction of such a provision would be beneficial to factors who would be aware of how their priority would be determined and to debtors who, being called upon to make payment to more than one person, would be enabled to find out who had the superior right in a receivable. The rule was moreover a fair one which could only serve to permit the growth of international trade which was itself promoted by cross-border factoring transactions.

The CHAIRMAN enquired whether there was support for the proposal of the United States of America.

Mr DE NOVA (Italy) supported the proposal which was expressed in clear terms and which could solve many problems.

Mr ADENSAMER (Austria) agreed that the proposed amendment might be of some benefit to commerce. However, its restriction to the establishing of a priority rule between factors could cause problems as a debtor might well be unsure as to whether an assignee was a factor or not. The Convention might then be applicable in circumstances which could not have been foreseen by the debtor and for these reasons his delegation believed that the question of priorities should be settled in a more general fashion and not in such a limited way.

Mr ROLLAND (Federal Republic of Germany) stated that his delegation had strong hesitations in supporting the United States proposal, principally because the draft Convention did not purport to deal at all with the issue of priorities which was a crucial matter under domestic law. To tackle it here could give rise to insoluble problems. An additional difficulty lay in establishing a connecting factor in terms of the time at which notice was given to the debtor, since priority might be conferred on the first assignee to give such notice even though priority would have been accorded to another assignee under the applicable domestic law. In these circumstances he could not support the proposed amendment.

Mr BERAUDO (France) expressed sympathy for the United States proposal, sub-paragraph (b) of which seemed to him to constitute an application of the general principle prior tempore, potior iure. On closer analysis, however, his delegation could not support the suggested amendment for even if the rule were as limited as had been suggested, there remained the risk of falling into the intricacies of the applicable law, which could differ in respect of, for example, liens, bankruptcy, the contract of sale and the factoring agreement. He feared therefore that the United States proposal might create more problems than it solved.
Ms REINSMA (Netherlands) stated that even though the United States proposal was a limited one, her delegation was unable to support the introduction in the Convention of rules governing priorities.

Mr RÉCZEI (Hungary) insisted on the purpose of the Convention as being to seek the unification of law and not the establishment of connecting factors. Moreover, the connecting factor contained in the United States proposal did not coincide with the bankruptcy legislation of many countries and he feared that it was too late at this stage to seek a uniform regulation along the lines suggested.

Mr DE PAIVA (Brazil) stated that his delegation shared the doubts expressed regarding the United States proposal.

The CHAIRMAN enquired of the representative of the United States whether he wished his proposal to be put to the vote.

Mr REISMAN (United States of America) suggested that the Committee of the Whole vote first on the question of whether it favoured the introduction of an article concerning priorities. If that were not the case then he would withdraw his delegation’s proposal.

The CHAIRMAN requested the Committee to vote on the question as formulated by the representative of the United States of America.

*The proposal that the Convention contain an article relating to priorities was rejected by twenty-one votes to three, with eight abstentions.*

Mr REISMAN (United States of America) stated that in the light of the vote his delegation was withdrawing its proposal for the inclusion in the draft Convention of a new Article Z.

*Article 1{(c) and (3) (continued)}*

The CHAIRMAN invited the Chairman of the working group on those provisions to present its report as contained in CONF. 7/C.1/W.P. 46.

Mr GOODE (United Kingdom) recalled that the group had been requested to consider two issues, the first of which had been whether the factoring agreement should provide for or contemplate notice of assignment to be given in writing as a condition for the application of the Convention. The group had unanimously been of the opinion that although notice in writing was indispensable for the purposes of Article 7 it was neither necessary nor desirable for the application of the Convention to depend upon whether the factoring agreement required written notice and it had therefore been proposed that the words “in writing” be deleted from Article 1{(a)}.

As to the definition of “writing” in Article 1{(3)} the group had taken as its starting point the decision of the Committee of the Whole that actual signature was not necessary to constitute a “writing” as well as the Secretariat proposal for a definition of “writing” contained in CONF. 7/C.1/W.P. 39. In producing its own definition the group had taken the view that such a definition should encompass any form of telecommunication, which could be a broader notion than that of electronic transmission, and that the telecommunication should be capable of being reproduced in tangible form as opposed, for example, to a telephone conversation recorded on an answering machine that could not be reproduced by way of a print-out or to a communication constituting a visual image on a screen which would disappear once the computer was switched off.

The group had therefore proposed that Article 1{(3)} be redrafted as follows:

“For the purposes of this Convention:
(a) a writing need not be signed;
(b) “writing” includes, but is not limited to, telegrams, telex and any other telecommunication capable of being reproduced in tangible form.”
In conclusion, he noted that the words "is not limited to" had been inserted so as to avoid the danger of excluding any existing or new form of telecommunication that might be considered by the applicable law to constitute "writing".

The CHAIRMAN called for comments on the report of the working group.

Mr HAGSTROM (Brazil) requested clarification of the significance of the words "need not be signed" in Article 1(3)(a).

Mr RICHARDS (Antigua and Barbuda) stated that he had some difficulty with the words "capable of being reproduced in tangible form" in the proposed Article 1(3)(b). There were many types of telecommunication that were capable of being reproduced in tangible form but which were not, to his mind, "writing". As he saw it, the point at issue was the permanence of the record. In addition, he suggested that the words "but is not limited to" in Article 1(3)(b) were superfluous and that given the flexibility of the remainder of the language they could be deleted.

Mr GOODE (United Kingdom) explained that the purpose of saying that writing need not be signed was to indicate that it need not bear a signature. The group had been of the view that it was for each court to apply its rules of proof and evidence to decide whether in a given case a party relying on a communication had satisfactorily demonstrated that it had been issued by the person from whom it purported to have originated.

As to the concerns of the representative of Antigua and Barbuda, he recalled that nothing was in effect permanent. The idea of the working group was that for a communication to be deemed to be "in writing" it must be capable of being touched or handled and not just seen or heard, which accounted for the use of the words "in tangible form". Such language was also to be found in the United States Uniform Commercial Code and had up to now apparently given rise to no difficulty. It had therefore been thought that those words might provide the best formulation for indicating that what the group was seeking to capture was the idea of some form of permanence in the same sense as a piece of paper.

Finally, he admitted that at first sight the words "but is not limited to" might seem to be redundant but experience, at least in English law, showed that the word "includes" might be interpreted as providing illustrations or alternatively as laying down an exhaustive list. It was therefore to avoid any such confusion that the group had added the words "but is not limited to" in Article 1(3)(b).

Mr BERAUDO (France) expressed doubt as to whether the text proposed by the working group, at least in its French version, reflected the decision taken by the Committee at an earlier stage in its proceedings to maintain the reference to "any form of writing, whether or not signed". By proposing that a writing need not be signed the group was in effect establishing a uniform rule of law and he wondered whether many delegations which had voted to maintain the language in Article 1(3) of the basic text to which he had referred had not thereby intended to intimate their wish that it was the applicable law which should decide whether or not any signature was required in connection with either the factoring or the sale contract. The matter should therefore be clarified before the Committee took a formal decision on the proposal of the working group.

Mr RONCORONI (Switzerland) drew attention to the fact that with the deletion of the words "in writing" in Article 1(1)(c), the definition of "writing" in Article 1(3) was, as it were, suspended in mid-air. In these circumstances paragraph 3 might be more suitably placed elsewhere in the Convention, for example in Article 7, and the possibility contemplated of reversing the order of sub-paragraphs (a) and (b) of the provisions prepared by the working group.

Mr RÉCZEI (Hungary) agreed with the observations of the representative of France regarding the desirability of leaving it to each legal system to decide whether a writing should be accompanied by signature or, in the event of the technique envisaged making it inappropriate to provide a traditional signature, for instance telex or telegram, some indication of the person from whom the communication emanated. With a view to achieving this result he suggested the deletion of Article 1(3)(a).
as proposed by the working group.

Mr ZYKIN (Union of Soviet Socialist Republics) agreed with those who saw the language of Article 1(3) as being too broad although the fact had to be borne in mind that there were situations, as for example with some electronic means of communication, where it would be unrealistic to require a traditional signature. In these circumstances he could agree to the deletion of the proposed sub-paragraph (a) of Article 1(3), the question of when a signature would be required being left to national law.

Mr KATO (Japan) stated that he had difficulty in understanding the concern expressed by some delegations regarding the language of Article 1(3)(a) as proposed by the working group since, in practice, notice of the assignment was usually given by means of a stamp on the invoice without any signature. He supported therefore the text proposed by the working group.

Mr REBMANN (Federal Republic of Germany) recalled the use of the words “for the purposes of this Convention” in the redraft of Article 1(3) which confirmed that it had not been the intention of the working group to affect general principles of domestic law regarding the requirement of a signature. In other words, it was only when the term “writing” appeared in the text of the Convention that it would assume the significance given to it by the proposed Article 1(3). He had therefore considerable difficulty in following some of the arguments advanced against the text proposed by the working group, all the more so as certain methods of communication, such as telex, would never be attested by a signature and in consequence he failed to understand how any delegation could support Article 1(3)(b) and at the same time call for the deletion of sub-paragraph 1(a).

As had already been pointed out, the customary method of giving notice of an assignment was by affixing a stamp on an invoice and he could not see how a signature could be required in such cases. If, moreover, the question were left to be governed by the applicable law then he doubted the seriousness of the Conference in seeking the unification of law. He could therefore only recommend that the text of the Article 1(3)(a) and (b) as proposed by the working group be adopted as such or that the definition of “writing” proposed by the group be included in Article 7 where it was principally relevant.

The CHAIRMAN stated that to his knowledge references to “writing” were to be found only in Articles 1, 3 and 7.

Mr GOODE (United Kingdom) fully endorsed the comments of the representative of the Federal Republic of Germany. The working group had been asked to formulate language which would implement the decision of the Committee of the Whole that a uniform rule be drafted to the effect that notice be effective whether or not it had been signed, always provided of course that the rule would be only for the purposes of the Convention. If the words “in writing” were deleted from Article 1(1)(c), as the group had recommended, writing would be relevant only to Articles 3, 7 and, by implication, conceivably to Article 8.

Mr EL-KATTAN (Egypt) stated that despite the unanimous decision of the working group his delegation would prefer that effect be given to the legislation of some countries which required that contracts over a certain value be evidenced in writing. This would ensure that third parties, in this case the debtor, would be fully aware of their rights and obligations, thus avoiding any ambiguity.

The CHAIRMAN recalled that what was at issue was not whether contracts should be in, or evidenced by, writing, but whether notice of the assignment should be in writing.

Mr AGYEKUM (Ghana) associated himself with the statement of the representative of the United Kingdom. The task assigned to the working group had been to give effect to the decision of the Committee of the Whole that a formulation be found which would convey the idea that a notice of assignment should be valid “whether or not signed”. This had been done.

Mr BASIALA (Zaire) stated that he had difficulty in understanding why, even if what was at issue was not the contract itself but only the giving of notice of the assignment, a signature should
not be required for a letter. This seemed to him to be indispensable although he could accept the absence of signature for other means of communication such as telex.

Mr RéCZEI (Hungary) agreed that although a stamp on a notice was not itself signed, the invoice itself would be signed and would therefore constitute a signed document.

Mr REISMAN (United States of America) drew attention to the realities of factoring where in over ninety-five percent of all cases notice of an assignment was communicated to the debtor by physically printing, stamping or somehow affixing it on the invoice, or automatically when the invoice was computer-generated. He recalled moreover that the Committee was being asked simply to agree to a uniform rule on notice of assignment and not to one relating to the execution of contracts which would continue to be governed by the local law determined in accordance with the rules of private international law.

It was perhaps however the case that the language proposed by the working group in CONF. 7/C.1/W.P. 46 could be modified to bring home that point more clearly and to that end he suggested that Article 1(3)(a) be amended to read "a notice need not be signed" and the beginning of Article 1(3)(b) to read "a notice in writing includes ..." (remainder unchanged).

Mr GOODE (United Kingdom) believed that the proposal of the United States representative might allay the concern of some delegations and he agreed with him that the Committee was at this stage discussing simply the form of notice of assignments and not the formal requirements for the factoring and supply agreements. In response to the anxiety expressed by one delegation at the idea that the Committee was somehow validating notice of assignments which failed to indicate the person to whom payment had to be made, it was his view that the question was already satisfactorily settled in Article 7.

The CHAIRMAN asked the Committee to take a decision on the proposal of the working group in CONF. 7/C.1/W.P. 46 to delete the words "in writing" in Article 1(1)(c) so as to avoid a narrowing of the scope of application of the Convention. He had so far heard no objections to this proposal and enquired whether there was support for such deletion.

Ms ESSOMBA (Cameroon) stated that she could not accept the deletion of the words "in writing" in Article 1(1)(c), all the more so as it was her recollection that the Committee of the Whole had reached a consensus on the principle that notice of the assignment of a receivable should be in writing. The advantages of preserving written form in this connection outweighed the disadvantages, particularly since the provisions of paragraph 3 conferred a very broad meaning on the term "writing" which had the result of facilitating the giving of the notice referred to Article 1(1)(c).

She also pointed out that provision was made for writing by Articles 3, 7 and 8 which were also concerned with the giving of notice, thus ensuring the coherence of the text of the Convention as a whole and an appropriate balance between the rights and obligations of the various parties to the transaction.

Mr THIAM (Guinea) admitted that the requirement of written form raised a number of problems, such as proof, the speed of commercial transactions and the coherence of the text of the Convention inasmuch as under Article 1(3)(a) writing did not need to be signed while under subparagraph (b) it also included telegrams, telex and so forth.

The proposal to delete the expression "in writing" would however lead to evidentiary problems and it had been the desire to resolve such problems which had resulted in the consensus referred to by the representative of Cameroon. He added that, in view of the need for speed in commercial transactions, the Committee had opted for the necessary flexibility reflected in sub-paragraph (b) and it would therefore be difficult for his delegation to accept the deletion of the words "in writing".

The CHAIRMAN drew attention to the fact that the Committee was discussing only the expression "in writing" as it appeared in Article 1(1)(c). The effect of maintaining the words "in writing" would be that each time a party involved in a factoring transaction wished to avoid the
application of the Convention, it could achieve that result simply by not giving notice in writing of the assignment of the receivable. He asked whether this was an appropriate rule and insisted on the fact that no one had called into question the requirement of writing in Articles 3 and 7.

Mr GOODE (United Kingdom) fully endorsed the Chairman’s remarks. The question raised by Article 1(1)(c) was not whether notice was in fact given in writing but whether the factoring contract should itself provide for the form in which notice of an assignment was to be given, always bearing in mind the requirement of writing in Articles 3 and 7. The issue facing the Committee was essentially that of whether it wished the application of the Convention to be excluded by the mere, and possibly accidental, fact that the factoring contract did not state that notice was to be given in writing.

The CHAIRMAN enquired whether in these circumstances any delegation maintained its objections to the deletion of the words “in writing” only in Article 1(1)(c). This not being the case he took it that the Committee had agreed to the deletion of those words.

*It was so decided.*

The CHAIRMAN invited the Committee to resume consideration of the proposal by the working group in respect of Article 1(3)(a) contained in CONF. 7/C.1/W.P. 46 and the United States proposal to redraft the provision so as to read “a notice need not be signed”.

Mr REBMANN (Federal Republic of Germany), Mr KATO (Japan) and Mr KOLLERT (Czechoslovakia) expressed support for the United States proposal.

The CHAIRMAN asked whether there were any objections to the United States proposal.

Mr HAGSTROM (Brazil) requested clarification as to the interpretation of the words “need not be signed”. If this meant actual signature by hand, then he would accept the United States proposal since in Brazil the notion of “signature” encompassed a printed name at the end of a telex or telegram.

Mr GOODE (United Kingdom) recalled that this question had been considered by the working group in which it had been established that telegrams and typewritten statements might be regarded as signed writing in some jurisdictions and as not bearing a signature in others. He believed however that a statement to the effect that a signature was not necessary would cause no problems for if the writing in fact embodied a signature then it embodied something which was unnecessary whereas if the writing embodied no signature then no difficulty arose because a signature was not required.

Mr REISMAN (United States of America) stated that while it was conceivable that notice to a debtor might not disclose the source from which it emanated, there was in such circumstances nothing in the Convention which would require the debtor to take any action as the notice would be ineffective under the provisions of Article 7(1). If the notice was intended to operate under Article 3(2) it was implicit that the notice indicate the source from which it came. As he had already recalled, in the vast majority of cases notice of the assignment would be given by the supplier since it would appear on the face of the invoice. In those cases where the notice was not given by the supplier or indicated as originating with him, Article 7(1)(a) placed the onus on the factor to establish that the notice had been given with the supplier’s authority, in the absence of which there was no obligation on the debtor to make payment to the factor.

In his view therefore, given the rapidly changing methods of communication and the wide distances which could separate the parties, it would be anachronistic to require an actual signature in connection with the type of notice and transactions with which the future Convention was concerned.

Mr DE PAIVA (Brazil) suggested that Article 1(3)(a) might read as follows: “A notice need not be signed but it has to contain elements identifying its source”.

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The CHAIRMAN enquired whether there were any objections to the language proposed by the representative of Brazil or to language to a similar effect, subject to drafting.

Mr REBMANN (Federal Republic of Germany) stated that he had no difficulties as to the substance of the proposal of the representative of Brazil although he believed the proposition contained therein to be self-evident.

The CHAIRMAN recalled that it was in accordance with practice at diplomatic Conferences that if one delegation had a serious problem with the text and proposed a solution which would accommodate it without causing difficulties to other delegations then that proposal ought to be considered even though some might find the language superfluous.

Mr DE PAIVA (Brazil) emphasised that the purpose of his delegation's proposal was to clarify the point raised in the working group that the word "signed" did not imply a signature by hand but rather that it was necessary that the identity of the sender of the notice be disclosed.

Mr GOODE (United Kingdom) stated that while he agreed with the representative of the Federal Republic of Germany that the content of the suggested addition was in a sense already implicit in the text proposed by the United States representative, his own delegation had no difficulty in accepting the language contained in the Brazilian amendment or a similar formulation.

Mr BERAUDO (France) felt that the language proposed by the Brazilian delegation rendered more explicit the intention of paragraph 3 and he could support it, all the more so as it was necessary, in international factoring, for the factor to indicate clearly who it was and where payment should be made.

The CHAIRMAN asked whether there were any objections to the language proposed by the representative of Brazil or to similar language. Noting that there were no objections, he referred the matter to the Drafting Committee.

He then recalled the proposal of the delegation of the United States of America that Article 1(3)(b) be redrafted as follows: "A "notice in writing" includes, but is not limited to, telegrams, telex and any other telecommunication capable of being reproduced in a tangible form". He added that some hesitations had been expressed regarding the words "but is not limited to" and "capable of being reproduced" and that explanations had been offered. In addition he stated that the language "notice in writing" constituted a definition for the purposes of Articles 3 and 7.

Mr RÉCZEI (Hungary) enquired whether the working group had intended to exclude oral statements on a tape recorder.

The CHAIRMAN replied that he had understood the Chairman of the working group as having indicated that the intention had been to exclude, for instance, a message conveyed by telephone and taken down on tape.

Mr BASIALA (Zaire) requested clarification as to whether it was the intention of the United States delegation that the writing or the notice did not need to be signed.

The CHAIRMAN stated that it was his understanding that the definition related to "notice in writing".

Finding that this explanation seemed to be satisfactory, he asked whether it was the wish of the Committee that the wording of the provision suggested by the working group as amended by the United States delegation be referred to the Drafting Committee.

It was so decided.

The meeting rose at 3.55 p.m.
TWENTIETH MEETING

Wednesday, 25 May 1988, at 11.00 a.m.

Chairman: Mr Sevón (Finland)

AGENDA ITEM 7: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FACTORING (Study LVIII – Doc. 33; CONF. 7/6 Add. 2; CONF. 7/C.1/ W.P. 43-45 and W.P. 47)

Article 5 (continued)

The CHAIRMAN announced that the report of the working group on Article 5 was now available in CONF. 7/C.1/W.P. 47 and he called upon the representative of the Soviet Union to introduce that report.

Mr ZYKIN (Union of Soviet Socialist Republics) stated that the working group had met on two occasions, in the course of which it had considered in depth both the basic text of Article 5 and the various amendments proposed thereto.

Ultimately a consensus had emerged in favour of the text reproduced in the report of the working group which was intended to serve as a sound basis for a compromise solution. The first two paragraphs of the proposed text corresponded to that of Article 5 as approved by the Unidroit committee of governmental experts and contained in Study LVIII – Doc. 33, while a new paragraph 3 had been added to meet the concern of some delegations which had in the Committee of the Whole expressed the fear that Article 5(1) might be interpreted as authorising the supplier to act in bad faith, without its being exposed to any legal consequences for such action. The aim of the new paragraph 3 was in effect to cover situations where the supplier, even though aware of the prohibition on assignment in a sales contract, nevertheless concluded a factoring contract.

The CHAIRMAN thanked the working group for its efforts and suggested that the Committee consider as a whole the text of Article 5 as proposed by the working group.

Mr BERAUDO (France) stated that, in view of the compromise arrived at by the working group under the able chairmanship of the representative of the Soviet Union, the French, Mexican and Philippine delegations had decided to withdraw the joint proposal they had submitted in CONF. 7/C.1/W.P. 43.

The CHAIRMAN expressed his thanks to the representative of France for the spirit of compromise displayed and for the concessions which had been made.

Mr BRENNAN (Australia) associated himself with the Chairman’s remarks and stated that his delegation could support the text of Article 5 as it appeared in the report of the working group.

The CHAIRMAN enquired whether there were any objections to the text prepared by the working group.

Mr GUITARD (Spain) stated that he had no objections to the text but sought clarification as to the meaning of “place of business” in Article 5(2), having regard to the provisions of Article 2(2). In other words, which contract was relevant for the purpose of determining the “place of business”, the factoring contract or the sales contract?

Mr THIAM (Guinea) considered that the problem raised by the Spanish representative was settled by Article 2(2) which employed the language “for the purpose of this Convention” and not
“for the purpose of this article”. The provision applied therefore to the whole Convention.

The CHAIRMAN understood the Spanish query as being directed rather to the question of which contract was relevant for the purpose of determining the place of business mentioned in Article 5(2).

Mr BERAUDO (France) drew attention to the close connection between paragraphs 1 and 2 of Article 5, the former stating that the assignment “shall be effective notwithstanding any agreement between the supplier and the debtor prohibiting such assignment”. The contract between those parties was a contract of sale and, in consequence, the application to Article 5(2) of the definition of the term “place of business” in Article 2(2) would lead to the conclusion that the debtor’s place of business referred to was the one which had the closest relationship to the contract of sale.

He added that his delegation interpreted Article 5(2) as being a provision which permitted a reservation to have an objective effect. If, therefore, the debtor had its place of business in a Contracting State which had made the declaration in question and if the contract of sale prohibited the assignment of a receivable by the supplier then the prohibition would be respected by all Contracting States and not just by those which had made the declaration.

The CHAIRMAN wondered whether the question raised by the representative of Spain was not answered by Article 5(2) itself in that by making reference to the place of business of the debtor, who would be a party to the contract of sale only, the provision could not be seen as contemplating the factoring contract.

Mr GOODE (United Kingdom) fully agreed with the observations of the representative of France as well as with the interpretation he had given of Article 5(2). He also wished to express the appreciation of the United Kingdom delegation for the spirit of compromise and cooperation which had permitted the Conference to make progress.

In reply to a question by the Chairman, Mr GUITARD (Spain) stated that he was satisfied with the answers to his request for clarification.

The CHAIRMAN noted that there was agreement as to the interpretation of Article 5(2) offered by the French delegation which therefore constituted a common understanding that would be reflected in the summary records.

Finding that no further comments were made on the text of Article 5, he congratulated the working group and its Chairman on finding so successful a solution to such a difficult problem.

Mr KOMAROV (Union of Soviet Socialist Republics) thanked all members of the working group for their contributions which had considerably eased his task in presiding over it.

The CHAIRMAN drew attention to a proposal by the United States of America in CONF. 7/6 Add. 2 for the addition of a new paragraph in Article 5 and he enquired whether that proposal had been addressed by the working group.

Mr REISMAN (United States of America) stated that the purpose of the proposals in CONF. 7/6 Add. 2 had been on the one hand to recognise the support for the reservation in paragraph 2 of a number of States and therefore to clarify the provision, and on the other to add a new paragraph 3 which tracked the virtually identical provisions of Article 55 of the 1983 Revision of the Uniform Customs and Practices for Documentary Credits. In view however of the involved negotiations which had led to the new text of Article 5, he would prefer to avoid creating problems and would therefore withdraw his delegation’s proposals.

The CHAIRMAN thanked the representative of the United States for his forbearance and enquired whether in these circumstances the text of Article 5 as proposed by the working group could be referred to the Drafting Committee.

*It was so decided.*
Article X

The CHAIRMAN recalled that this provision was closely related to Article 5 in that it constituted a reservation to paragraph 1 of that article. He noted that no proposals had been made on Article X and enquired whether there were any comments on it.

Mr GOODE (United Kingdom) noted that since the numbering of Article 5 would change, it would be necessary to make a consequential amendment to Article X.

The CHAIRMAN found that Article X as so amended was acceptable to the Committee and proposed that it be referred it to the Drafting Committee.

It was so decided.

Article 10 (continued)

The CHAIRMAN recalled that a certain number of issues had already been discussed in relation to Article 10 at the Committee's eighteenth meeting. As he understood the situation, two proposals were still outstanding, the first by the Australian delegation to include in sub-paragraph (a) of paragraph 1 a reference to Articles 10, 11 and X, and the second to exclude the application of sub-paragraph (a) to Article 5.

Mr BRENNAN (Australia) reiterated his proposal for a reference to additional articles in Article 10(1)(a), although he wondered whether the existing language of Article 10 did not already encompass that article itself.

The CHAIRMAN suggested that while the question of the need to refer to Article 10 in the article itself was a matter of drafting, a reference to Articles 11 and X might be seen as one of substance.

Mr KATO (Japan) supported the Australian proposal, in particular in so far as it concerned the inclusion in Article 10 of a reference to Article X.

The CHAIRMAN suggested that the reference to Article X might be viewed as a drafting matter since the provision was so closely connected with Article 5 which itself referred to Article X. The question remained however of the desirability of making a reference to Article 11.

Mr BRENNAN (Australia) wondered whether a reference to Article 11 might likewise be more a matter of drafting than of substance since Article 10(1) made mention of factoring contracts governed by the Convention and if a contract were so governed then it was perhaps implicit that regard would have to be had to the rules of interpretation set out in Article 11.

The CHAIRMAN noted that there were no objections to treating the Australian proposal as raising questions of drafting while he saw no delegation calling for deletion of the reference in Article 10(1)(a) to Article 5. He enquired therefore whether the proposal by the delegation of Czechoslovakia contained in CONF. 7/C.1/W.P. 45 was still relevant to the discussion.

Mr KOLLERT (Czechoslovakia) considered that the new text of Article 10(3) prepared by the Drafting Committee took account of his concerns.

Mr JACOBSSON (Sweden) stated that it was his understanding that the Committee had agreed that Article 10(3) neither prevented nor allowed prohibitions on assignments in factoring contracts and left their effectiveness to be decided by the applicable law. In these circumstances he asked why the Convention should not apply to a subsequent assignment prohibited by the factoring contract if such assignments were allowed by the applicable law, all the more so since the application of the provisions of the Convention protecting the debtor could be advantageous to it.

The CHAIRMAN enquired whether what the representative of Sweden was contemplating was
a situation in which, under the applicable law, a provision in the factoring contract prohibiting a subsequent assignment would be ignored, thus raising the question of the application of the Convention.

Mr JACOBSSON (Sweden) proposed the deletion of paragraph 3 of Article 10.

Mr BRENAN (Australia) sought clarification as to whether the thought underlying the Swedish proposal was in any way related to Article 5.

Mr JACOBSSON (Sweden) stated that his delegation's proposal had no connection with Article 5. His point was that the provisions of Articles 7 and 8, which afforded protection to the debtor, would be valuable even if the claim were made by a factor to whom receivables had been assigned in contravention of a prohibition on assignment contained in the factoring contract.

The CHAIRMAN wondered whether the concern of the Swedish delegation might not be resolved by the addition to paragraph 3 of the words "... or under the applicable law", given the apparent lack of support for the proposal to delete the provision.

Mr SANTOS (Philippines) agreed with the representative of Sweden that there was no relation between Article 10(3) and Article 5 and for this reason he expressed his delegation's support for the Swedish proposal.

The CHAIRMAN enquired whether there were any objections to the Swedish proposal.

Mr KOLLERT (Czechoslovakia) stated that he could not support the deletion of Article 10(3) whose retention was fundamental to his delegation. The clause on prohibition was regularly inserted in factoring contracts between, for example, parties in Czechoslovakia and in Sweden, without any difficulties arising and he had understood that a majority of delegations at the meetings of the Unidroit committee of governmental experts had agreed that the Convention should not apply to factoring contracts containing such a prohibition.

Mr KATO (Japan) asked what was the practical intention behind the proposal of the Swedish delegation to delete paragraph 3. In his view Article 10 was related to Article 5 in situations where an assignment was made notwithstanding a prohibition against assignment in the first contract.

Mr JACOBSSON (Sweden) insisted that his delegation's proposal was not intended to deprive the parties of their freedom to agree in a factoring contract upon a clause prohibiting assignment. What it sought was to make sure that if such a clause were to be held ineffective under the applicable law then the Convention would apply to protect the debtor.

Mr REISMAN (United States of America) suggested that the problem perceived by the representative of Sweden might arise from the use of the word "apply" in Article 10(3). The Convention should not seek to give effect to a prohibition on assignment contained in a factoring contract but it might be possible to satisfy all concerned by language to the effect that the Convention should not be deemed to permit an assignment prohibited by the terms of the factoring contract.

Mr KOLLERT (Czechoslovakia) insisted on the maintenance of the original idea to be found in the basic text approved in Rome by the Unidroit committee of governmental experts. The amendment proposed by the United States delegation was one of substance and not of drafting.

Mr JACOBSSON (Sweden) stated that he would withdraw the proposal to delete paragraph 3 in favour of the proposal of the United States delegation.

Mr KOMAROV (Union of Soviet Socialist Republics) supported the position of the Czechoslovak delegation.

Mr REISMAN (United States of America) explained on a point of clarification that his proposal related to subsequent assignments prohibited by the factoring contract.
Mr SANTOS (Philippines) stated that he could not at this stage support the United States proposal in the form in which it was expressed.

Mr RICHARDS (Antigua and Barbuda) indicated that it was his understanding from a reading of the Explanatory Report on the draft Convention that it had not been intended to deal with assignments of the receivables subsequent to the assignment to the factor and it seemed to him that the United States proposal was addressing a completely different matter. Nor did he see any contradiction between Article 5 and Article 10(3).

The CHAIRMAN put to the vote the proposal of the United States delegation in the following terms: "This Convention shall not be deemed to permit any subsequent assignment which is prohibited by the terms of the factoring contract".

Eight votes having been cast in favour of the proposal with eight against and thirteen abstentions, the amendment was not carried.

After finding that there were no further comments on Article 10 the CHAIRMAN suggested that it be referred to the Drafting Committee with the directives to which he had earlier referred.

It was so decided.

Preamble

The CHAIRMAN proposed that the Committee proceed to consideration of the preambular provisions. He recalled that Article 11, which was concerned with the interpretation of the future Convention, made reference to the preamble and to that extent a question of substance might be regarded as being involved. He also noted that the Swedish delegation had submitted in CONF. 7/C.1/W.P. 44 an alternative text of the preamble and he called upon the representative of Sweden to introduce his proposal.

Mr JACOBSSON (Sweden) stated that in the view of his delegation the draft preamble in the basic text contained a number of unnecessary repetitions and redundancies. In particular he recommended the deletion of the whole of the second paragraph which, if shorn of the reference to developing countries as had been the case with the preamble to the draft Leasing Convention, said nothing that was not already said in the first paragraph of the basic text.

As to the third paragraph in the basic text he understood that the message which it sought to convey was that international factoring could contribute to the promotion of international trade in general and not that it could assist individual factors, suppliers or debtors. If this were so then a simplified version of the third paragraph could be transposed as the first paragraph and the original first paragraph modified very slightly as a new second paragraph. In sum, his delegation's proposal was to redraft the preamble as follows:

"THE STATES PARTIES TO THIS CONVENTION

CONSCIOUS of the fact that international factoring has an important role to play in the development of international trade,

RECOGNISING therefore the need to provide a legal framework that will facilitate international factoring, while maintaining a fair balance of interests between the different parties involved in factoring transactions,

HAVE AGREED AS FOLLOWS;"

The CHAIRMAN called for comment on the Swedish proposal and in particular as to whether it could be considered as a whole in place of the basic text.

Mr DE PAIVA (Brazil) stated that he could support the text proposed by the Swedish representative, subject to the substitution in the second paragraph of the words "importance of
providing” for “need to provide”.

Mr RÉCZEI (Hungary) saw no objection to the Swedish proposal being taken as a basis for discussion. His only observation bore on the deletion of any reference to “uniform rules”, the absence of which he would regret in the preamble to an instrument which was seeking precisely to bring about a degree of uniformity in the field of international trade law.

In response to a question by the Chairman, Mr JACOBSSON (Sweden) stated that he had no difficulty in accepting the suggestions of the representatives of Brazil and of Hungary.

The CHAIRMAN enquired whether, in these circumstances, the Committee saw any objection to accepting the text of the draft preamble as submitted by the Swedish delegation, subject to the amendment proposed by the representative of Brazil and the incorporation in the second paragraph of a reference to “uniform rules” as suggested by the representative of Hungary.

The CHAIRMAN noted that there were no objections to this procedure and accordingly proposed that the preamble be referred to the Drafting Committee for consideration.

*It was so decided.*

*The meeting rose at 12.15 p.m.*

CONF. 7/C.1/S.R. 21
27 May 1988

TWENTY-FIRST MEETING

Wednesday, 25 May 1988, at 2.30 p.m.

*Chairman:* Mr Sevón (Finland)

AGENDA ITEM 7: CONSIDERATION OF THE DRAFT UNIDROIT CONVENTION ON INTERNATIONAL FACTORING (CONF. 7/D.C./W.P. 13 and Add.)

REPORT OF THE DRAFTING COMMITTEE

The CHAIRMAN called upon the Chairman of the Drafting Committee to introduce the Committee’s report.

The CHAIRMAN of the Drafting Committee expressed his appreciation to his colleagues on the Committee, to the staff of Unidroit and to the Secretariat of the Conference for all their efforts.

He stated that he would, in his presentation, identify the changes of substance which had been made in respect of each article to give effect to the expressed wishes of the Committee of the Whole as well as any other purely drafting amendments which the Drafting Committee had seen fit to make. He noted that the revised text, containing the preamble, was not yet available and he would, pending its distribution, therefore refer to the preliminary text as set out in CONF. 7/D.C./W.P. 13.

CHAPTER I – SPHERE OF APPLICATION AND GENERAL PROVISIONS

*Article 1*

The CHAIRMAN of the Drafting Committee stated that as regards Article 1, the first change made had been to add a new paragraph 1 which was intended to give effect to the wish of the Committee of the Whole, following a suggestion of the representative of Sweden, that an introduc-
tory paragraph be included setting out the scope of application of the Convention. The provision read as follows: “This Convention governs factoring contracts and assignments of receivables as described in this Chapter”.

The new paragraph 2 replaced the former paragraph 1. The Drafting Committee had considered a suggestion by the representative of Sweden that the reference to contracts of sale of goods “other than those for the sale of goods bought for their personal, family or household use” in sub-paragraph (a) should be transferred to a separate paragraph and expressed in more positive form. The Drafting Committee had, however, reached the conclusion that, unlike the case of the draft Leasing Convention, the phrase was already cast in the positive form and that if it were to become an independent paragraph a vital element in the definition of factoring as currently practised would be removed, namely the factoring of trade debts as opposed to consumer receivables. For these reasons the sub-paragraph had been retained in its original form apart from the addition of the word “primarily” after the word “bought”.

As to sub-paragraph (b), the words “relating to the receivables” had been added after the word “(ledging)” as proposed by the Italian delegation while, in accordance with a decision of the Committee of the Whole, the words “in writing” had been deleted from sub-paragraph (c).

The language of the former paragraph 2, now paragraph 3, had remained unchanged in the English version. In the French text the following drafting change had been made: the words “la référence aux “marchandises” et à une “vente de marchandises” comprend également les services et la prestation de services” had been replaced by “les dispositions qui s’appliquent aux marchandises et à leur vente s’appliquent également aux services et à leur prestation”.

Turning to paragraph 4, formerly paragraph 3, the text reflected the essence of the proposals of the working group on Article 1(1)(c) and (3) (CONF. 7/C.1/W.P. 46) which had derived from the formula of the Unidroit Secretariat (CONF. 7/C.1/W.P. 39). As regards sub-paragraph (a), the words “in writing” had been added to avoid a possible implication that a notice which was not specified to be in writing might indeed have to be in writing while the element that the notice “must identify the person by whom or in whose name it is given” had been introduced to reflect the point made in the Committee of the Whole that a notice that did not identify its source could create serious problems for the debtor.

Paragraph 4(b) was a new formulation intended to reflect the essential element that a telecommunication which is not itself in tangible form must nevertheless be capable of being reproduced in tangible form in order to qualify as a “writing” as opposed, for example, to telephone messages recorded on answering machines and incapable of reproduction in tangible form. The provision now read as follows: ““notice in writing” includes, but is not limited to, telegrams, telex and any other telecommunication capable of being reproduced in tangible form”.

The title of Chapter 1 was adopted by twenty-two votes to none.

The CHAIRMAN invited comments on Article 1(1).

Mr BERAUDO (France) observed that the French version of Article 1(1) did not reflect the decision of the Drafting Committee to delete the words “tels que”.

Mr RONCORONI (Switzerland) asked whether there was a reason for the word “assignments” in the English text having been translated into French by “les transferts” whereas the term had always been rendered in French by the word “cessions”.

Mr BERAUDO (France) replied that since Article 1 served as an introduction to the Convention, a general formulation was necessary to cover all those dealings between the debtor and the factor which would be governed by the Convention, whether or not they arise out of the assignment. It had moreover been pointed out at Drafting Committee meetings that the term “assignment” had a broader connotation than did the word “cession” in French.

Mr RONCORONI (Switzerland) stated that he was satisfied with the explanation.
The CHAIRMAN found that there were no objections to the deletion of the words “tels que” in the French text.

Mr JACOBSSON (Sweden) enquired whether the Drafting Committee had considered making a reference to Article 11 at the end of Article 1(1) so as to refer to the subsequent assignments contemplated by Article 11.

The CHAIRMAN of the Drafting Committee stated that he did not recall the matter having been specifically discussed within that Committee but, had it done so, he did not believe that a decision would have been taken to include a reference to Article 11 in Article 1(1) as the latter provision defined the general scope of application of the Convention and Article 11 was not a scope provision but rather indicated the way in which the Convention would operate in relation to subsequent assignments.

In the absence of any further comments the CHAIRMAN assumed that the Committee found the explanation to be satisfactory.

No other observations being made on paragraph 1 and none on paragraphs 2, 3 and 4, the CHAIRMAN put Article 1 as a whole to the vote, the only change being the deletion of the words “tels que” in the French text of paragraph 1.

*Article 1 as a whole was adopted by twenty-five votes to none.*

*Article 2*

The CHAIRMAN of the Drafting Committee stated that the new text of the article contained no changes of substance. As to drafting, the language of paragraph 1 had been amended to bring it into line with the corresponding provision of the draft Leasing Convention as also had that of paragraph 2 so as to ensure that the reference to “place of business” qualified the *chapeau* and paragraph 1(a) of Article 2 only, and not also paragraph 1(b).

No comments being made on either paragraph 1 or paragraph 2 the CHAIRMAN put Article 2 as a whole to the vote.

*Article 2 as a whole was adopted by twenty-four votes to none.*

*Article 3*

The CHAIRMAN of the Drafting Committee stated that Article 3 had been reformulated in order to make it clear that the exclusion of the Convention in the factoring contract operated to exclude the Convention as a whole and not only between the parties to that contract. This had been achieved by combining the original paragraphs 1 and 2 in a single paragraph. Thus the original paragraph 3 had now become paragraph 2, the text of which remained unchanged except for a consequential amendment, the reference to “preceeding paragraphs” being replaced by one to the “previous paragraph”.

In the absence of comments the CHAIRMAN put Article 3 as a whole to the vote.

*Article 3 as a whole was adopted by twenty-two votes to one, with one abstention.*

*Article 4*

The CHAIRMAN of the Drafting Committee stated that the former Article 11 had now been renumbered Article 4. The text of paragraph 1 had remained unchanged while paragraph 2 had been modified, as had been the case with the draft Leasing Convention, to make it clear that the first rule of interpretation to apply related to the general principles on which the Convention was based and
that only in the absence of such principles should regard be had to the law applicable by virtue of the rules of private international law.

No comments being made, the CHAIRMAN put Article 4 as a whole to the vote.

*Article 4 as a whole was adopted by twenty-seven votes to none.*

**CHAPTER II – RIGHTS AND DUTIES OF THE PARTIES**

*The title of Chapter II was adopted by twenty-nine votes to none.*

**Article 5**

The CHAIRMAN of the Drafting Committee stated that no changes had been made to the text of Article 5 (formerly Article 4).

In the absence of comments, the CHAIRMAN put Article 5 to the vote.

*Article 5 was adopted by twenty-eight votes to none.*

**Article 6**

The CHAIRMAN proposed that the Committee revert to this article pending receipt of the report of the working group on the former Article 5.

*It was so agreed.*

**Article 7**

The CHAIRMAN of the Drafting Committee stated that the text of Article 7 (formerly Article 6) had remained unchanged.

No comments having being made, the CHAIRMAN put Article 7 to the vote.

*Article 7 was adopted by twenty-nine votes to one.*

**Article 8**

The CHAIRMAN of the Drafting Committee indicated that no amendments of substance had been made to Article 8 (formerly article 7). The text of paragraph 1 remained unchanged whereas in paragraph 2 the words *"pro tanto"* had, to his personal regret, been deleted without anything being added to replace them.

The CHAIRMAN enquired whether the Drafting Committee had considered the discussions of the Committee of the Whole on the question of whether the reference to notice *"given"* to the debtor should be substituted by language indicating that the notice must have reached the debtor.

The CHAIRMAN of the Drafting Committee stated that it had indeed looked into the matter. However it had to be recalled that the word *"give"* was to be found in the United Nations Convention on Contracts for the International Sale of Goods and that in other conventions also the word *"given"* was taken to mean *"given and received"*. In these circumstances the Drafting Committee had concluded that it would be preferable to adhere to existing terminology.

The CHAIRMAN understood the intention of the Drafting Committee as having been that the word *"given"* should be taken to mean *"given to and received by"*. He then enquired whether there were any further remarks on Article 8(1).
Mr BRENNAN (Australia) raised a question of consequential drafting following from the decision of the Committee of the Whole on Article 1(4) to define the term “notice in writing”. He wondered whether, having defined that term, the chapeau to Article 8(1) ought not to read “and notice in writing of the assignment is given to the debtor”. In other words he suggested moving the words “in writing” from Article 8(1)(a) to the chapeau. The proposal was, he stated, not intended to bring about any change of substance.

The CHAIRMAN of the Drafting Committee expressed agreement with this suggestion to bring the text into line with Article 1.

The CHAIRMAN enquired of the French-speaking delegations whether they would find it acceptable that the words “par écrit” should be incorporated in the chapeau of Article 8(1).

Mr BERAUDO (France) proposed that the wording “la notification écrite” be employed.

The CHAIRMAN suggested that it was important for the same language to be used in Article 8 and in Article 1(4).

Mr BERAUDO (France) agreed that in these circumstances it would be preferable to employ the words “la notification par écrit”.

In the absence of further comments on paragraph 1 or on paragraph 2, the CHAIRMAN put Article 8 as a whole to the vote, including the Australian amendment to the chapeau.

*Article 8, as so amended, was adopted by twenty-nine votes to none.*

**Article 9**

The CHAIRMAN of the Drafting Committee stated that the amendments to Article 9 (formerly Article 8) had been introduced to clarify the relationship between the two paragraphs of the article. The solution adopted by the Drafting Committee had in the first place been to modify paragraph 1 so as to meet the concern of the United States delegation of ensuring that it covered all defences other than rights of set-off. The paragraph now spoke of “all defences arising under that contract of which the debtor could have availed itself” rather than “all defences of which the debtor could have availed himself under that contract”.

As to paragraph 2 the reference to “other defences” had been deleted so as to conform to the original intention which had been to restrict it to rights of set-off available to the debtor at the time the debtor received notice of an assignment.

The CHAIRMAN called for comments on paragraph 1 of Article 9.

Mr REISMAN (United States of America) recalled, for purposes of clarification, that in the discussions within the Drafting Committee it had been indicated that a defence available to the debtor against the factor under Article 9(1) would not include any defences arising from claims which it had against the supplier under the revised Article 6(3), in the event of the debtor being located in a State which had adopted the reservation in respect of Article 6(1).

The CHAIRMAN of the Drafting Committee believed that it would be desirable to reflect in the summary records the point that if a supplier, in breach of its contract with the debtor, were to assign a receivable and thereby incur a liability to the debtor to pay damages, and if this were to occur in a State where the assignment took effect, notwithstanding the prohibition against assignment, then the debtor would not be able to set off those damages against a claim by the factor.

No further comments being made on paragraph 1, the CHAIRMAN enquired whether there were any remarks on paragraph 2.

Mr DE NOVA (Italy) drew attention to the language of the French text which employed the words “dérivant du contrat” whereas the English version contained the words “under that contract” and he asked whether the French version included all defences available in law and not just those
available under the contract.

Mr BERAUDO (France) considered that the expression “dérivant du contrat” also covered defences that had their basis in the law governing the contract.

Mr DE NOVA (Italy) stated that he was satisfied with this explanation.

Mr RONCORONI (Switzerland) suggested that in the light of the explanation given by the representative of France the words “dérivant du contrat” could be deleted.

The CHAIRMAN pointed out that the proposal of the representative of Switzerland would affect the English text as it would amount to the deletion of the words “arising under that contract”, thus altering the meaning of the text. He further noted that the proposal would open up a debate as to whether defences arising from circumstances other than the contract were also to be taken into account.

The CHAIRMAN of the Drafting Committee agreed that the proposed deletion would not be desirable.

Mr RONCORONI (Switzerland) stated that he was satisfied with the explanation given. His intervention had been more in the nature of a question than a proposal.

Finding that there were no further comments on paragraph 1, the CHAIRMAN enquired whether there were any remarks on paragraph 2.

Ms ESSOMBA (Cameroon) pointed out that the last part of Article 9(2) referred to the receipt of notice by the debtor whereas the Committee of the Whole had decided that in relation to notice the verb “given” also included the notion of receiving. A special reference to receipt in the text could create problems in the interpretation of the Convention as a whole with regard to the meaning of “giving” notice, also because it implied a different act from the one mentioned in Article 8. She therefore suggested that the words “received a notice” be replaced by the words “was given notice”.

The CHAIRMAN of the Drafting Committee stated that the representative of Cameroon had brought to light an inconsistency which had persisted in the text for some time and he supported an amendment along the lines suggested. His attention had also been drawn by the Deputy Executive Secretary to the need to change the cross-reference in Article 9(2) from one to Article 7(1) to one to Article 8(1).

The CHAIRMAN asked whether it would be acceptable to the Committee for Article 9 to be put to the vote on the understanding that the Drafting Committee would amend the text of paragraph 2 in the manner proposed by the representative of Cameroon and by the Chairman of the Drafting Committee.

Mr GUITARD (Spain) agreed with the intervention of the representative of Cameroon as to the inconsistency between the drafting of Articles 8(1) and 9(2). In his opinion, the words “is given” were to be interpreted in the sense that notice is to be given to and received by the debtor. If Article 9 were to be amended as had been suggested, then that would result in changing the timing referred to in Article 9(2). In Article 8, the Convention referred to an effect but in Article 9 the intention was to refer to a moment in time, namely that of receipt of the notice. The moment at which the notice was “given” could be different from that at which it was received.

The CHAIRMAN stated that he assumed it to be the wish of the Committee of the Whole that the Drafting Committee be instructed not to alter the time element in Article 9 but to refer to the corresponding wording in Article 8 so as to make it clear that the time to be taken into consideration was not that when the notice left the supplier or the factor but that when it was received by the debtor.

_It was so agreed._
The CHAIRMAN put to the vote Article 9 as a whole, subject to the authority conferred on the Drafting Committee to make the necessary amendments.

Article 9 as a whole was adopted by twenty-eight votes to none on the understanding that it would be amended by the Drafting Committee in accordance with the intentions of the Committee of the Whole.

Article 10

The CHAIRMAN of the Drafting Committee stated that no changes of substance had been made to Article 10 (formerly Article 9) although some purely drafting amendments had been introduced. As regards paragraph 1 he drew attention to the substitution of the word “alone” by the words “by itself” while the phrase “the debtor has a claim against the supplier for recovery of the price” had been replaced by the language “to recover a sum paid by the debtor to the factor if the debtor has a right to recover that sum from the supplier”. It had in this connection been pointed out that a factoring transaction could take place by way of loan and not by way of purchase so that the reference to the “price” in the former text had been too restrictive.

At the request of the Chairman, Mr BERAUDO (France) explained the changes made to the French text of Article 10 which were to be found in CONF. 7/D.C./W.P. 13 Add. He pointed out that the French text had been amended to bring it into line with the English and that the term “sum” at the end of Article 10(1) was now translated by the word “sommes”. The concluding language of Article 10(1) now read “... s’il dispose d’un recours en répétition des sommes payées au fournisseur”. In addition, the words “dans la mesure où” had been added to the chapeau of Article 10(2) and deleted from each of the sub-paragraphs.

The CHAIRMAN of the Drafting Committee stated in respect of Article 10(2) that the chapeau had been slightly reformulated so as to make it clear that what was being referred to was the debtor’s right to recover from the supplier a sum previously paid to the factor. The amended text thus read as follows: “The debtor who has such a right to recover from the supplier a sum paid to the factor in respect of a receivable...”. As to sub-paragraph (a) the reference to the price had been altered to refer to “an obligation to make payment to the supplier”, while in sub-paragraph (b) the reference to “non-performance” had been expanded to include “defective or late performance” so as to bring the text into line with that of Article 10(1).

Noting that there were no further comments on paragraph 1 or on paragraph 2, the CHAIRMAN put Article 10 as a whole to the vote.

Article 10 as a whole was adopted by twenty-six votes to none, with one abstention.

Article 11

Referring to Article 11 (formerly Article 10), the CHAIRMAN of the Drafting Committee stated that, apart from updating some cross-references and inserting in paragraph 2 the words “[F]or the purposes of this Convention”, the major change of substance made in response to a suggestion of the Czechoslovak delegation and agreed to by the Committee of the Whole, had been to include the word “subsequent” in Article 11(3). As regards paragraph 1(a), this now referred to sub-paragraph (b) of the paragraph and not of “this article”. The Drafting Committee had moreover given careful consideration to the suggestion of the Australian delegation to include in sub-paragraph (a) references to Article 11 itself and to Article X. It had however been felt that it would not be appropriate to implement that proposal since Article 11(1)(a) applied to subsequent assignments and various rules set out in certain other articles and Article 11(2) and (3) themselves referred specifically to subsequent assignments and laid down rules in respect of such assignments. It had therefore been deemed unnecessary to refer to Article 11 or to Article X by way of a cross-reference.
in Article 11(1)(a).

The CHAIRMAN enquired whether there were any comments on Article 11.

Mr DE NOVA (Italy) noted that Article 11 was somewhat different from the other articles contained in Chapter II which was concerned with the rights and duties of the parties, being more in the nature of an article on scope and it might therefore be preferable to include its provisions in a separate Chapter III.

The CHAIRMAN of the Drafting Committee stated that it had considered various options for the location of Article 11 in the text of the Convention, for example whether to move the whole of the article, or only paragraph 3, to the chapter on scope of application, or to transform paragraph 3 into a separate article but it had ultimately decided that although Article 11 might seem to be a scope provision, this was not the case. Admittedly, it was stated that certain provisions of the Convention applied to subsequent assignments but the article also laid down rules applicable to such assignments. In these circumstances, and since all the rules mentioned in Article 11 were contained in Chapter II, it had been thought legitimate to include Article 11 in the chapter on rights and duties of the parties, especially since the chapter heading did not specify the parties and could therefore be taken as applying to the parties to a subsequent assignment.

Mr DE NOVA (Italy) thanked the Chairman of the Drafting Committee for his explanation but felt compelled to maintain his proposal that Article 11 be included in a new Chapter III, entitled “Subsequent assignments”.

The CHAIRMAN enquired whether there was support for the proposal by the representative of Italy.

Mr JACOBSSON (Sweden) seconded the proposal of the Italian delegation.

The CHAIRMAN put to the vote the proposal to insert before Article 11 a new chapter heading entitled “Subsequent assignments”.

*The proposal was approved by twelve votes to seven, with nine abstentions.*

The CHAIRMAN called for further comments on Article 11(3).

Mr KATO (Japan) suggested that since the new Chapter III contained only one article, Article 11, it might be desirable to split up the article, the present paragraph 3 becoming a new Article 12.

The CHAIRMAN of the Drafting Committee saw considerable merit in the proposal of the representative of Japan.

The CHAIRMAN put to the vote the proposal of the Japanese delegation to divide Article 11 into two separate articles, the new Article 11 being composed of paragraphs 1 and 2 and Article 12 of the former Article 11(3).

*The proposal was approved by twenty-four votes to none, with five abstentions.*

The CHAIRMAN suggested that the Drafting Committee be instructed to make the necessary consequential amendments to the references, if any, to Article 11 in the other articles.

*It was so agreed.*

The CHAIRMAN put to the vote Article 11, composed only of its first two paragraphs.

*Article 11 as so constituted was adopted by twenty-nine votes to none.*
The CHAIRMAN put to the vote Article 12 (formerly Article 11(3) as it appeared in CONF. 7/D.C./W.P. 13).

*The new Article 12 was adopted by twenty-six votes to one.*

*The meeting was adjourned at 3.35 p.m. and resumed at 3.55 p.m.*

The CHAIRMAN invited the Committee to consider the outstanding provisions of the draft Convention, namely Article 6, Article X and the preamble, the texts of which had been submitted by the Drafting Committee in CONF. 7/D.C./W.P. 13 Add.).

*Article 6 (continued)*

The CHAIRMAN of the Drafting Committee stated that the text of Article 6 exactly followed, with one addition, the working group proposal for the former Article 5 which had been approved earlier in the day by the Committee of the Whole. The change concerned paragraph 2 which now included the language "at the time of conclusion of the contract of sale of goods" which provided a definition in point of time as to the place of business of the debtor.

Having noted that there were no comments on Article 6, the CHAIRMAN put the article as a whole to the vote.

*Article 6 as a whole was adopted by twenty-four votes to none, with one abstention.*

*Article X*

The CHAIRMAN of the Drafting Committee drew attention to two amendments to Article X. Both were consequential amendments, the first being the substitution of a reference to Article 5 by one to Article 6 and the second the insertion of the words "at the time of conclusion of the contract of sale of goods" to reflect the amendment to Article 6(2).

In the absence of comments, the CHAIRMAN put Article X to the vote.

*Article X was adopted by twenty-eight votes to none.*

*Preamble*

The CHAIRMAN of the Drafting Committee stated that the text of the draft preamble as submitted by the Drafting Committee took account of the proposal by the Swedish delegation contained in CONF. 7/C.1/W.P. 44 which had been accepted by the Committee of the Whole. Only a few changes had been made. In the second line of the second paragraph the word "important" had been replaced by "major" so as to avoid employing the words "important" in the second paragraph and "importance" in the third. However, the word "significant" had been offered by the Drafting Committee as an alternative to "major" and the Committee of the Whole might wish to consider which term was preferable.

In the third paragraph the words "need to" in the Swedish proposal had been replaced by "importance of" while the phrase "adopting uniform rules" had been inserted in the light of the observations of the representative of Hungary.

In reply to a call from the chair for comments on the revised text submitted by the Drafting Committee, Mr CUMING (Canada) considered the use of the word "major" in the second paragraph to be an overstatement and he expressed a preference for a qualifying adjective such as "significant" which would better reflect the role of factoring in international trade.

Mr RICHARDS (Antigua and Barbuda) and Mr DE PAIVA (Brazil) supported the Canadian proposal.
The CHAIRMAN found that there were no objections to this amendment and asked for a suitable French equivalent.

Mr SAMSON (Canada) suggested the words “fonction importante”.

Mr BERAUDO (France) seconded this proposal.

In these circumstances, and noting that no other comments had been made, the CHAIRMAN put the preamble as amended to the vote.

*The preamble was adopted by thirty votes to none.*

**Article 1 (continued)**

*Paragraph 3 (continued)*

Mr YUAN (China) requested clarification as regards the use of the word “services” in Article 1(3) and asked:

1. whether there was a definition of “services” to be found in any convention or other international legal document;

2. if not, whether such a definition was necessary in the Factoring Convention and

3. if such a definition was not necessary, whether the matter might be addressed in the Explanatory Report on the Convention.

In answer to the first question, the CHAIRMAN stated that to his knowledge the word “services” was employed in no other international instrument in the same manner as it was used in the draft Factoring Convention.

Mr GOODE (United Kingdom) stated that he was unaware of any definition of the word “services”. The closest definition in the United Kingdom was that “services” includes “facilities” in the sense of comprising not only what is offered but also what is available for people to take. He was under the impression that there was a recent Directive of the European Communities concerning the cancellation of contracts concluded away from business premises which also employed the term “services” without any definition being offered. He suggested that it was difficult to provide such a definition, nor indeed would he wish to do so, even for the purposes of the summary records.

Mr BERAUDO (France) recalled that Article 3(2) of the United Nations Convention on Contracts for the International Sale of Goods referred to “services” without defining them. The provision limited itself to stating that the Convention “does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services”.

Mr KATO (Japan) considered that there was no need to limit future interpretations of the term “services” by defining it in the Convention.

Mr REISMAN (United States of America) stated that earlier discussions within Unidroit on the draft Convention had indicated that, according to the professional associations, factoring of receivables from what are generally termed “services”, as opposed to that of receivables arising out of the sale of goods, was on the increase and that this was also the case with international transactions. The only sensible definition of “services” would seem to be a negative one relating to receivables arising other than from a sale of goods, which would however limit flexibility. In his view there was no need for such a definition. What was important in the Convention was the term “receivables” and since the Convention drew no distinction between receivables arising from a sale of goods and those arising from the provision of a service he recommended that the wording remain
unaltered and that the understanding of “services” be determined by commercial practice.

Ms DUSSEAX (Commission of the European Communities) recalled that the term “services” appeared in the Treaty of Rome and that the expression “the free provision of services” was used with increasing frequency in Europe. She added that for the understanding of the Treaty the term “services” was taken to include, among others, banking and insurance services. Moreover, in a number of conventions that were not yet in force the word “services” was employed to exclude some services or to include others but no definition of the term had been offered. It would therefore be difficult to specify which services were contemplated by the future Factoring Convention although there was an abundant literature in Europe which was of importance in view of the creation of the Single European Market.

The CHAIRMAN stated that he was not convinced that conclusions could be drawn from the use of the word “services” in the Treaty of Rome establishing the European Communities for the purpose of interpreting the Convention under discussion.

Mr RICHARDS (Antigua and Barbuda) noted that the words “contracts of sale of goods” were the operative words in Article 1(2)(a) which set out the parameters of the Convention, stating as it did that “the supplier may or will assign to the factor receivables arising from contracts of sale of goods ...”. The phrase “services and the supply of services” in Article 1(3) was however problematic because it was open-ended. He suggested that the United Nations Sale Convention might be of assistance in determining which types of services ought to be included.

The CHAIRMAN pointed out that the United Nations Sale Convention did not explain the sense in which the term “services” was employed, the purpose of its use being to delimit the notion of “sale” and in his view it was not therefore of any great assistance.

This being said he drew attention to three facts. First, the draft Factoring Convention dealt with international transactions, so that any services which would be included within its scope would be limited to services of an international character based on an international contract, as the supplier of the services and the debtor should have their places of business in different States. Second, the contract must give rise to receivables and the services therefore be of a commercial nature while third the receivables must be of such a character as to be capable of being collected through factoring.

As to the nature of the services, he indicated that they could, for example, arise out of a contract of insurance, a contract of carriage of passengers or goods, assuming that receivables arising thereunder were indeed ever factored, or a contract of consultancy although he was not sure whether the term “services” would extend to banking as he doubted whether banks would have recourse to factoring to collect receivables. It seemed from the interventions of a number of speakers that there was no support in the Committee for attempting to define “services” for the purposes of the Convention and he enquired of the representative of China whether he wished to pursue his three questions.

Mr YUAN (China) expressed his appreciation for the explanations which had been given and stated that he did not wish to insert any new language in Article 1(3).

The CHAIRMAN concluded that in these circumstances the Committee of the Whole had completed its task and he commended the Drafting Committee and its Chairman for the excellent work that had been accomplished.

The CHAIRMAN of the Drafting Committee sought the general authorisation of the Chairman of the Committee of the Whole for the Drafting Committee to make any minor changes, by way of “toilette”, in the course of its finalising the text for Plenum, as had been accorded in connection with the draft Leasing Convention.

The CHAIRMAN proposed that the Drafting Committee be authorised to make any consequential changes that it might find necessary, with regard to which the Chairman of the Drafting Committee would report back to Plenum.
It was so agreed.

The CHAIRMAN expressed his thanks to all the members of the Committee of the Whole for the support and understanding they had shown which had permitted the Committee to complete its work within the time allotted.

Mr DE PAIVA (Brazil) stated that the Committee of the Whole could not adjourn without addressing its warm thanks to its Chairman for the manner in which he had conducted its proceedings. What had been achieved by the Committee could in large part be attributed to the Chairman, to his guidance and to his admirable competence.

The CHAIRMAN declared the work of the Committee of the Whole to be concluded.

The meeting rose at 4.30 p.m.
PART II

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| Consideration of the draft final provisions capable of embodiment in the draft Convention on international financial leasing | | |
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