THE SIXTEENTH SESSION (1983)

A. Report of the United Nations Commission on International Trade Law on the work of its sixteenth session (Vienna, 24 May-3 June 1983) (A/38/17)[a]

CONTENTS

INTRODUCTION

1. The present report of the United Nations Commission on International Trade Law covers the sixteenth session of the Commission, held at Vienna, from 24 May to 3 June 1983.

2. Pursuant to General Assembly resolution 2205 (XXI) of 17 December 1966, this report is submitted to the General Assembly and is also submitted for comments to the United Nations Conference on Trade and Development.

[a] *Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 17* (A/38/17) (10 August 1983) (hereinafter referred to as "Report"). The Report has also been issued as document A/CN.9/243 (29 June 1983) and is reproduced here.

CHAPTER I. ORGANIZATION OF THE SESSION

A. *Opening*

3. The United Nations Commission on International Trade Law (UNCITRAL) commenced its sixteenth session on 24 May 1983. The session was opened on behalf of the Secretary-General by Mr. Carl-August Fleischhauer, the Legal Counsel.

B. *Membership and attendance*

4. General Assembly resolution 2205 (XXI) established the Commission with a membership of 29 States, elected by the Assembly. By resolution 3108 (XXVIII),the General Assembly increased the membership of the Commission from 29 to 36 States. The present members of the Commission, elected on 9 November 1979 and 15 November 1982, are the following States:[1] Algeria,** Australia,** Austria,** Brazil,** Central African Republic,** China,** Cuba,* Cyprus,* Czechoslovakia,* Egypt,** France,** German Democratic Republic,** Germany, Federal Republic of,* Guatemala,* Hungary,* India,* Iraq,* Italy,* Japan,** Kenya,* Mexico,** Nigeria,** Peru,* Philippines,* Senegal,* Sierra Leone,* Singapore,** Spain,* Sweden,** Trinidad and Tobago,* Uganda,* Union of Soviet Socialist Republics,** United Kingdom of Great Britain and Northern Ireland,** United Republic of Tanzania,** United States of America* and Yugoslavia*.

5. With the exception of Central African Republic, Senegal and United Republic of Tanzania, all members of the Commission were represented at the session.

6. The session was also attended by observers from the following States: Argentina, Bulgaria, Canada, Chile, Democratic People's Republic of Korea, Finland, Greece, Holy See, Jamaica, Lebanon, Libyan Arab Jamahiriya, Morocco, Netherlands, Portugal, Republic of Korea, Switzerland, Thailand, Tunisia, Venezuela and Zaire.

7. The following United Nations organs, specialized agency, intergovernmental organizations and international non-governmental organization were represented by observers:

(a) *United Nations organs*
United Nations Industrial Development Organization

(b) *Specialized agency*
World Bank

(c) *Intergovernmental organizations*
Asian-African Legal Consultative Committee
Commission of the European Communities
Council for Mutual Economic Assistance
Council of Europe
Hague Conference on Private International Law
International Institute for the Unification of Private Law
Organization of American States

(d) *International non-governmental organization*
International Association of Democratic Lawyers

C. *Election of officers*

8. The Commission elected the following officers:[2]

Chairman:	Mr. M. H. Chafik (Egypt)
Vice-Chairmen:	Mrs. J. Vilus (Yugoslavia) Mr. T. Sawada (Japan) Mr. M. J. Bonell (Italy)
Rapporteur:	Mr. J. Barrera Graf (Mexico)

D. *Agenda*

9. The agenda of the session, as adopted by the Commission at its 269th meeting on 24 May 1983, was as follows:

1. Opening of the session
2. Election of officers
3. Adoption of the agenda
4. International contract practices
5. International payments
6. International commercial arbitration
7. New international economic order
8. Co-ordination of work
9. Status of conventions
10. Training and assistance
11. Relevant General Assembly resolutions
12. Future work
13. Other business
14. Adoption of the report of the Commission

E. *Adoption of the report*

10. The Commission adopted the present report at its 284th meeting, on 3 June 1983 by consensus.

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*Term of office expires on the day before the opening of the regular session of the Commission in 1986.

**Term of office expires on the day before the opening of the regular session of the Commission in 1989.

[1]Pursuant to General Assembly resolution 2205 (XXI), the members of the Commission are elected for a term of six years. Of the current membership, 19 were elected by the Assembly at its thirty-fourth session on 9 November 1979 (decision 34/308) and 17 were elected by the General Assembly at its thirty-seventh session on 15 November 1982 (decision 37/308). Pursuant to resolution 31/99 of 15 December 1976 the term of those members elected by the Assembly at its thirty-fourth session will expire on the last day prior to the opening of the nineteenth regular annual session of the Commission in 1986, while the term of those members elected by the General Assembly at its thirty-seventh session will expire on the last day prior to the opening of the twenty-second regular annual session of the Commission in 1989.

[2]The elections took place at the 269th and 274th meetings, on 24 and 26 May 1983. In accordance with a decision taken by the Commission at its first session, the Commission has three Vice-Chairmen, so that together with the Chairman and Rapporteur, each of the five groups of States listed in General Assembly resolution 2205 (XXI), sect. II, para. 1, will be represented on the bureau of the Commission (see *Official Records of the General Assembly, Twenty-third Session, Supplement No. 16* (A/7216), para. 14 (Yearbook ... 1968-1970, part two, I, A).

CHAPTER II. INTERNATIONAL CONTRACT PRACTICES: UNIFORM RULES ON LIQUIDATED DAMAGES AND PENALTY CLAUSES[3]

Introduction

11. At its twelfth session, the Commission requested its Working Group on International Contract Practices to consider the feasibility of formulating uniform rules on liquidated damages and penalty clauses applicable to a wide range of international trade contracts.[4] At its fourteenth session, the Commission considered the draft uniform rules prepared by the Working Group and requested the Secretary-General to incorporate in the rules such supplementary provisions as might be required if the rules were to take the form of a convention or a model law, to prepare a commentary on the rules, to prepare a questionnaire addressed to Governments and international organizations seeking to elicit their views on the most appropriate form for the rules and to circulate the rules to all Governments and interested international organizations for their comments, together with the commentary and the questionnaire.[5]

12. At its fifteenth session the Commission had before it the rules with the required supplementary provisions and the commentary (A/CN.9/218),[b] together with an analysis of the responses of Governments and international organizations to the questionnaire and of their comments on the rules (A/CN.9/219 and Add. 1).[c] At that session the Commission considered the form that the rules might take, and also considered the substance of article A, paragraph 1, and articles D, E, F and G of the rules. It thereafter referred these articles for consideration to a Drafting Group.[6] As the Drafting Group was unable to complete its work in the time available, the Commission decided that the secretariat should submit a revised text of the rules for consideration by the Commission at its sixteenth session, taking into account the discussion at the session and within the Drafting Group. It also decided to determine the form of the rules at the sixteenth session.[7]

13. At its current session the Commission had before it a revised text of the rules, with explanatory footnotes (A/CN.9/235).[d]

Discussion at the session[8]

14. The Commission commenced its deliberations by considering whether the uniform rules should take the form of general conditions, a convention or a model law.

15. There was some support for the view that the uniform rules should take the form of general conditions. In support of this view, it was noted that general conditions could be used by parties as soon as they were finalized by the Commission and would accordingly come into use earlier than if one of the other forms were adopted. Furthermore, parties would have the freedom to adapt the rules to suit the needs of the particular contracts concluded by them. Once the general conditions were widely accepted in international trade, they would influence the drafting of national legislation on liquidated damages and penalty clauses. In opposition to the form of general conditions, it was noted that they would be ineffective where they conflicted with applicable mandatory national laws. The degree of unification achieved by this method would therefore be very limited.

16. There was support for the view that the form of a convention should be adopted. In support of this view, it was noted that a convention would provide the most effective form of unification. Since liquidated damages and penalty clauses were frequently used in international trade contracts, an effective unification of this subject-matter was necessary. The procedure for the adoption of a convention, either through a conference of plenipotentiaries or through the General Assembly, would bring the rules to the attention of States and generate interest in the rules. In opposition to the form of a convention, it was observed that a convention on the subject in question would receive little support by way of adherence to it. In this connection, it was noted that recent experience seemed to indicate that many conventions never received the requisite support for their entry into force. It was also noted that the scope of the subject-matter covered was very limited, and that, accordingly, a convention was inappropriate. The procedure for the adoption of a convention through a conference of plenipotentiaries would also involve considerable expense. Some representatives whose first preference was for the form of a convention indicated, however, that they could accept the form of a model law if a majority supported that form.

17. The majority view supported the form of a model law. It was noted that this form enabled States, at the time the model law was incorporated in their national legislation, to make changes necessary to make the

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[b] Yearbook ... 1982, part two, I, A.

[c] Yearbook ... 1982, part two, I, B.

[3] The Commission considered this subject at its 270th, 271st, 272nd, 273rd, 274th, 275th, 276th, 277th, 278th, 282nd and 283rd meetings on 24, 25, 26, 27, and 30 May and 1 and 2 June 1983. Summary records of the meetings are reproduced in this volume, part three, I, B, 2.

[4] Report of the United Nations Commission on International Trade Law on the work of its twelfth session, *Official Records of the General Assembly, Thirty-fourth Session, Supplement No. 17* (A/34/17), para. 31 (Yearbook ... 1979, part one, II, A)

[5] Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17* (A/36/17), para. 44. (Yearbook ... 1981, part one, A).

[6] Report of the United Nations Commission on International Trade Law on the work of its fifteenth session, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 17* (A/37/17), para. 18. (Yearbook .. 1982, part one, A).

[7] *Ibid.*, para. 40.

[d] Reproduced in this volume, part two, I.

[8] For the summary records of the discussion, see A/CN.9/SR.270-278, 282 and 283.

model law effective in their own legal systems. Furthermore, a model law would, in particular, have influence at a regional level on the drafting or modernization of the laws governing liquidated damages and penalties. It was also noted that a model law could be adopted by the Commission, and therefore involved far less expense than the adoption of a convention. In opposition to the form of a model law, it was noted that the adoption of a model law by the Commission would not create sufficient interest among States in the model law, which would consequently be ineffective as an instrument for unification. Furthermore, since it was open to a State to make changes in the model law, either at the time of incorporation into its legislation or subsequently, the uniformity achieved through the model law might be limited. Some representatives whose first preference was for the form of a model law indicated, however, that they could accept the form of a convention if a majority supported that form.

18. It was observed that the central question to be considered was the extent of commitment to the view that the laws in regard to liquidated damages and penalties needed unification. If there was no real commitment to this view, any uniform rules which might be approved would be ineffective, whatever the form in which they were embodied, that is, if a convention were adopted, it would not enter into force, and if a model law were adopted, it would not be followed by States in their legislation.

19. Attention was directed to the fact that, at its fifteenth session, the Commission had noted that it might be useful to cast the uniform rules in a form which might enable the rules to be used for several purposes.[9] Following, for example, the form used in the Hague Convention relating to a Uniform Law on the International Sale of Goods of 1 July 1964 (the Hague Convention) to which was annexed the Uniform Law on the International Sale of Goods, a convention might be drafted to which could be annexed uniform rules on liquidated damages and penalty clauses. Contracting States to such a convention would be obligated to adopt these uniform rules. Furthermore, the convention could permit a reservation (as, for example, in article V of the Hague Convention) that the uniform rules were only to apply when the parties to a contract had chosen to apply the uniform rules to their contract. States not adhering to such a convention could regard the uniform rules as a model law which might be used in revising their national legislations.

20. There was considerable support for the adoption of this approach. It was noted that this approach would enable the Commission to proceed to the drafting of the rules, and to decide, after the drafting was completed, whether the rules could appropriately be annexed to a convention or should form a model law. Furthermore, the exact scope of a possible convention and the reservations to be permitted therein could be determined after the completion of the drafting. The Commission accordingly decided to discuss the revised draft uniform rules submitted to it, on the provisional basis that they might constitute a set of uniform rules to be set forth in an annex to a convention. It also decided that, after discussion by the Commission, the rules should be referred to a drafting group for consideration in the light of the discussion.

Creation of the Drafting Group

21. It was decided that the Drafting Group should consist of France, India, Sierra Leone, Spain, Union of Soviet Socialist Republics and United States of America.

Discussion of specific articles

22. The text of article A, paragraph 1, as considered by the Commission was as follows:

Article A, paragraph 1[10]

Revised draft (draft model law)

"(1) This law applies:

"*(a)* To contracts in which the parties have agreed that, upon a total or partial failure of performance by a party (the obligor), the other party (the obligee) is entitled to [recover or to withhold] an agreed sum of money from the obligor, [where such sum is intended as a pre-estimate of damages, or as a security for performance, or both] [where such sum is intended as a pre-estimate of damages to be paid by the obligor for loss suffered by the obligee as a consequence of that failure, or as a penalty for that failure, or both], and

"*(b)* Where, at the time of the conclusion of the contract, the parties have their places of business in different States, and the rules of private international law lead to the application of the law of (the State adopting the Model Law).

"(1 *bis*) Except as expressly provided in this law, it is not concerned with the validity of the contract or of any of its provisions."

23. The Commission considered subparagraph *(a)* of this paragraph, and discussed whether the words "recover or to withhold" should be retained. Under one view, they served a useful purpose in clarifying that the rules were not restricted to cases where the agreement between the obligee and obligor contemplated the payment of an agreed sum by the obligor upon failure of performance, but also covered cases where the agreed sum had been paid by the obligor to the obligee before failure of performance and was to be withheld upon failure of performance. It was suggested that the word "retain" should be substituted for the word "withhold". However, under another view, although the retention of these words did not cause difficulties, they should be deleted since they were superfluous.

[9] Report of the United Nations Commission on International Trade Law on the work of its fifteenth session, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No 17* (A/37/17), para. 17. (Yearbook ... 1982, part one, A).

[10] The text of the specific articles was before the Commission in document A/CN.9/235 (reproduced in this volume, part two, I).

24. It was noted that there was a divergence between the terms "total or partial failure of performance" used in this subparagraph and the terms "non-performance of an obligation, or defective performance other than delay" used in article E. The view was also expressed that the terms "total or partial failure of performance" were unclear and that the terms might be deleted. It was agreed that the Drafting Group should, in any event, provide a uniform terminology.

25. The Commission considered whether the word "agreed" in the phrase "agreed sum of money" was appropriate. It was suggested that this word might be misleading, as parties might not specify a sum in a liquidated damages or penalty clause, but instead specify a method of determining a sum. The prevailing view was that the word "agreed" was sufficient to cover cases where the contract specified a method of determining the sum.

26. The Commission considered the two alternative phrases at the end of the subparagraph defining the nature of the agreed sum. There was general agreement that neither alternative was fully satisfactory. As regards the first alternative, it was noted that the meaning of the term "security" was unclear. As regards the second alternative, it was noted that the reference therein to "loss" suggested that the agreed sum was only payable if the obligee could prove that he had suffered loss. It was also observed that under both alternatives, where the agreed sum was described in its character of a pre-estimate of damages, it was described as "intended" by the parties to constitute such a pre-estimate. It was suggested that such a formulation might require an inquiry by a tribunal into the intention of the parties and that such an inquiry would be difficult and inadvisable.

27. There was some discussion as to the types of clauses which might be covered by the subparagraph, and it was decided that the Drafting Group should take this discussion into account in its examination of the subparagraph.

28. The Commission decided to defer the consideration of paragraph 1 *(b)* and 1 *bis*.

29. The text of article D as considered by the

31. It was noted that the previous draft expressed the ideas contained in the revised draft in a more concise form. There was general agreement that the opening words of the previous draft should be deleted, as their function was now served by article X. There was also general agreement that the proposal in the revised draft to place on the obligor the burden of proving that he was not liable for the failure of performance (that is, by the insertion of the words "proves that he") was inadvisable, as the allocation of burden of proof should be left to the applicable law governing the burden of proof. A view was also expressed that the rule might be reformulated in a positive form.

32. The previous draft was referred to the Drafting Group for consideration in the light of the deliberations in the Commission.

33. The text of article E as considered by the Commission was as follows:

Article E

Revised draft

"(1) Where the contract provides that the obligee is entitled to the agreed sum on delay in performance of an obligation, the obligee is entitled both to require performance of the obligation and to the agreed sum.

"(2) Where the contract provides that the obligee is entitled to the agreed sum on non-performance of an obligation, or defective performance other than delay, the obligee is entitled either to require performance, or to the agreed sum. If, however, [the obligee proves that] the agreed sum cannot reasonably be regarded as a substitute for performance, the obligee is entitled both to require performance of the obligation and to the agreed sum."

Paragraph 1

34. The prevailing view was that the revised draft of paragraph 1 was preferable to the previous draft. There was general agreement with the rule set forth in the paragraph. There was also general agreement that the phraseology describing the failure of performance

Furthermore, the inclusion of these words might suggest that article E was not subject to the rule contained in article D. Under another view, however, these words clarified the scope of the paragraph, and in particular, directed attention to the fact that the nature of the contractual agreement determined whether paragraph 1 or paragraph 2 of the article applied. It was further suggested that the words "as specified in the contract" might be added after the words "the obligation" to clarify the rule.

37. The Commission considered whether the retention of the word "require" in the phrase "entitled to require performance" was necessary. The view was expressed that this word was necessary as it clarified the content of the entitlement to performance. The prevailing view, however, was that the rule contained in the paragraph would not lose its substance by the deletion of the word. The view was also expressed that the retention of this word would confer on the obligee a right to specific performance, which was undesirable, as the existence of this right should be determined by the applicable law. It was pointed out that the omission of that word would not necessarily avoid that result in all legal systems. Furthermore, the deletion of this word might enable drafting changes to be effected which might make article Y superfluous.

38. The paragraph was referred to the Drafting Group for consideration in the light of the deliberations in the Commission.

Paragraph 2

39. There was general agreement that the paragraph did not need to describe the types of non-performance other than delay and that the phraseology describing non-performance in this article should be in conformity with the phraseology to be adopted in paragraph 1 of this article and in article A. There was also general agreement that the words "the obligee proves" were unnecessary, and that the allocation of the burden of proof should be left to the applicable law governing the burden of proof. It was also noted that, in conformity with the prevailing view expressed in regard to paragraph 1 of this article, the word "require" should be deleted in the phrase "to require performance".

40. There was considerable discussion as to whether the compromise achieved in this paragraph was satisfactory. In the circumstances described in the first sentence, there was an alternative entitlement to performance or to the agreed sum and, in the circumstances described in the second sentence, a cumulative entitlement. Under one view, retaining only the rule contained in the first sentence would lead to simplicity of result. Furthermore, the cumulation envisaged in the second sentence could sometimes lead to unjust enrichment of the obligee. In opposition to this view, it was observed that the paragraph embodied a delicate compromise between the approaches of the legal systems which conferred an alternative entitlement and those which conferred a cumulative entitlement, and should therefore be maintained. It was suggested that the paragraph should be redrafted to make the right to alternative or cumulative entitlement depend on the terms of the contract. It was noted, however, that, even under the present drafting, the terms of the contract would prevail over the rules in this article by virtue of article X; what was needed was a rule to determine the issue when it was not resolved in the contract.

41. There was support for the view that the phrase "substitute for performance" was not sufficiently clear, and that an attempt should be made to find an alternative phrase to express the idea to be conveyed.

42. The paragraph was referred to the Drafting Group for consideration in the light of the deliberations in the Commission.

43. The text of article Y as considered by the Commission was as follows:

Article Y

> "Where, in accordance with the provisions of this (Convention) (law) the obligee is entitled to require performance of an obligation, a court is not bound to enter a judgment for specific performance unless the court would do so in respect of similar contracts not governed by this (Convention) (law)."

44. There was support for the view that the rules should not deal with the issue as to whether an obligee was or was not entitled to specific performance. This issue should be left for determination to the applicable law. It was therefore suggested that article E, which referred to the right to performance, should be redrafted so as to eliminate the need for article Y. The Commission therefore agreed to postpone the consideration of article Y until it had before it the text of article E as revised by the Drafting Group.

45. The text of article F as considered by the Commission was as follows:

Article F

Revised draft

> "Where the obligee is entitled to the agreed sum, he [is not entitled to damages] [may not assert a claim for damages] to the extent of the loss covered by the agreed sum. He [is also not entitled to damages] [may also not assert a claim for damages] to the extent of the loss not covered by the agreed sum, unless he can prove that his loss grossly exceeds the agreed sum."

46. The Commission noted that this article reflected a compromise between two approaches to the relationship between the right of the obligee to the agreed sum and his right to claim damages. Under the first approach, the obligee was only entitled to the agreed sum and could not claim damages, even if his loss resulting from the obligor's non-performance was not fully compensated by the agreed sum. Under the second approach, the obligee was in such circumstances entitled to claim damages in addition to the agreed sum. It was

noted that each of these approaches had advantages and disadvantages and that, in particular, under the second approach the function of the agreed sum in creating certainty as to the compensation recoverable upon failure of performance was diminished. It was suggested, however, that each of these approaches resulted in greater certainty as to the rights and obligations of the parties as to the compensation recoverable than did the compromise approach in this article. Under the compromise approach, it was suggested, there would be frequent disputes as to whether the loss suffered by the obligee grossly exceeded the agreed sum.

47. There was support for the second approach noted above, and greater support for the first approach. There was also considerable support for the view that the article reflected an acceptable compromise that did not create too great a degree of uncertainty.

48. The Commission considered other compromise solutions which might be considered more acceptable than the one contained at present in the article. There was support for the view that different rules might be adopted depending on whether the agreed sum constituted liquidated damages or performed a different function. If it constituted liquidated damages, the obligee should not be entitled to claim damages in addition to the agreed sum, while in other cases the obligee might be permitted to claim damages to the extent of the loss not covered by the agreed sum if the agreed sum could not reasonably be regarded as compensation for that loss. This approach was further elaborated in suggestions that the revised draft of the article might be acceptable if instead of the phrase "unless he can prove that his loss grossly exceeds the agreed sum" at the end of the article, there were substituted either the phrase "unless the agreed sum cannot reasonably be regarded as a substitute for performance" or the phrase "unless the agreed amount cannot reasonably be regarded as liquidated damages". These latter suggestions also attracted considerable support.

49. After extensive deliberation, however, the Commission was of the view that the rule expressed in the article as currently drafted was the most acceptable. There was wide agreement that a more appropriate word should be substituted for the word "grossly". The revised draft was accordingly referred to the Drafting Group for consideration in the light of the deliberations in the Commission.

50. The text of article X as considered by the Commission was as follows:

Article X (new article)

> "The parties may by agreement only derogate from or vary the effect of articles D, E and F of this (Convention) (law)."

51. A suggestion was made that parties should not be permitted to derogate from or vary the effect of article D. However, there was wide support for the substance of the article in its present form. It was noted that there might be advantages in permitting the parties to determine the allocation of the loss caused by the obligor's failure of performance even if he was not liable for that failure. Allocating the loss to the obligor in such circumstances prevented a dispute as to whether or not the obligor was liable for his failure of performance, and was not necessarily unjust to the obligor.

52. It was noted that, under this article, parties were free to vary the effect of articles D, E and F, either expressly or impliedly, and that this should be clarified either by specifying this, or by deleting the words "by agreement" which might suggest the need for express agreement.

53. The article was referred by the Commission to the Drafting Group for consideration in the light of the deliberations in the Commission.

54. The text of article G as considered by the Commission was as follows:

Article G

Revised draft

"(1) The agreed sum shall not be reduced by a court or arbitral tribunal.

"(2) Notwithstanding the provisions of paragraph 1 of this article, the agreed sum may [shall] be reduced [though not below the extent of the loss suffered by the obligee]:

"*(a)* if the agreed sum is shown to [be grossly disproportionate in relation to] [grossly exceed] the loss that has been suffered by the obligee; or

"*(b)* (i) if parties have provided that the obligee is entitled to the agreed sum even when the obligor is not liable for the failure of performance, and

"(ii) if the obligee claims the agreed sum when the obligor is not liable for the failure of performance, and

"(iii) if entitlement to the agreed sum would be manifestly unfair in the circumstances."

55. There was considerable discussion as to whether the rules set forth in paragraph 2 *(b)* of the article were needed. Under one view these rules should be retained, as they were a method of mitigating the possible hardship which might result to the obligor when the parties varied the rule set forth in article D and enabled the obligee to claim the agreed sum even when the obligor was not liable for his failure of performance. It was also observed that it was desirable to retain the term "manifestly unfair", mentioned in paragraph 2 *(b)*, as a criterion for reducing the agreed sum, as there may be cases where the agreement between the parties fixing the agreed sum might not be equitable. It was further observed that manifest unfairness should also be applicable as a criterion for reducing the agreed sum when parties had varied the rules set forth in articles E and F, and such variation resulted in unfairness to the obligor. The prevailing view, however, was that para-

graph 2 *(b)* should be deleted. It was noted that, if parties had varied the rule set forth in article D, their agreement should not be interfered with under this article. It was further noted that the concept of manifest unfairness was not precise. Furthermore, paragraph 2 *(b)* as drafted was complicated and difficult to understand, and the reduction of the agreed sum sought to be secured thereunder could in many cases be also secured under paragraph 2 *(a)*.

56. There was general agreement that the principles set forth in paragraphs 1 and 2 *(a)* should be retained. There was wide support for combining these principles in a single paragraph, as this would lead to simplification. In this connection, there was support for a simpler rule that a court or arbitral tribunal might reduce the agreed sum unless that sum could be regarded as a pre-estimate of damages. The prevailing view, however, was that such a rule would not provide sufficient guidance to a court or arbitral tribunal.

57. The Commission considered whether, if the conditions for reducing the agreed sum were satisfied, the article should oblige the court or arbitral tribunal to reduce the agreed sum (that is, by specifying that the agreed sum shall be reduced) or whether it should give the court or arbitral tribunal a discretion as to reduction (that is, by specifying that the agreed sum may be reduced). The imposition of an obligation on the court or arbitral tribunal was supported on the ground that this would lead to greater certainty in the operation of the article. Furthermore, it was noted that, under article F, if loss grossly in excess of the agreed sum existed, the obligee was entitled to claim damages and thereby obtain increased compensation. Accordingly, article G should set forth a parallel rule under which the obligor was entitled to a decrease in the sum payable by him if the agreed sum grossly exceeded the loss. There was, however, somewhat greater support for the view that the issue should be left to the discretion of the court or arbitral tribunal. It was noted that, if the conditions for reduction were satisfied, a court or arbitral tribunal would, in practice, always reduce the agreed sum.

58. The Commission also considered whether guidelines should be established to assist the court or arbitral tribunal in determining the extent of reduction when the conditions for reduction were satisfied. There was support for retaining the words "though not below the extent of the loss suffered by the obligee", thereby imposing a limit below which a reduction could not be made. There was considerable support, however, for the view that the extent of reduction should be left to the discretion of the court or arbitral tribunal, which could then make an equitable reduction having regard to all the circumstances of the case. It was also noted that it was not easy to formulate a comprehensive set of principles to guide the court or arbitral tribunal which could be incorporated in the article.

59. The Commission referred the article for consideration to the Drafting Group in the light of the deliberations in the Commission.

Proposed structure of the draft uniform rules

60. The Commission considered a proposal of the secretariat for the structure of the uniform rules. This proposal set forth certain articles as forming "Part I: Scope of application and general provisions", and indicated that "Part II: Substantive provisions" might consist of articles D, E, F and G considered by the Commission. The proposal set forth the following articles as forming part I:

Article A

"These Rules apply to international contracts in which the parties have agreed that, upon a failure of performance by one party (the obligor), the other party (the obligee) is entitled to an agreed sum from the obligor, whether as a penalty or as compensation [for that failure]."

Article A bis

"For the purposes of these Rules:

"*(a)* A contract shall be considered international if, at the time of the conclusion of the contract, the parties have their places of business in different States;

"*(b)* The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract;

"*(c)* Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of these Rules."

Article B

"For the purposes of these Rules:

"*(a)* If a party has more than one place of business, his place of business is that which has the closest relationship to the contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the conclusion of the contract.

"*(b)* If a party does not have a place of business, reference is to be made to his habitual residence."

Article C

"These Rules do not apply to contracts concerning goods, other property or services which are to be supplied for the personal, family or household purposes of a party, unless the other party, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the contract was concluded for such purposes."

Article X

"The parties may by agreement only derogate from or vary the effect of articles D, E and F of these Rules."

61. The Commission noted that the text of article A, set forth above, which defined the contracts to which the draft rules applied, and the text of article X, had been considered in substance by the Commission and had been remitted by the Commission to the Drafting Group, and would be considered by the Commission at a later stage when the Drafting Group submitted the texts as prepared by it to the Commission.

62. The Commission noted that article A *bis (a)* set forth above, was derived from article 2 *(a)* of the Convention on the Limitation Period in the International Sale of Goods (New York, 1974,)[e] and that paragraphs *(b)* and *(c)* of article A *bis* were identical with paragraphs (2) and (3), respectively, of article 1 of the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980, hereinafter referred to as the Vienna Sales Convention).[f] The Commission also noted that article B, set forth above, was identical with article 10 of the Vienna Sales Convention, and that article C, set forth above, was derived from article 2 *(a)* of the Vienna Sales Convention.

63. A view was expressed that paragraph *(c)* of article A *bis* and article C might be reformulated to provide that the rules only applied to contracts of a commercial character. While there was wide agreement that, in principle, the rules should apply only to commercial contracts and not to consumer transactions, the prevailing view was that there would be great difficulty in defining the term "commercial", as different legal systems approached such a definition in different ways.

64. The Commission accordingly accepted the rules expressed in articles A *bis*, B and C, and these provisions were remitted to the Drafting Group.

Possible reservation clauses in a convention

65. The Commission considered a proposal of the secretariat on possible reservation clauses which might be incorporated in a convention if the uniform rules were to be annexed to a convention. The Commission noted that the substance of these reservation clauses were those mentioned at an earlier stage in the deliberations in the Commission as clauses which might possibly be so incorporated.

66. The clauses considered by the Commission were as follows:

Contracting-in clause

"Any State may declare at the time of signature, ratification, acceptance, approval or accession to this Convention that it will apply the Uniform Rules only to a contract in which the parties to the contract have agreed that the Uniform Rules be applied thereto."

Writing requirement

"A Contracting State whose legislation requires contracts to be concluded in or evidenced by writing may at any time make a declaration that it will apply the Uniform Rules only to a contract concluded in or evidenced by writing where any party has his place of business in that State."

67. The Commission agreed to the substance of these clauses but took no decisions on them because, if the uniform rules were to take the form of a model law, such decisions might not be necessary. With regard to the writing requirement, one delegation stated that to achieve a result similar to that in the Vienna Sales Convention it would also be necessary to use the approach of article 12 of that Convention or to find another appropriate solution.

Proposal of Drafting Group

68. The Commission considered the text of the rules as submitted by the Drafting Group. The Commission noted that there had been agreement within the Drafting Group on the text of all articles, with the exception of article E (2). The provisions submitted by the Drafting Group, except for article E (2), were those now appearing in annex I.

69. Article E (2) as submitted by the Drafting Group was as follows:

"If the contract provides that the obligee is entitled to the agreed sum upon a failure of performance other than delay, he is entitled either to performance or to the agreed sum. If, however, the agreed sum [cannot reasonably be regarded] [was not provided] [as a substitute for performance] [as compensation for that failure of performance], the obligee is entitled to both performance of the obligation and the agreed sum."

70. After deliberation, the Commission agreed that the phrase "cannot reasonably be regarded" was preferable to the phrase "was not provided", and that the phrase "as compensation for that failure of performance" was preferable to the phrase "as a substitute for performance". The Commission adopted the text of article E (2) retaining the preferred phrases noted above.

71. The view was expressed that the rule to determine the place of business of a party contained in article B (1) was unclear, because the place of business was determined by reference to its relationship to both the contract and its performance. It was suggested that the adoption of a single point of reference (for instance the place of performance of the contract) would lead to clarity. The prevailing view, however, was that as the text contained in this article had been adopted in the Vienna Sales Convention, it should also be adopted in this article in the interest of consistency.

[e] Yearbook ... 1974, part three, I, B (A/CONF.63/15).

[f] Yearbook ... 1980, part three, I, B (A/CONF.97/18, annex I)

72. The Commission noted that the change of the word "grossly" to "substantially" in articles F and G was of a drafting nature, and was not intended to indicate a change of meaning.

73. The Commission was in agreement with the view that paragraph 1 *bis* of article A of the revised draft as set forth in paragraph 22 above was unncessary. The Commission also agreed that article Y set forth in paragraph 43 above should be incorporated in a convention if the uniform rules were to be annexed to a convention.

74. Several suggestions of a drafting and linguistic character were made with a view to ensuring conformity of the text in all the working languages of the Commission. The secretariat was requested to take note of these suggestions, and to ensure such conformity.

75. The Commission considered whether the title "Uniform rules on liquidated damages and penalty clauses" was appropriate. The view was expressed that the present title was suitable and indicated the two types of clauses dealt with in the rules. The prevailing view, however, was that a change was desirable, because in civil law systems the term "penalty clause" covered both penalty clauses and liquidated damages clauses as understood in the common law. It was suggested that the title should read "Uniform rules on contract clauses for an agreed sum due upon a failure of performance". It was agreed that this title should be provisionally adopted.

Decision of the Commission

76. After deliberation, the Commission completed its work on liquidated damages and penalty clauses by adopting the draft rules on the substance of the subject as set forth in annex I to this report.[11]

77. The Commission noted that, in the discussions as to the form that the draft rules might take, three possibilities had initially been considered: the form of general conditions, a model law, or a convention following the structure of the Vienna Sales Convention. After observing that the views were divided on the form the draft rules might take, a fourth possibility had also been noted as a compromise solution, that is, to adopt the form of a convention in which the draft rules were set forth in an annex, which could accommodate both the convention and model law approaches. The States which did not wish to adhere to a convention might use the annex as a model law (see paragraphs 14 to 20 of this report). The Commission also took note of a sample draft convention prepared by the secretariat to provide for the event that the fourth possibility would be adopted. This draft convention is set forth in annex II to this report.

78. Although there appeared to be a greater preference in favour of a model law, there was also considerable support for the approach based on a convention with the rules annexed thereto. However, the Commission could not reach a consensus as to the form which the draft rules should take. In view of the importance of this issue, which was of interest to all States, the Commission considered that any decision on the final form of the draft rules should be one for the Sixth Committee of the General Assembly.[12]

CHAPTER III. INTERNATIONAL PAYMENTS[13]

A. *Draft Convention on International Bills of Exchange and International Promissory Notes and draft Convention on International Cheques*

79. The Commission, at its fourteenth and fifteenth sessions, considered the possible future courses of action concerning the draft Convention on International Bills of Exchange and International Promissory Notes[g] and the draft Convention on International Cheques.[h][14] Divergent views were expressed as to whether these draft texts should be reviewed and revised, in the light of comments from Governments and international organizations, by the Commission itself or first by the Working Group on International Negotiable Instruments. The Commission postponed its final decision on that question to its seventeenth session but placed this item on the agenda for the present session to allow for possible discussion in case pertinent information would be available.

80. At its current session, the Commission considered a suggestion of the secretariat to devote a substantial period of time of the seventeenth session to a substantive discussion of key features and major controversial issues to be identified by the secretariat in an analysis of all comments of Governments and international

[11]One delegation stated that, notwithstanding the considerable efforts made by the Commission and the spirit of accommodation shown by all delegates in the course of the work, it remained to be convinced that the topic of liquidated damages and penalty clauses was, by virtue of its intrinsic nature, an appropriate subject for unification.

[g]Yearbook ... 1982, part two, II, A, 3 (A/CN.9/211).

[h]Yearbook ... 1982, part two, II, A, 5 (A/CN.9/212 and Corr.1 (Spanish only)).

[12]One delegation stated that in its view majority support had clearly emerged during the deliberations in favour of a model law. Accordingly, the Commission should adopt the rules in the form of a model law. It was observed by another delegation that it had originated the proposal for adopting a convention with the Rules annexed thereto, and at the time this proposal was made it had appeared to command wide support At the conclusion of the deliberations, however, it had been uncertain whether this proposal commanded the same support The more appropriate course for the Commission to adopt in these circumstances was to ascertain the opinion in the meeting and to take a decision as to form accordingly, rather than to leave the decision as to form to the Sixth Committee.

[13]The Commission considered this subject at its 280th meeting on 31 May 1983.

[14]Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17* (A/36/17), paras. 17-21 (Yearbook ... 1981, part one, A); report of the United Nations Commission on International Trade Law on the work of its fifteenth session, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 17* (A/37/17), paras. 44-50 (Yearbook ... 1982, part one, A).

organizations. This suggestion was made in the light of the first comments received from Governments, and in view of the need to expedite matters and, in particular, to assist in the long-term planning of the work programme of future sessions.

81. The Commission, after deliberation, accepted this suggestion in principle. However, divergent views were expressed as to the appropriate duration of such discussion. While some support was expressed for fixing the duration already at the current session, the prevailing view was that a precise assessment could only be made after the comments on the draft texts had been received by the secretariat.

82. The Commission, after deliberation, authorized the secretariat to determine, in the light of the comments received by 30 September 1983, the appropriate duration of the discussion, but not exceeding two weeks.

B. *Electronic funds transfers*

83. The Commission at its fifteenth session decided that the secretariat should begin the preparation of a legal guide on electronic funds transfers, in co-operation with the UNCITRAL Study Group on International Payments.[15] It was suggested that the legal guide should be designed to identify the legal issues, describe the various approaches, point out the advantages and disadvantages of each approach and suggest alternative solutions.

84. The Commission at its current session took note of a progress report that the secretariat had begun the work leading to the preparation of the legal guide (A/CN.9/242).[i] The Study Group had met once during the past year and two meetings were tentatively scheduled for the next year. It was expected that several draft chapters of the legal guide would be made available to the seventeenth session of the Commission for general observation.

CHAPTER IV. INTERNATIONAL COMMERCIAL ARBITRATION: MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION[16]

85. The Commission, at its fourteenth session, entrusted the Working Group on International Contract Practices with the preparation of a draft model law on international commercial arbitration.[17] The Commission, at its fifteenth session, took note of the report of that Working Group on the work of its third session (A/CN.9/216)[j] and requested it to proceed with its work expeditiously.[18]

86. The Commission, at its current session, had before it the reports of the Working Group on the work of its fourth session held at Vienna from 4 to 15 October 1982 (A/CN.9/232)[k] and of its fifth session held in New York from 22 February to 4 March 1983 (A/CN.9/233).[k]

87. The Commission took note of these reports and expressed its appreciation to the Chairman of the Working Group, Mr. Iván Szasz. It noted that the Working Group had considered draft articles 1 to 36 (A/CN.9/WG.II/WP.37 and 38)[l] and 37 to 41 (A/CN.9/WG.II/WP.42),[m] revised draft articles I to XII, XXV and XXVI (A/CN.9/WG.II/WP.40),[m] and some further issues possibly to be dealt with in the model law (A/CN.9/WG.II/WP.41).[m]

88. The Commission was agreed that the preparation of the model law was of great interest for both developed and developing countries and that it could help to facilitate international commercial arbitration as an appropriate method of settling disputes in international trade transactions. It was suggested, as an additional step towards developing international commercial arbitration, to consider suitable means by which the Commission and its secretariat could assist regional arbitration centres and similar institutions in developing countries. Another suggestion, which should be considered at a later stage, was to include in the model law on arbitration some provisions on conciliation. Yet another suggestion was that the Working Group should carefully study all aspects of the relationship between courts and arbitral tribunals.

89. The Commission requested the Working Group to proceed with its work expeditiously.

CHAPTER V. NEW INTERNATIONAL ECONOMIC ORDER: INDUSTRIAL CONTRACTS[19]

90. The Commission had before it the report of the Working Group on the New International Economic Order on the work of its fourth session (A/CN.9/234).[n] The report set forth the deliberations of the Working Group on the basis of the report of the Secretary-

[i] Reproduced in this volume, part two, II.

[15] Report of the United Nations Commission on International Trade Law on the work of its fifteenth session, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 17* (A/37/17), para. 73 (Yearbook ... 1982, part one, A).

[16] The Commission considered this subject at its 279th meeting, on 31 May 1983.

[17] Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17* (A/36/17), para. 70 (Yearbook ... 1981, part one, A).

[j] Yearbook ... 1982, part two, III, A.

[k] Reproduced in this volume, part two, III, A and D, respectively.

[l] Reproduced in this volume, part two, III, B, 1 and 2, respectively.

[m] Reproduced in this volume, part two, III, D, 3, 1 and 2, respectively.

[n] Reproduced in this volume, part two, IV, A

[18] Report of the United Nations Commission on International Trade Law on the work of its fifteenth session, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 17* (A/37/17), paras. 88 and 89 (Yearbook ... 1982, part one, A).

[19] The Commission considered this subject at its 283rd meeting, on 2 June 1983.

General entitled "Draft legal guide on drawing up contracts for construction of industrial works: sample chapters" (A/CN.9/WG.V/WP.9 and Add. 1-5).[o] The report noted that the Working Group had considered the draft outline of the structure of the guide (A/CN.9/WG.V/WP.9/Add.1)[o] and the draft sample chapters on "Choice of contract types" (A/CN.9/WG.V/WP.9/Add.2),[o] "Exemptions" (A/CN.9/WG.V/WP.9/Add.3)[o] and "Hardship clauses" (A/CN.9/WG.V/WP.9/Add.4).[o]

91. The report further noted that there was general agreement in the Working Group that the draft outline of the structure was acceptable on the whole. It was generally recognized that, as the work progressed, some rearrangement of chapters might become necessary and the secretariat was given a discretion to do so, if needed, taking into account the views expressed during the deliberations at the Working Group. It was agreed in the Working Group that the guide should be drafted so as to be of practical value for various categories of persons involved in negotiating and drafting international contracts for construction of industrial works, such as administrators and businessmen, as well as for lawyers. The context of the new international economic order was stressed and it was pointed out that the guide would be of particular benefit to purchasers from developing countries.

92. The Commission expressed its appreciation to the Working Group and its chairman for the progress made in this extremely complex field. The importance of the guide for developing countries was stressed and the Commission agreed with the Working Group on the need to prepare the legal guide expeditiously.

93. The view was expressed that other legal aspects of the new international economic order were also important and it was suggested that a long-term programme for the work of the Working Group should be considered. In this connection, it was pointed out that the issues listed in the report of the Working Group on the work of its first session (A/CN.9/176)[p] should be taken into consideration in connection with the future work, since they had been included in the work programme of the Commission. It was noted that a duplication, which might result from considering issues dealt with by other international organizations, should be avoided. One delegation stated that the legal issues in the field of deep sea mining should be dealt with by the body especially envisaged under the Law of the Sea Convention (see A/CN.9/234, para. 22).

CHAPTER VI. CO-ORDINATION OF WORK[20]

A. *General co-ordination of activities*

94. The Commission had before it a report of the Secretary-General which set forth the main activities of the secretariat for the purpose of co-ordination of work in the field of international trade law since the fifteenth session (A/CN.9/239).[q] Representatives of a number of international organizations active in the field of international trade law reported to the Commission on the co-operation between their organizations and the Commission.

95. The representative of the Council of Europe indicated that his organization was continuing to co-operate with the Commission in respect of the legal problems arising in international payments. It had been decided to postpone any decision as to whether the revision of the 1930 Geneva Convention providing for a Uniform Law for Bills of Exchange and Promissory Notes was desirable until the Commission had completed its work in respect of negotiable instruments. The Council was also co-operating with the Commission in its work on electronic funds transfers. As to the legal value of computer records, a subject on which the Council of Europe had adopted a recommendation to Governments, the Council would make its experience available to the Commission. The representative of the Council of Europe also reported on the status of its work in preparing draft conventions on reservation of title and on bankruptcy.

96. The representative of the Council for Mutual Economic Assistance (CMEA) reported that a regional seminar had been held in Moscow in April 1983 on the Convention on the Limitation Period in the International Sale of Goods (New York, 1974) and the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). The seminar, in which the Commission's secretariat participated, was attended by the heads of the legal departments of the Ministries of Foreign Trade of the countries belonging to CMEA.

97. The representative of the Hague Conference on Private International Law reported that the newly elected members of the Commission which were not members of the Hague Conference had been invited to the second session of the special commission created by the Hague Conference to consider the preparatory work for the revision of the 1955 Hague Convention on the Law Applicable to International Sale of Goods. The session would be held in November 1983. At the fourteenth session of the Conference it had been decided to postpone work which might lead to the revision of the 1931 Geneva Convention for the Settlement of Certain Conflicts of Law in connection with Bills of Exchange and Promissory Notes.

98. The representative of the Organization of American States reported that the draft agenda for the Third Inter-American Specialized Conference on Private International Law, which will be held at Washington in the spring of 1984, includes overland transport of passengers and goods as well as maritime transport. In regard to the latter, it was expected that the Conference, rather than preparing a regional convention on the subject, would probably adopt a resolution supporting

[o] Reproduced in this volume, part two, IV, B.

[p] Yearbook ... 1980, part two, V.

[20] The Commission considered this subject at its 269th, 281st and 282nd meetings, on 24 May and 1 June 1983.

[q] Reproduced in this volume, part two, V, A.

ratification or accession to the Hamburg Rules. The suggestion was made that the Commission and the Organization of American States should co-operate in the promotion of conventions such as the Hamburg Rules which are of universal interest.

99. It was also reported that the Commission's secretariat had participated in the seminar organized last year by the Organization of American States by giving lectures on the Vienna Sales Convention and that similar participation was planned for this year with lectures on industrial contracts and on the Hamburg Rules.[r]

100. The representative of the International Institute for the Unification of Private Law reported that 58 States had participated in the diplomatic conference held at Geneva from 31 January to 18 February 1983 to adopt a Convention on Agency in the International Sale of Goods. The Convention was designed to supplement the Vienna Sales Convention prepared by the Commission. The representative of the Institute also reported that work was progressing satisfactorily on several subjects of interest to the Commission, including leasing contracts, factoring, codification of the law of international trade and uniform rules relating to liability and compensation for damage caused during the carriage over land of hazardous substances.

101. The representative of the Asian-African Legal Consultative Committee (AALCC) spoke of the assistance which the Commission might be able to give in support of the Regional Arbitration Centres established by the AALCC.

102. The representative of the World Bank reported on the close co-operation between his organization and the Commission in respect of the Commission's work on industrial contracts. He mentioned that the World Bank was often involved in this type of contract, particularly in connection with industrial development projects in developing countries. He stated that the Bank was glad to give its support to the Commission and its secretariat in the preparation of the legal guide on industrial contracts, which would be of great value.

Decision of the Commission

103. The Commission expressed its approval of the co-ordination activities of the secretariat. It also welcomed the statements of those representatives of other organizations who had spoken. The secretariat was urged to continue its efforts in this regard. In respect of the organizations mentioned in General Assembly resolution 34/142 on the co-ordinating role of the Commission, attention was drawn to the particular need to strengthen the co-operation with the United Nations Conference on Trade and Development. The secretariat was requested to submit a report to the seventeenth session of the Commission on the actions taken to create closer co-operation between the two organizations, with a view to implement General Assembly resolution 2205 (XXI), II, paragraph 8 *(f)* and paragraph 10.

[r]Yearbook ... 1978, part three, I, B (A/CONF.89/13, annex I).

B. *Current activities of international organizations related to the harmonization and unification of international trade law*

104. The General Assembly, in resolution 34/142, requested the Secretary-General to place before the Commission at each of its sessions a report on the activities of other organizations related to international trade law together with recommendations as to steps to be taken by the Commission.

105. At its fifteenth session, the Commission repeated its desire, expressed at its fourteenth session, that a report should be submitted at regular intervals on all the activities of other organizations active in the field of international trade law. In response to this request the Commission had before it at its current session a report of the Secretary-General entitled "Current activities of international organizations related to the harmonization and unification of international trade law" (A/CN.9/237 and Add.1-3).[s]

106. There was general agreement that the report was informative and useful to government officials and law professors alike and that it also contributed to the co-ordination of activities among international organizations.

107. It was suggested that the work of certain other international non-governmental organizations should be included in future reports.

Decision of the Commission

108. The Commission took note with appreciation of the report on current activities of international organizations related to the harmonization and unification of international trade law.

C. *International transport of goods: liability of international terminal operators*

109. The Commission had before it a report of the Secretary-General on some recent developments in the field of international transport of goods (A/CN.9/236).[t] The report described the activities of other organizations in the areas of marine insurance, transport by container and freight forwarding. It also described the work of the International Institute for the Unification of Private Law on the liability of international terminal operators, and discussed the principal legal issues connected with the preliminary draft Convention on Operators of Transport Terminals, which had been prepared by the Institute. The report noted that the

[s]Reproduced in this volume, part two, V, B.

[t]Reproduced in this volume, part two, V, C.

preliminary draft Convention sought to unify the disparate legal rules governing the liability of international terminal operators, so as to fill in the gaps in the liability regime for the international transport of goods which had been left by international transport conventions, such as the United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg Rules). The report also noted that the central features of the preliminary draft Convention paralleled those of the Hamburg Rules.

110. The Commission noted with appreciation that the Governing Council of the International Institute for the Unification of Private Law had adopted the preliminary draft Convention at its sixty-second session, held in May 1983. The Commission was informed by the observer from the Institute that, when the Governing Council adopted the text, it expressed its great interest in the possibility of co-operation by the Commission in work on this project. The Governing Council decided that, if the Commission took up the topic the Institute would, upon a request by the Commission, transmit the text to the Commission for its consideration and would forego engaging in further work on the topic.

111. There was general agreement that the work of the Institute on the liability of international terminal operators was of a high quality and of great importance.

112. The view was expressed that co-operation by the Commission with the Institute and undertaking work on the topic of liability of international terminal operators would constitute a concrete example of the fulfilment by the Commission of the co-ordinating role entrusted to it by the General Assembly.

113. It was suggested that work by the Commission on the formulation of uniform rules on this topic should not be limited to storage and safekeeping of goods in international transport, but should also include storage and safekeeping of goods not involved in transport. Moreover, it was suggested that the Commission should not at this stage prejudge the ultimate form which the uniform rules on the topic should take, for example, convention or model law.

114. The Commission noted with appreciation the statement by the Secretary of the Commission that work on this topic, even within a working group, could be absorbed within the existing budget of the Commission, and would entail no additional financial implications. The Commission also noted with appreciation the statement by the Secretary of the Commission that this project would not itself create a need for additional staff in the secretariat although, as noted in the Medium-Term Plan, 1984-1989 (A/CN.9/XIV/R.1, para. 50), which was approved by the Commission at its fourteenth session,[21] the overall increase in the role and responsibilities of the Commission had created a need for two additional professional staff members in the secretariat.

[21]Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17* (A/36/17), para. 122 (Yearbook ... 1981, part one, A).

Decision of the Commission

115. The Commission decided to include the topic of liability of international terminal operators in its work programme, to request the International Institute for the Unification of Private Law to transmit its preliminary draft Convention to the Commission for its consideration, and to assign work on the preparation of uniform rules on this topic to a working group. The Commission deferred to its next session the decision on the composition of the Working Group. The secretariat was requested to submit to the Commission at its next session a study of important issues arising from the preliminary draft Convention by the Institute, and to consider in this study the possibility of broadening the scope of uniform rules to cover storage and safekeeping of goods not involved in transport.[22]

D. *Revision of the Uniform Customs and Practice for Documentary Credits*

116. The Commission was informed that the definitive text of the current revision of the 1974 version of the Uniform Customs and Practice for Documentary Credits was expected to be completed by the Commission on Banking Technique and Practice of the International Chamber of Commerce within a short time and to be adopted by the Council of the International Chamber of Commerce during the month of June 1983. It was further expected that the new version of the Uniform Customs and Practice for Documentary Credits would be submitted to the Commission at its seventeenth session with a request for endorsement similar to that given by the Commission in 1975 to the 1974 version of the Uniform Customs and Practice for Documentary Credits.[23]

E. *Legal aspects of automatic data processing*

117. The Commission had before it a note by the secretariat which conveyed in an annex a report on legal aspects of automatic data processing of the Working Party of the Economic Commission for Europe (ECE) and the United Nations Conference on Trade and Development (UNCTAD) on Facilitation of International Trade Procedures (A/CN.9/238).[a] The report of the Working Party described legal problems which arose in the teletransmission of trade data and suggested actions which might be undertaken by various international organizations in their respective areas of

[a]Reproduced in this volume, part two, V, D.

[22]Two representatives reserved their positions on these matters, having preferred these decisions to have been postponed until the next session of the Commission, so that they could consult with relevant circles in their countries. One of them also indicated that the subject of international terminal operators was quite different from the subject of storage and safekeeping of goods not involved in transport. This subject also had no relevance to international trade law.

[23]Report of the United Nations Commission on International Trade Law on the work of its eighth session, *Official Records of the General Assembly, Thirtieth Session, Supplement No. 17* (A/10017), para. 41 (Yearbook ... 1975, part one, II, A).

competence. The report of the Working Party suggested that, since the problems were essentially those of international trade law, the Commission as the core legal body in the field of international trade law appeared to be the appropriate central forum to undertake and co-ordinate the necessary action.

118. The Commission took note of the intention of the secretariat to submit to the seventeenth session a report on the actions which the Commission might take to co-ordinate activities in this field, keeping in mind the areas of competence of the various international organizations concerned.

CHAPTER VII. STATUS OF CONVENTIONS[24]

119. The Commission considered the status of conventions that were the outcome of its work, that is, the Convention on the Limitation Period in the International Sale of Goods (New York, 1974);[v] the Protocol amending the Convention on the Limitation Period in the International Sale of Goods (Vienna, 1980);[w] the United Nations Convention on the Carriage of Goods by Sea (1978 Hamburg Rules);[x] and the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980).[y] the Commission had before it a note by the Secretary-General entitled "Status of Conventions" (A/CN.9/241)[z] which set forth the status of signatures, ratifications and accessions to these Conventions.

120. The Secretary of the Commission informed the Commission that the secretariat had intensified its efforts to promote these Conventions, particularly through its co-ordination and training and assistance programmes (see paras. 98, 99, 127 and 128 of this report). As regards the Convention on the Limitation Period in the International Sale of Goods and the United Nations Convention on Contracts for the International Sale of Goods, the Secretary noted that world-wide interest in these Conventions was growing and that, due to this encouraging trend, these Conventions might be expected to enter into force as early as 1984. In this regard, the Secretary of the Commission reported that the Council for Mutual Economic Assistance (CMEA) had organized a seminar on the two Conventions at which general support was expressed for the Conventions. In addition, the Secretary expressed the hope that since the United Nations Convention on Contracts for the International Sale of Goods and INCOTERMS were mutually supplementary, the International Chamber of Commerce might promote the Convention in conjunction with INCOTERMS.

121. As regards the United Nations Convention on Contracts for the International Sale of Goods, the Commission was informed that steps towards the ratification of this Convention were being taken in several States, and that some of these States anticipated that they would ratify the Convention in 1984.

122. The Secretary of the Commission stated that, once the Convention on the Limitation Period in the International Sale of Goods and the United Nations Convention on Contracts for the International Sale of Goods entered into force, the secretariat could concentrate its efforts on promoting the United Nations Convention on the Carriage of Goods by Sea. As regards this latter Convention, the Secretary of the Commission reported that the UNCTAD was also taking steps to promote this Convention, since the United Nations Convention on International Multimodal Transport of Goods was necessarily linked to the entry into force of the United Nations Convention on the Carriage of Goods by Sea. Moreover, the Secretary noted that, if the Commission undertook work on the topic of international terminal operators, this could help to promote interest in the United Nations Convention on the Carriage of Goods by Sea.

123. Several States indicated that the question of adhering to the United Nations Convention on the Carriage of Goods by Sea was under active consideration, and that the Convention was regarded favourably in various circles.

124. A view was expressed that the process of identifying and discussing problems and issues arising from the Convention should be accelerated. It was suggested that this could perhaps be accomplished through regional consultations among States interested in maritime transport.

CHAPTER VIII. TRAINING AND ASSISTANCE[25]

Introduction

125. The Commission, at its fourteenth session,[26] agreed that it should continue to sponsor symposia and seminars on international trade law. It was considered desirable for these seminars to be organized on a regional basis. In this way, it was felt, a larger number of participants from a region could attend and the seminars would themselves help to promote the adoption of the texts emanating from the work of the Commission. The Commission welcomed the possibility that regional seminars might be sponsored jointly with regional organizations. The secretariat was requested to make such arrangements as it found desirable in this regard.

[v] Yearbook .. 1974, part three, I, B (A/CONF.63/15)

[w] Yearbook ... 1980, part three, I, C (A/CONF.97/18, annex II).

[x] Yearbook ... 1978, part three, I, B (A/CONF.89/13, annex I).

[y] Yearbook ... 1980, part three, I, B (A/CONF.97/18, annex I).

[z] Reproduced in this volume, part two, VI.

[24] The Commission considered this subject at its 269th meeting on 24 May 1983.

[25] This subject was considered by the Commission at its 283rd meeting, on 2 June 1983.

[26] Report of the United Nations Commission on International Trade Law on the work of its fourteenth session, *Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 17* (A/36/17), para. 109 (Yearbook ... 1981, part one, A).

At its fifteenth session,[27] the Commission considered the progress made by the secretariat in organizing such symposia and seminars, and agreed that the secretariat should continue to explore various possibilities of collaborating with other organizations and institutions in the organization of such symposia and seminars.

126. By its resolution 37/106 of 16 December 1982, the General Assembly reaffirmed the importance, in particular for the developing countries, of the work of the Commission concerned with training and assistance in the field of international trade law, and welcomed the initiatives being undertaken to sponsor regional symposia and seminars. The Assembly also expressed its appreciation to those States that had made financial contributions to be used towards the financing of symposia and seminars and of other aspects of the training and assistance programme of the Commission, and to those Governments and institutions that were arranging symposia or seminars in the field of international trade law. Furthermore, the Assembly invited Governments, relevant United Nations organs, institutions and individuals to assist the secretariat in financing and organizing symposia and seminars.

127. The Commission had before it a report of the Secretary-General entitled "Training and assistance" (A/CN.9/240).[aa] This report set out the steps taken y the secretariat to implement the decisions of the Commission and of the General Assembly. The report noted, in particular, the association of the secretariat with several regional seminars in the field of international trade law. The secretariat had co-operated with the Organization of American States (OAS) in a seminar organized by the Inter-American Juridical Committee of the OAS at Rio de Janeiro in August 1982 which considered, *inter alia*, the activities of the Commission and, in particular, the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980). The secretariat had participated in a seminar organized by the Council for Mutual Economic Assistance (Moscow, 14 and 15 April 1983) on the Vienna Sales Convention. The secretariat had also co-operated with the Regional Centre for Arbitration, Kuala Lumpur (established under the auspices of the Asian-African Legal Consultative Committee) in a seminar organized by the Centre (Kuala Lumpur, 2 and 3 November 1982) on aspects of the Commission's work on international commercial arbitration. The report noted that it was planned to collaborate in the holding of other regional seminars. The report also noted that, while the principal limitation on the organization of symposia and seminars was that not enough funds were available for this purpose, the secretariat would continue its efforts to explore all suitable opportunities for training and assistance, and to make the work of the Commission known.

128. The Secretary of the Commission made a statement in which he outlined some of the projects planned for the ensuing year. He noted, in particular, that the secretariat of the Inter-American Juridical Committee of the OAS had agreed to incorporate the subject of the Hamburg Rules in the annual international law seminar of OAS at Rio de Janeiro in August 1983. He also noted that it was planned to collaborate with the International Trade Centre (UNCTAD/GATT) in a project to train governmental trade promotion agencies and private-sector organizations in developing countries on how they could advise exporters and importers on legal aspects of foreign trade.

Discussion at the session

129. The view was expressed that future reports on training and assistance should specify more clearly the extent and the manner of the involvement of the secretariat in the projects mentioned therein. It was also suggested that thought might be given to developing teaching material on international trade law which could be used in universities.

Decision of the Commission

130. The Commission expressed its appreciation of the endeavours made by the secretariat in the field of training and assistance, and approved the general approach taken by the secretariat in this area.

CHAPTER IX. RELEVANT GENERAL ASSEMBLY RESOLUTIONS, FUTURE WORK AND OTHER BUSINESS[28]

A. *Relevant General Assembly resolutions*

1. *General Assembly resolution on the work of the Commission*

131. The Commission took note with appreciation of General Assembly resolution 37/106 of 16 December 1982 on the report of the Commission on the work of its fifteenth session.

2. *General Assembly resolution on a unit of account and adjustment of limitations of liability*

132. The Commission took note with appreciation of General Assembly resolution 37/107 of 16 December 1982 on provisions for a unit of account and adjustment of limitations of liability adopted by the Commission.

3. *General Assembly resolution on international economic law*

133. The Commission took note of General Assembly resolution 37/103 of 16 December 1982 on progressive development of the principles and norms of inter-

[aa] Reproduced in this volume, part two, VII.

[27] Report of the United Nations Commission on International Trade Law on the work of its fifteenth session, *Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 17* (A/37/17), para. 132 (Yearbook ... 1982, part one, A).

[28] The Commission considered this subject at its 283rd meeting, on 2 June 1983.

national law relating to the new international economic order. It also took note that the secretariat had conveyed to the United Nations Institute for Training and Research (UNITAR) information on the activities of the Commission relevant to the study being conducted by UNITAR on this issue.

134. A view was expressed that this study was connected with aspects of international trade law and that the Commission should make a more active contribution to it.

B. *Newsletter*

135. The Commission, at its fifteenth session, requested the secretariat to prepare a note for its sixteenth session which would consider the format a newsletter on the Commission might take, as well as the administrative and financial implications. At its current session, the Commission had before it a note of the secretariat which suggested that, for various financial and administrative reasons, it would be preferable for the secretariat to issue an informal newsletter reporting on matters of relevance to the work of the Commission addressed to participants at Commission and Working Group meetings, and perhaps to selected members of the general public who have consistently expressed interest in the work of the Commission (A/CN.9/XVI/R.1).

136. The view was expressed that an informal newsletter issued once or twice a year would serve to keep persons interested in the work of the Commission, and especially participants at meetings of the Commission and its Working Groups, abreast of new developments.

137. The view was also expressed that some thought should be given to the means by which information regarding court decisions interpreting the conventions prepared by the Commission could be widely disseminated once those conventions came into force, as was expected in the next few years. In this respect attention was drawn to the fact that the International Institute for the Unification of Private Law had for many years given wide coverage in its *Uniform Law Review* to the decisions concerning application and interpretation of the most significant conventions existing in the field of international trade law. It was suggested, therefore, that in view of the expertise acquired by the Institute in this difficult task, which calls for considerable expenditure in money as well as in terms of staff, the Commission should request its secretariat to explore with the Institute the possibility of concerted action in this connection.

138. The Commission requested the secretariat to provide it with more detailed information at its seventeenth session.

C. *Other business*

139. One delegation was of the view that the Commission should have a well thought out programme of work. A list of possible subjects—short-term and medium-term—should be prepared and submitted to the States members of the Commission in advance so that the Governments could consult the various concerned ministries and departments and decide on the priority of subjects to be undertaken. *Ad hoc* decisions on one subject should be avoided. Priorities should be given to the subjects which were of a development nature and were directly connected to international trade. In deciding on the priority subjects, the Commission should co-ordinate with UNCTAD and UNIDO. Further, it should avoid duplication of work. The time had come when the Commission should also do some introspection about its objectives and methods and, in particular, on the question of how to achieve uniformity, as the question of "convention" or "model law" would continue to come up until a solution was found. The valuable time of the Commission should not be wasted in endless debate on this question. The secretariat should try to find a compromise solution. Further, this Commission should adhere to its age-old tradition of reaching decisions by consensus.

D. *Date and place of the seventeenth session of the Commission*

140. It was decided that the seventeenth session of the Commission would commence on 25 June 1984 in New York. The secretariat was requested to decide whether the session should last for two or three weeks once it had received the comments of Governments and interested international organizations on the draft Convention on International Bills of Exchange and International Promissory Notes and the draft Convention on International Cheques.

E. *Sessions of the Working Groups*

141. It was decided that the Working Group on International Contract Practices would hold its sixth session from 29 August to 9 September 1983 at Vienna and its seventh session from 6 to 17 February 1984 in New York.

142. It was decided that the fifth session of the Working Group on the New International Economic Order would be held from 23 January to 3 February 1984 in New York.

F. *Composition of the Working Group on International Contract Practices*

143. It was decided that the membership of the Working Group on International Contract Practices should be expanded to include all States members of the Commission.

ANNEX I

Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance

[Annex reproduced in part three, II, A, in this volume]

ANNEX II

Draft United Nations Convention on Contract Clauses for an Agreed Sum Due upon a Failure of Performance

[Annex reproduced in part three, II, B, in this volume]

ANNEX III

List of documents before the Commission

[Annex not reproduced. See check-list of UNCITRAL documents at the end of this volume]